

# **The border dispute between Croatia and Slovenia**

## ***- The stages of a protracted conflict and its implications for EU enlargement -***

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## Abstract

This thesis looks into how bilateral issues feed into ongoing EU accession negotiations and are, in fact, able to stall the process. Further, this piece of research analyses whether and how it is possible to resolve bilateral issues during accession negotiations.

The salience of this single-case study of the border dispute between Croatia and Slovenia is the hitherto non-existent situation of two EU Member States facing an unresolved bilateral conflict over territory, here a so-called mixed dispute (maritime and land). The study reconstructs the conflict and both its bilateral and third-party management efforts between the end of Yugoslavia and the most recent stage, the lawsuit before the CJEU, with focus on the events 2008-2018 including the troublesome arbitration procedure from 2012-2017.

The method employed in this qualitative within-case study is process tracing. The availability of both (i) actors for interviews and (ii) documents renders process tracing particularly apt. Interviews play a central role and are at the heart of this study. Actors are vital sources of information and can help reconstruct events and the causal mechanisms between them. Documents are the second pillar of the data collection approach this study is based on. Draft documents in particular are a first-hand primary source and an equally crucial instrument alongside interviews in the process tracer's toolbox.

Prior to Croatia's EU accession on 01 July 2013, this very conflict had led to a blockade of the accession negotiations of one party to the conflict (Croatia) by the other party to the conflict that was already an EU member (Slovenia). The inherent feature of the present case is that an issue of national interest has been pursued by means of the Member State veto power. That leverage is indeed at hand not least when bilateral attempts have failed. As a result, the asymmetric power relationship between the two countries at the time produced some coercive momentum to 'solve' the conflict, or to initiate such solving, *during* Croatia's accession negotiations. These features are unique in the history of EU enlargement.

In view of the implications for the post-Yugoslav space in relation to the EU, an analysis of how a bilateral conflict between an EU Member State and a Candidate Country was handled is urgently needed. That is what this study will want to provide. The recent so-called Western Balkans Strategies of the European Commission from 2012 and 2018 confirmed the merits-based approach meaning each Candidate Country is going to join the EU when it fully complies with EU conditionality individually and irrespective of the progress of other Candidate Countries. It follows from the current merits-based approach that it appears highly unlikely that the remaining SFRY successor States and Albania will be able to join at the same time. As a result, every time one Candidate Country has joined, it acquires the Member State veto power vis-à-vis another Candidate Country, so conflict over bilateral issues between Member States and Candidate Countries may become self-energising.

This study presents concluding recommendations with regard to, first, a sustainable implementation of the common State border between Croatia and Slovenia; second, pressing bilateral issues in the ongoing and prospective accession negotiations with the Candidate Countries from the former Yugoslavia; third, means to strengthen dispute resolution both in terms of an EU framework and concerning reform of international arbitration; and fourth, ways to create some responsiveness between the rule-of-law record of and financial support for Candidate Countries.

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## List of Abbreviations

ASI	Agreement on Succession Issues
AVNOJ	Anti-Fascist Council for the National Liberation of Yugoslavia
BiH	Bosnia and Herzegovina
BIS	Bank for International Settlements
CEE	Central and Eastern European States
CIA	Central Intelligence Agency
CIS	Community of Independent States
CJEU	Court of Justice of the European Union
COELA	Council Working Group on Enlargement
COREPER	Comité des Représentants Permanents (EU Ambassadors)
CP	Common Position
CS	Continental Shelf
CSCE	Conference on Security and Cooperation in Europe
ČSFR	Czech and Slovak Federative Republic
DCP	Draft Common Position
EC	European Community
ECJ	European Court of Justice
EU	European Union
FPRY	Federal Peoples Republic of Yugoslavia
FTT	Free Territory of Trieste
FYROM	Former Yugoslav Republic of Macedonia
FRY	Federal Republic of Yugoslavia
HDZ	Hrvatska Demokratska Zajednica (Croatian Democratic Union)
HSLŠ	Hrvatska socijalno-liberalna stranka (Croatian Social Liberal Party)
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
IGC	Intergovernmental Conference
ITLOS	International Tribunal of the Law of the Sea
JNA	Yugoslav People's Army
LCY	League of Communists of Yugoslavia
NATO	North Atlantic Treaty Organisation
OBAR	Opening Benchmark Assessment Report
OSCE	Organisation for Security and Cooperation in Europe
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SDP	Social Democratic Party of Croatia
SDS	Slovenska Demokratska Stranka (Slovenian Democratic Party)
SEE	South-Eastern European States
SFRY	Socialist Federal Republic of Yugoslavia
TEU	Treaty on European Union
TO	Territorial Defence
UNCLOS	United Nations Convention on the Law of the Sea
UNPROFOR	United Nations Protection Force
UK	United Kingdom of Great Britain and Northern Ireland
USSR	Union of Soviet Socialist Republics
VRMO-DPMNE	Internal Macedonian Revolutionary Organization – Democratic Party for Macedonian National Unity

## Preface

In mid-June 1991, Slovenia started to build check-points along the future international border with Croatia. A row over the location of one of the border posts could be solved by telephone diplomacy on the eve of both countries' declarations of independence. Twenty-eight years later, the lifespan of almost one generation after the dismemberment of Yugoslavia, the two countries are involved in a lawsuit over the border between the two countries at the EU's Court of Justice. How could it come to this? What has made the current situation so intractable? Why is it that two countries that have never been at war are not able to solve a border dispute politically?

Is there an outright "conflict mindset" in the region for historical reasons, as a former Coordinator of the Stability Pact for South Eastern Europe has told this author? Or is it that good-neighbourly relations are virtually impossible at the political level when nobody can afford to be unpatriotic?

If one is inclined to look at the wider picture of the region, an incident from early December 2016 may be worth contemplating. The President of Croatia was visiting war veterans and a Dubrovnik kindergarten to mark the 25th anniversary of the city's shelling by the Yugoslav Army (JNA) when she handed out chocolate bars along with a signed photograph of herself. The children happily ate the chocolate only to find out that an angry parent complained about the origin of the chocolate - made in Serbia - on social media. The President felt obliged to publicly apologise, promising to send Croatian products to the parents whose children received the Serbian chocolates. The event sparked a fair amount of teasing and mockery on social media. Is 'Chocolategate' perhaps more than a communication mishap?

Meanwhile, Slovenian winemakers have heavily protested at the use of "Teran", a local grape from Slovenian Istria and its Karst region, by producers from Croatian Istria. In September 2017, the Slovenian government sued the European Commission for allowing Teran to be used on the labels of Croatian winemakers, a derogation that the Commission had endorsed a few months earlier. Are we witnessing a trade war between Slovenia and Croatia over a grape variety which has been part of the geographical region of Istria for more than 600 years irrespective of political borders?

Many Slovenes go on holiday in Croatia during the summer, and many citizens on both sides of the border are uncomfortable with the border dispute over what they see as a trivial question. Politicians, on the other hand, have used the border dispute in election campaigns, both in Slovenia and Croatia, and there is a lot of patriotic language to go with it.

However, what is at times a nationalist rhetoric seems largely incomprehensible to many locals and observers alike. Croatia and Slovenia were together for a long time in more recent history, during the Habsburg era, during royalist Yugoslavia, and during communist Yugoslavia. Still, Slovenia and Croatia are relatively young States and this is perhaps why borders matter. However, both countries are now members of the European Union where borders could be seen as anachronistic. After all, contemporary Europe strives for an ever-closer Union between its peoples where internal borders are becoming more symbolic rather than functional. Why has that argument not been convincing enough to help find a stable and bilaterally agreed solution between the two countries?

This study re-constructs the development of the bilateral border conflict between Croatia and Slovenia. The aim is to reveal the processes at work, the historical and contemporary

circumstances, what the actors in the conflict did, at what moment they did it and why they did it. In addition, this piece of research aims to highlight the role of the European Union and of judicial third parties in the management of the conflict. Lastly, the study will look at the precedent-setting value of the Slovenian-Croatian conflict, its resolution attempts and what this means for ongoing and prospective EU enlargement in South East Europe.

In the scorching heat of late July 2015, this author would go on early morning runs from Savudrija on the Croatian mouth of Piran Bay to Sečovlje by the salt pans on the Slovenian side. Stops had to be made, passing the border checkpoints back and forth at one of the most stunning sections along the former Parenzana railway path from Trieste to Poreč. As it happened, the arbitration procedure between Croatia and Slovenia to settle the common State border imploded the very same week. And this was the moment the idea for this study was born.

## Acknowledgements

This research project began with a burning curiosity that intensified as I dug deeper: it was about time that somebody delved into some in-depth analysis of the miracle of the diplomatic and legal struggle about Piran Bay. After all, this was not about oil or gas reserves under the seabed or about huge fishing zones. Nor was it about controlling a world-trade shipping route or access to a nuclear-powered naval fleet. However, to the observer it was a fascinating struggle that has been around for a quarter of a century.

Would there be enough material for scholarly research and a thesis? Had most of the developments been going on behind the scenes or was there perhaps a solid bunch of official documents? Historical archive material there was not, as much of it obviously was either too contemporary or perhaps classified anyway. Would there be enough oral history from politicians and civil servants involved in the process? How would I manage to meet these people in Ljubljana, Zagreb, Brussels or elsewhere, and interview them? And how would I devise a decent analytical framework?

At the academic level, I am highly indebted to Professor Susanne Pickel and Professor Michael Kaeding at Duisburg-Essen University for accepting to supervise my research. It is by no means a walk in the park to find supervisors for a topic meandering between international relations and European integration, international law, and history. I am very grateful for Susanne and Michael's availability, expert guidance and particularly helpful suggestions throughout all stages of writing this thesis. Further, I wish to thank all fellow postgraduates from Susanne's PhD seminar, in particular Toralf Stark and Wiebke Breustedt, for their clever reflections, and Jutta Wergen, Jennifer Kaniewski and Ulrike Bohnsack for their support. I am grateful for early academic inspiration on European Union issues to Isabelle Canu and Thomas Fischer. I should like to extend my appreciation also to Damir "Stane" Fras and my brother Martin for reading large parts of my manuscript, and to Martin Schmaus and Timo "Häberle" Landenberger for producing the maps and providing expertise on graphics. Furthermore, I wish to thank Chris Burns, Mark Dunne, Julian Hale, Fiona Kearns, and Claire McNally for their neat advice on my use of the English language. In the end, all errors are mine.

The first 'exploratory' talks with interviewees were difficult and inspiring at the same time. Starting out as a humble observer, one may not have sufficient expert knowledge to ask the right questions. Still, the many interviews that I conducted were unexpectedly fruitful and everyone proved remarkably open, keen and helpful. I am highly indebted to all interviewees (listed in the bibliography) for their readiness to talk to me, their frankness, and for providing me with specialist expertise as well as anecdotal and documentary evidence. Many civil servants, who must stay anonymous according to the rules of the game, have provided me with enlightening insight into the secret workings of the national, intergovernmental and supranational level behind the scenes, which I greatly appreciate. It has been enormously rewarding and a privilege to go on this process-tracing journey meeting so many gifted and passionate people with strong views on what they do or did.

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Thomas Bickl  
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## **I. Introduction**

The border dispute between Croatia and Slovenia as an inter-State conflict over territory has been locked at a critical stage. With the Final Award of the arbitral tribunal published in June 2017, the Award's non-recognition by Croatia on the grounds of unlawful communication between Slovenia and its tribunal member during the arbitration procedure, and the lawsuit filed by Slovenia before the Court of Justice of the European Union (CJEU) in July 2018, the conflict, at the time of writing, is at a protracted stage. This comes irrespective of the fact that the arbitration procedure was supposed to constitute a final and binding settlement of the bilateral conflict in the first place.

To be sure, the state of play is that what started as a mere by-product of the dissolution of Yugoslavia in 1991, i.e. the fact that the boundaries of the Republics of the Socialist Federal Republic of Yugoslavia (SFRY) were not clearly determined neither at land nor at sea (see fig. 1 overleaf), has become a remarkably rock-solid conflict between Croatia and Slovenia, two of Yugoslavia's successor States, almost 30 years on. It must be noted that the boundaries of the SFRY Republics have never been established expressly. There have been no such legal acts, neither by the federal parliament nor by the parliaments of the Republics (Dragičević et al, 2013: 10; Milenkoski and Talevski, 2001: 93; Radan, 2000: 7). The land boundary was *de facto* governed by the limits of the cadastral units of the municipalities or districts in the border areas of the SFRY Republics. This 'cadastral delimitation', or 'administrative border', became the international border after the independence declarations of both countries on 25 June 1991. At various spots, however, the cadastral records do overlap. As for the sea boundary, the territorial SFRY waters were fully integrated, i.e. there was no internal allocation of territorial waters by Republics, which left the question of maritime delimitation between Slovenia and Croatia at the time of independence fully open (interview senior Croatian civil servant, 19-08-2016; interview senior Slovenian civil servant, 17-10-2016; see also PCA Final Award, 2017: 10-11, paras 37-42; 113).<sup>1</sup>

### **I.1 Main argument**

The border dispute between Croatia and Slovenia was a purely bilateral issue in the initial stages of the relations of the two newly independent countries after 1991. As from the mid-2000s, however, the conflict turned into a power struggle between Slovenia as an EU Member and Croatia as a Candidate Country, in particular during Croatia's EU accession negotiations in 2008/09. In a major diplomatic exercise involving the two States, the European Commission, and the EU Council Presidency, the settlement of the conflict was finally externalised to a third-party arbitral tribunal. After the Croatian withdrawal from the arbitration procedure in the summer of 2015 following a major disruption due to a leaked intelligence recording of conversations between a Slovenian government representative and the Tribunal member appointed by Slovenia (*ex-parte* communication), both the Tribunal's Partial and Final Award were not recognized by the respective governments in Zagreb.

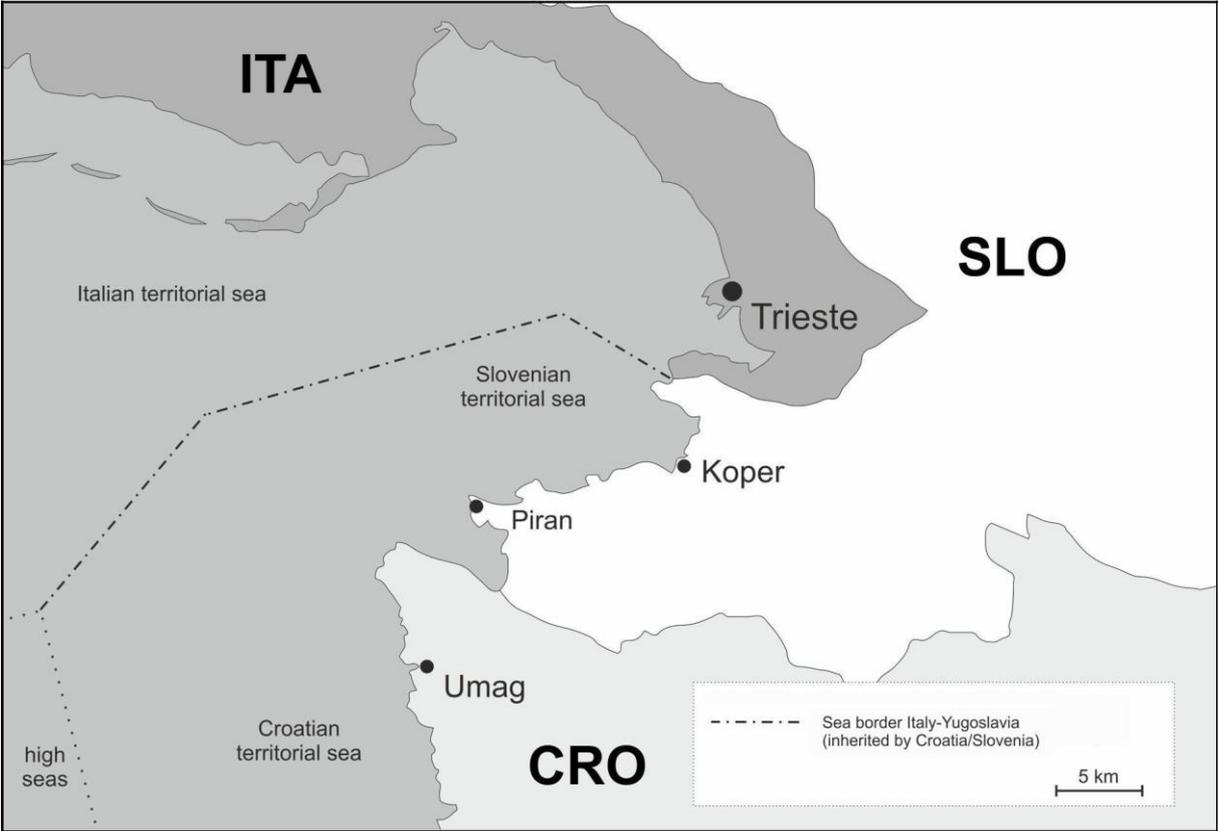
As a result, the real-life situation at the time of writing is such that two EU Member States continue to be in a major territorial conflict over their common State border, both at land and at sea - an unparalleled situation in the history of European integration. All the more so, as the matter is the first-ever Member-State-against-Member-State case on a territorial issue brought

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<sup>1</sup> As was the case with maritime delimitation between Croatia and Bosnia-Herzegovina and between Croatia and the FR Yugoslavia (later between Croatia and Montenegro).

before the CJEU. In fact, such manifest territorial conflict within the EU not only constitutes a serious political burden for the internal political cohesion of the European Union. On an operational level, some substantial cross-border issues in the region, such as Fisheries or the Schengen border, the bread-and-butter of EU value-added on the ground, are sincerely hampered or blocked altogether.

Figure 1: Maritime delimitation in the Gulf of Trieste after the independence of Croatia and Slovenia in 1991 (schematic view)



Base map: d-maps.com © Martin Schmaus

This study is going to attempt at delivering an in-depth analysis of how this deadlock was arrived at. The following research questions<sup>2</sup> centre around the *causal mechanisms* for the conflict to become ever more intractable:

- What are the specific circumstances and causal mechanisms of a bilateral conflict between an EU Member State and a Candidate Country - Slovenia and Croatia - with regard to conflict resolution?
- What are the conclusions that can be drawn from the Croatia-Slovenia case with regard to other latent or upcoming cases of bilateral conflict and its management in an EU context under very similar circumstances?

The aim is to trace down “the unfolding of events and situations over time” (Collier, 2011: 824) looking at the actions and behaviour of, first, the agents and institutions of both Slovenia and Croatia as parties to the conflict, second, the third parties involved in the management of

<sup>2</sup> The analytical-framework research questions are outlined in more detail in II.3.

the conflict *within* the EU framework, such as the European Commission, and the respective EU Council Presidencies, and third, the externalised arbitral proceedings.

Looking ahead, conclusive recommendations will be presented with regard to, first, a sustainable implementation of the common State border between Croatia and Slovenia, second, pressing issues in the ongoing and prospective accession negotiations with the Candidate Countries from the former Yugoslavia, third, means to strengthen dispute resolution both in terms of an EU framework and concerning reform of international arbitration, and fourth, ways to create a responsiveness between the rule-of-law record of and financial support for Candidate Countries.

## **I.2 Literature review**

The following literature review has two tasks: First, it identifies the existing layer of research on general aspects relating to the border dispute between Slovenia and Croatia. It covers, *inter alia*, the historical background of territorial conflict in the region, the founding and the dissolution of Yugoslavia, EU enlargement with regard to Southeast Europe, identity political-societal issues in post-independence Slovenia and Croatia, post-SFRY border disputes in the region as a whole, general features of the bilateral border dispute between Croatia and Slovenia, and legal aspects of maritime delimitation in the Adriatic and in the Gulf of Trieste.

Second, the screening of existing research helps identify its contribution to the subject matter being researched, and therefore help designate more clearly the research gap and the contribution to the debate that this study will want to make. It is important to note that the horizontal literature review is going to both appreciate existing research and outline what findings have been provided, and what findings there is a clear need for. As already mentioned, the approach here is interdisciplinary. As a result, the review covers scholarly works from the quarters of history, political science and neighbouring social-science disciplines, and international law.

### **I.2.1 Territorial conflict in the region in the 19th and 20th century**

As the below works demonstrate, conflict over territory is by no means a unique feature of States in the process of dissolution. Historically, the 19th and the 20th century have seen innumerable pieces of territorial conflict including atrocious bloodshed, particularly in Europe. Existing scholarship has neatly established that territorial disputes tend to result in borders being re-drawn or newly drawn. In no area in Europe is this more evident than in the so-called Julian Region what today is the far north-east of Italy, the coastal Karst region, and the Istrian parts of Slovenia and Croatia.

Duroselle (1966) and Novak (1970), in their seminal works on the Free Territory of Trieste (FTT), give a detailed account of the process of re-alignments of borders in the region at the end of World War II tracing the negotiations between the then Allied Powers (the U.S., Britain, France, and the Soviet Union), Italy, and Yugoslavia on the settlement for Trieste. The analyses of the governance of Zone A (later to become Italian territory) and Zone B (later to become part of Yugoslavia) covering an area which today belongs to Slovenia and Croatia, including the presently disputed waters in Piran Bay, by the Allied Military Government and Yugoslavia respectively during the emergence of the Cold War have some comparative merit.

Capano (2016) has consulted archival sources to demonstrate that the northern Adriatic border and Trieste have experienced both the ideological confrontation of the Cold War and the following détente including its role in the final Italo-Yugoslav settlement in 1975, the Osimo Treaty.

In their political geography of the Julian Region from a Yugoslav point of view, Roglić et al (1945) shed light on the period between the establishment of the Italo-Austrian border in 1866 and the end of World War I which resulted in Italian rule over Istria up until the end of World War II. They provide a critical account of the situation of the Yugoslav (Croat and Slovene) minority in Istria during Italian rule 1918-1943, in particular the language policy of the Italian authorities resulting in a ban of the local Slavic languages from public administration and the closure of Yugoslav schools.

Rutar (2005) argues that national identities in the region had by no means been straightforward at the end of the 19th century. Scheer (2013) provides a study on the use of cultural symbols in the Northern Adriatic by the Austro-Hungarian occupants during World War I, whilst Klabjan (2010) examines the commemoration practices of World War I by both Italians and Slovenes/Croats in the multinational Northern Adriatic after Italian rule had been fully implemented in the early 1920s. Jurkić (2011) highlights the impact of Italian rule on the identity of Croats in Istria in the 1920s and 1930s, and D'Alessio (2008) demonstrates that the multi-ethnic composition of Istria during Austrian and early Italian rule (1860-1925) including “localized foreigners” produced a multiplicity of political and cultural circles to be re-enforced later with the integration into Italy and Yugoslavia respectively.

Cresciani (2004) illuminates the re-intensifying of territorial and ethnic conflict in the inter-war period, the Italian and Yugoslav atrocities up until the end of World War II, and the waves of emigration from Istria and Trieste in the 1920s, after the Yugoslav takeover of Istria in 1945, and of *triestini* between 1953 and 1956. Manin (2007) has equally helpfully contributed to the tracing of these events of “human losses”. Wörsdörfer (2004) traces the processes of constructing and articulating patriotic and nationalist sentiments in the upper Adriatic from 1915-1955. Kaplan (2000) has demonstrated that, from a present-day perspective, borderland identities in the Northern Adriatic need not necessarily compete, but are indeed able to mesh.

To round off, Promitzer (2015) provides a fine-grained analysis of the identity struggle of the tiny Serb orthodox community in four villages in Bela Krajina along the Slovene-Croat border, and how they coped during Yugoslav unification and later in times following Slovenian and Croatian independence. The subsequent accession of the two countries to the EU meant that the Slovene-Croat border marked an EU external border between 2004 and 2013, posing restrictions to local cross-border traffic on the Bela Krajina Serbs. The same did hold for all Croat and Slovene citizens 2004-2013, as Pipan (2007) illustrates, and is again true at the time of writing as the Croat-Slovene border constitutes a *Schengen* border.<sup>3</sup>

With regard to the first (of two) research question(s), the specific circumstances and causal mechanisms of the Slovenia-Croatia border dispute (see II.3), the above research provides for the awareness of a historically dense period of territorial conflict and changing sovereignty in the north-east Adriatic in pre-Yugoslav and early-Yugoslav times. Between the mid-19<sup>th</sup> century and 1918, Habsburg controlled the north-eastern Adriatic. In the period between

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<sup>3</sup> Slovenia joined the Schengen area in 2007.

World War I and World War II, Italian rule over Istria impacted heavily on the Slovene and Croat ethnic communities, especially through the very strict language policy and the forced Italianisation of names. Territorial sovereignty is likely to have been greatly missed by Croats and Slovenes alike, and this fact is worth keeping in mind when it comes to the sensitivities over the maritime border between Slovenia and Croatia at the heart of the northeast Adriatic.

### **I.2.2 History of Yugoslavia**

Relevant scholarship issues with regard to Yugoslavia commences at the founding of the new State at the end of World War I, its unfavourable territorial reality, and the lack of national identity. A rich body of research on Socialist Yugoslavia after World War II demonstrates that the country's successful emancipation on the world stage could not cover up the diverging developments inside the country, the national question, the growing regional disparities and, eventually, the gradual fading away of the joint values (amongst them 'brotherhood and unity') of the political elite in Yugoslavia.

The events around the frontier-making Paris Peace Conference 1919-1920 and the founding of Yugoslavia 1918 are comprehensively evaluated by Lederer (1963) and Djokić (2010). Lederer pinpoints the changing frontier as the dominant theme in Southeast Europe since the mid-19th century and traces the enormous challenge of facing unsettled borders during the first years of the newly founded Kingdom of Serbs, Croats and Slovenes. Djokić sheds light on the fact that Yugoslavia in its infancy days still had to struggle for international recognition *during* the Paris Peace Conference, and on the major divisions between the Serbs and the Croats in the Yugoslav delegation at Paris, not least through the two main delegates, Nikola Pašić and Ante Trumbić. Moodie (1945) has investigated the final delimitation of the Yugoslav-Italian border by the separate bilateral Treaty of Rapallo 1920. He pointed out that Europe can hardly be divided up into would-be coherent units without laying the foundations for subsequent irredentism, an insight which he may have felt also physically whilst conducting his study when World War II was already in full swing.

Ramet (2006) provides a thematic history of Yugoslavia with a special emphasis on (objective) system legitimacy. Covering all three Yugoslavias (Yugoslavia I 1918-1941, Yugoslavia II 1945-1991, and Yugoslavia III 1991-2006 consisting of Serbia and Montenegro), she demonstrates why all three States failed mainly because of an inability to uphold the rule of law.

In a classical history study of Yugoslavia, Calic (2014) regards the unification of the South Slavs as a 'late nation' with a lack of consensus on national identity despite the uniting determination to shake off foreign rule. Her findings include that Tito's Yugoslavia, during the first three decades, enjoyed a substantial level of legitimacy due to the successful liberation of the country from fascist occupation, an emancipation from Stalin, the booming economy in the 1950s and 1960s, and the personal integrity of Tito himself. The massive economic decline in the 1970s, however, had led to a deepening of the regional disparities, and the collective notion of communist brotherhood had become increasingly untenable, rounded off by a nationalist turn in the federal Republics by the late 1980s leading to the break-up of the country.

Accetto (2007), drawing on the relationship between law and politics in federal Yugoslavia after World War II, argues that the doctrine of the *unity* of powers (as opposed to the *separation* of powers), and the lack of hierarchical order within the Yugoslav judiciary did

not allow for real and independent scrutiny on the part of the federal Constitutional Court and the respective bodies in the federal Republics of the legality and constitutionality of federal and regional governance. In addition, quasi-constant constitutional reform<sup>4</sup> amending the balance between the federal level and the Republics, including cutting down the competences of the Constitutional Court, lead to the SFRY constitution of 1974 - potentially the longest one in the world - regulating an enormous scope of everyday life, but failing to provide a clear enumeration of competencies, and the acceptance of the ruling elite and the entire population. Such was the situation, according to Accetto, that left politics in the driving seat, and the judicature powerless, during the dissolution of Yugoslavia.

On the eve of Yugoslavia's disintegration, Bagwell (1991) argues that the SFRY constitution was a mixture of autonomous rule inside the Republics and joint rule by the Federal Executive Council (FEC). That concept, according to Bagwell, destroyed the sense of brotherhood and contributed to the decline of Yugoslavia as the governments in the Republics had consolidated their power.

Jović (2009), in his unique analysis of the 1967-1990 period and Kardelj's concept behind the 1974 constitution, provides a unique focus on the actors of the political elite in Yugoslavia reconstructing their ideas, concepts and perceptions. His approach is that the beliefs, intentions and explanations of the actors must be taken seriously. This implies that events have to be analysed *as they happened in their context*, and not with the benefit of hindsight. Jović demonstrates that the ideological consensus of the political elite was made up of the Marxist concept of self-management and the emancipation from Stalin, which led to the application of the concept of the withering away of the State. The consensus that had started to evaporate even before the death of Tito left the State (that had indeed withered away to some degree) so vulnerable that the break-up of the country was unstoppable.

Further to historical circumstances, the history of Yugoslavia is crucial in terms of the context of the Croatia-Slovenia border dispute. A major point of awareness here is that it matters whether a State is able to provide a sense of legitimacy and to uphold the rule of law. Another beneficial set of findings is that the real or perceived level of autonomy of the Republics in Yugoslavia had an immense impact on the life-time of the country. In a similar vein, the sense of brotherhood and unity is demonstrated to have been eroded by the 1974 constitution and the political elite in the Republics. The benefits of the above findings for this study are that there is much more to national or regional identity and legitimacy than mere territorial sovereignty, disputed as it may be in a contemporary context.

### **I.2.3 Dissolution of Yugoslavia, borders, and State recognition/succession**

Existing research on the break-up of Yugoslavia relevant to this study centres around the underlying processes and perceptions of the country's disintegration as opposed to the potential hindsight bias of memory distortion, inevitability and foreseeability, the EC Arbitration Commission on Yugoslavia (Badinter Commission), international law and the right to self-determination, the use of previously administrative borders as new international borders, and the recognition of newly independent States.

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<sup>4</sup> Post-WW-II-Yugoslavia has seen four constitutions: 1946, 1956, 1963, and 1974 (Accetto, 2007: 205-6).

Bieber et al (2014), in a comprehensive stock-taking of the political-science scholarship on the dissolution of Yugoslavia, offer illuminating insights into what had been blind spots in the analyses of the end of the SFRY. Bieber et al avoid reading history backwards in terms of ‘Yugoslavia was doomed to fail anyway’. Instead, they demonstrate that the transition from federal units to independent States was a gradual process, and that the alleged historical continuity of post-1991 statehood has in some cases simply been constructed *ex post*. Bieber et al raise the awareness that there may also be continuities which persist beyond the end of Yugoslavia, such as biographical links, cultural and social practises.

Bagwell (1991), in his analysis of the right of SFRY Republics to secede - in the immediate aftermath of the referenda and the declarations of independence in Slovenia and Croatia - holds that the right to secede does not derive from paragraph 1 of the Basic Principles of the SFRY constitution of 1974 - a provision cited all too often - as it was too “nebulous”. Still, according to Bagwell, the peoples or nationalities of Yugoslavia, through their Republic-level governments, *are entitled* to exercise the sovereign right of secession from the Federation. Further, the right of option held by the individual entailed the right to secede by referendum. Third, any right to secession was potentially regulated at Republican level and was not part of the federal competencies. Fourth, there had been recent breaches of constitutional provisions by Serbia through renouncing the autonomy of Kosovo and Vojvodina in February 1989 thus questioning the very foundations of Yugoslavia.<sup>5</sup> Last, secession was lawful as long as the present borders between the Republics were respected.

The disintegration of Yugoslavia and the subsequent violent warfare were mainly caused by the diplomatic recognition of the new States by the Western powers, argues Thomas (1997). He holds that the EU and the United States completely neglected the principle of territorial integrity. Sterio (2010), much in the same vein, posits that self-determination leading to independence was only possible with the support of the Great Powers, with political considerations prevailing over principles of international law. Likewise, Hannum (1993) accuses both the EU and the United Nations of a unique approach on secessionist calls of Slovenia and Croatia without objective criteria. What follows, according to Hannum, is that the EU has created a situation where federal States are less solid than a unitary State as regards secessionist demands of the territorial units. Iglar (1992), however, demonstrates with regard to the UN Charter and subsequent General Assembly resolutions that Croatia and Slovenia (and other SFRY Republics) do have the right to self-determination, but not to secession from the SFRY. Still, according to Iglar, it may be in the best interests of all Yugoslav peoples to agree on each of them choosing its own future. Stojanović<sup>6</sup> (1995) argues that the Western powers had not acted cautiously enough, and regrets that a SFRY request from the mid-1980s to become an associate member of the European Community (EC) was not taken seriously. For him, it should have been the UN, not the EC, to convene a conference on Yugoslavia. The aim should have been to make international recognition of seceding States conditional to a prior agreement between all SFRY Republics.

Craven (1996), in his seminal analysis of the EC Arbitration Commission on Yugoslavia 1991-1993, known as the Badinter Commission, acknowledges the Commission’s unique work on issues such as statehood, recognition, territorial integrity, and succession, resulting in *opinions* instead of binding awards, an unusual practice by arbitral standards. Craven, whilst

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<sup>5</sup> The status of Kosovo and Vojvodina as autonomous provinces is expressly mentioned in Article 1 of the SFRY constitution. For a detailed account of the amendments to the Serbian constitution in relation to the autonomy of Kosovo and Vojvodina see Accetto (2007: 218).

<sup>6</sup> Svetozar Stojanović was an advisor to the first president of the Federal Republic of Yugoslavia (FRY), Dobrica Ćosić, 1992-1993.

admitting to possible doubts as to the independent interest of the Conference on Yugoslavia as such, concludes that the internal organisation of a State, i.e. unitary or federal, does not play a role in the process of dismemberment (the latter meaning that a majority of the constituent territorial units also comprising a majority of the population altogether have disassociated themselves from the parent State). It follows, according to Craven, that as a result of such dismemberment, a continuation of the existence of the parent State in terms of State succession cannot be assumed. As for presumptive units for future statehood, the principle of *uti possidetis (juris)* determines which entities have the right to territorial sovereignty, i.e. those units which exist within the borders of a former administrative unit (such as a SFRY Republic) notwithstanding the principle of self-determination which all successor States needed to adhere to. All emerging States being equal successors, they shared an obligation to arrive at a distribution of the assets and liabilities of the preceding State.

Pellet<sup>7</sup> (1992) acknowledges the Badinter Commission's contribution to narrowing down the principle of self-determination. Further, the distinction between *citizenship* and *nationality*, i.e. Serbs retaining civil rights in Croatia and Bosnia-Herzegovina, potentially served a very useful purpose in so far as it helped avoiding the further fragmentation of States. Whilst lauding the Commission's attachment to the principle of *uti possidetis juris* with regard to the respect of frontiers, Pellet underlines the fundamental importance of territorial integrity, and that borders could only be modified by agreement. As for the future role of arbitration after the end of the hostilities in Yugoslavia at some point, "the existence of an impartial body, charged with resolving the inevitable conflicts which remain or might arise between the Republics would be even more important today" (Pellet, 1992: 180) - a remarkable act of prophecy at the time.

In an updating legal appraisal of the principle of *uti possidetis*, Sorel and Mehdi (1994) note that by means of the Badinter Commission's work the principle of *uti possidetis*, i.e. the principle that internal borders of a previous State become international borders of the newly independent successor States to a colonial power, was now applicable in a universal manner on all continents and would enjoy being on equal footing with the principle of territorial integrity.

Radan (2000), in a critical analysis of the "post-secession international borders", questions the validity of some of the Opinions delivered by the Badinter Commission. In his view, there cannot be talk of respecting internal borders as international borders of break-away States when those very borders had never been expressly determined in the first place. Further, the application of the principle of *uti possidetis* as suggested in Opinion 3 of the Badinter Commission was questionable as the judgement of the International Court of Justice (ICJ) the Commission had referred to had been selectively quoted leaving out the clear reference to decolonisation. Therefore, *uti possidetis* could *not* be regarded as a general principle applicable to all cases of independence.

Analysing the process leading to the international recognition of Croatia as an independent State, Vukas (2011), a Croatian national<sup>8</sup>, appraises the findings of the Badinter Commission. He appears critical, however, of the - in his view - complex process stemming from the requirements imposed by the EC Foreign Ministers at their special meeting in December 1991 which had been more demanding than the ones for recognition of the countries from Central

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<sup>7</sup> Professor Alain Pellet was a Special Advisor for Slovenia for the full duration of the 2012-2017 arbitration procedure.

<sup>8</sup> Budislav Vukas was a founding member of the International Tribunal of the Law of the Sea (ITLOS) 1996-2005, and served as arbitrator appointed by Croatia in the arbitration procedure 2012-2015.

Europe after the dissolution of the USSR. Türk (1993), in a similar vein, critiques the - from his point of view - over-cautious approach of the EC and the U.S. towards the disintegration of Yugoslavia and the initial hesitation to recognize Slovenia and Croatia suspecting that the caution had to do with the dissolution of the USSR as one of the two superpowers unfolding at the same time. Like Vukas, Türk, a Slovenian national<sup>9</sup>, whilst acknowledging the work of the Badinter Commission, is critical towards the EC for delaying recognition, in particular for disregarding the fact that there had already been effectiveness of government in the Republics disassociating themselves from the SFRY, one of the international legal criteria for recognition.

Blum (1992) is critical of the UN Security Council's Resolution 777 (declaring that the SFRY did not exist any longer) and the subsequent General Assembly Resolution 47/1 from September 1992 denying 'rump Yugoslavia' (Federal Republic of Yugoslavia FRY, i.e. Serbia and Montenegro) the continuation of the SFRY's UN membership.

The Agreement on Succession Issues of all five successor States of the SFRY (Slovenia, Croatia, Bosnia-Herzegovina, the FRY<sup>10</sup>, and Macedonia) reached in 2001 is examined by Škrk et al (2015). They acknowledge the political significance of the agreement as it settled the legacy of Yugoslavia by means of negotiations and mutual consent. Legally, the agreement settled the assets and liabilities of the SFRY including the allocation of movable and immovable property (including tangible movable property which can be considered cultural heritage).<sup>11</sup> Škrk et al are critical, however, about the lack of a dispute settlement mechanism which, in their view, left the most complex question, the unresolved issue of foreign currency bank deposits from SFRY times open.<sup>12</sup>

Stanič (2001), on the eve of the actual conclusion of the agreement, highlights the lessons from the Yugoslav case. In her view, the importance of the continuity of rights and obligations has grown, not least because of newly independent States having to rely on fair conditions on capital markets for their bonds, which can be very difficult if debt allocation arrangements are pending. In addition, the role of international organisations such as the EBRD, the IMF and the World Bank was increasing as they shaped many issues to do with apportionment keys. Much in the same vein, Stahn (2002) acknowledges the fundamental role of monetary institutions. As for further distinctive features of the 2001 Succession Issues Agreement, he sheds light on the strong protection of nations' cultural heritage and of acquired rights in a post-conflict environment.

With regard to historical circumstances, it is enlightening that the European Community played a special role in the process of the dissolution of Yugoslavia. Not least due to the powerless judiciary in the late SFRY, the EC employed an arbitration commission to settle the very different views of the Republics on the issues of self-determination, State succession and State recognition. The fact that the *uti possidetis* principle for borders was not free of controversy in the Yugoslav context, also plays a role hinting on the second research question, namely on the conclusions for contemporary and future EU enlargement. Further, the Agreement on Succession Issues (ASI) as the only pluri-lateral agreement between the SFRY

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<sup>9</sup> Danilo Türk was Slovenian Ambassador to the UN and subsequently President of Slovenia 2007-2012.

<sup>10</sup> Today Serbia (the FRY existed from April 1992 to February 2003, the succeeding entity Serbia and Montenegro 2003-2006; subsequently both countries separated in 2006 into Montenegro and Serbia; in 2008, Kosovo became independent from Serbia).

<sup>11</sup> It is important to note that territorial issues were *not* a part of the agreement.

<sup>12</sup> The Ljubljanska Banka (LB) case, a major financial conflict issue between Slovenia and Croatia is briefly mentioned in VI.1.4.

successor States started a process that continues to the very day which goes to show that a state of unresolved conflict is nothing unusual in the post-Yugoslav space.

#### **I.2.4 Slovenia-Croatia border after 1991**

Scholarship on the border highlights the implications of the independence of Croatia and Slovenia on cross-border life from a political-historical and sociological angle, and on the first major stand-off over competing claims to a disputed strip of land on the lower reaches of the Dragonja.

Barbić (2000) takes stock of the first decade of the new international border between the two countries from a sociologist's perspective. Her empirical findings from the upper Kolpa valley show that what used to be a mixed-marriages open area along the purely administrative border had increasingly turned into a less permeable borderland with new obstacles for cross-border employment, cross-border use of services (schools and hospitals), and local cross-border traffic. Zavrtnik Zimic (2003) argues that the newly established border after 1991 has led to a selective "Schengen periphery". Too much effort had been directed at the policing and securisation of the border (on the part of the Slovene government) rather than looking at the social aspects of unobstructed contacts between the citizens on both sides.

In an empirical political geography study, Pipan (2007) demonstrates that the new Schengen border arrangements have led to the creation of some sort of second Berlin Wall to the locals on both sides of the border whose contacts have declined substantially. The area, according to Pipan, will continue to be held hostage by the "Fortress Europe" concept as Schengen membership for Croatia still was a distant prospect due to the very long and permeable land border of Croatia vis-à-vis Bosnia-Herzegovina and Montenegro.

Zajc (2015) takes a historian's look at the contemporary perception of the history of the Slovenian-Croatian border in Slovenia. His findings include that during Yugoslav times the (administrative) border to Croatia could be turned on (when complaining about financial contributions to less developed Republics), or off (when on vacation in Dalmatia). With the new international border in 1991, however, that "wider space" was sealed off. The perception of the new 'Slovenian smallness', according to Zajc, rendered it a post-independence complex which, in turn, attributed an enormous amount of frustration to the undetermined sea border. Very soon, a pseudo-historical narrative became dominant in what Zajc labels a "constructed conflict".

The first scholars to analyse the most prominent example of the overlapping claims of Slovenia and Croatia along the land border, the so-called "Three Hamlets", are Klemenčič and Schofield (1995). The disputed area is a strip of land along the left bank of the lower reaches of the Dragonja river just before it flows into Piran Bay. Klemenčič and Schofield identify the salience of the case as the delimitation along the Dragonja at the point where it hits Piran Bay has a direct effect on the maritime-delimitation starting point in the Bay.

In his analysis of geographical, historical and international law documents related to the claims on the disputed land along the lower Dragonja, and his interviews with locals in the area, Pipan (2008) traces violations of the 1991 status quo in the subsequent years by both sides. Drawing on possible solutions as for the border conflict, Pipan suggests arbitration and bilateral negotiations.

As for specific circumstances of the Croatia-Slovenia border dispute, the first research question, scholarly works demonstrate the asymmetric nature of the border since Slovenian EU accession in 2004. The Slovenian-Croatian border first was an EU external border, and since 2007, it was also a Schengen border, a status it retained after Croatian EU accession in 2013. One can posit a certain degree of divisiveness of the border due to its politically asymmetric nature and the different status on either side of the border that comes with it.

### **I.2.5 Transitional Justice**

In the Yugoslav context, the armed conflict in Croatia in the areas of the insurgent Serbian minority 1991-1995 (Homeland War) was only second to the atrocities in Bosnia-Herzegovina 1992-1995. Research on transitional justice in the post-Yugoslav region focuses on the work of the ICTY, on the barriers to starting domestic trials at all, and on whether and how war-crime prosecution impacts on justice and the much-needed aim of reconciliation.

In her ground-breaking study of the International Criminal Tribunal for the Former Yugoslavia (ICTY)'s impact in Bosnia-Herzegovina and Serbia, Orentlicher<sup>13</sup> (2018) researched on how the ICTY's work affected the citizens of the successor States of Yugoslavia. She has developed benchmarks for assessing the impact of an international criminal tribunal, and, perhaps most importantly, avenues how denial can be transformed into acknowledgment. In addition, Orentlicher presents findings on the most tangible aspect, the effect of catalysing and fostering *domestic* war-crime prosecution.

To that end, Dragović-Soso and Gordy (2011) point out that domestic war crime prosecution had been scarce in the 1990s, and the capacity for war-crime prosecution was only boosted after 2000. The first special prosecutor for war crimes in Serbia was established in 2003, whilst a special war crimes chamber started its work in Croatia in 2005, and in Bosnia-Herzegovina in the same year.

A fine-grained historian's account of the handling of war crimes is provided by Zgonjanin (2018). First, he analyses the ICTY cases of Vukovar, the Krajina, and Kosovo, in particular the Gotovina, Milošević, and Mrkšić cases using archive material from the ICTY and other sources. Second, Zgonjanin investigates the political and military leadership's approach to war-crimes with a focus on Croatia and Serbia 1991-1999. His findings include that there was virtually no political will in Croatia and Serbia to have war crime perpetrators prosecuted, and that this was the reason why the ICTY had to step in, predominantly at the level of army Generals and Commanders. Further, Zgonjanin demonstrates that the domestic strategies vis-à-vis war crimes consisted of ignoring, covering up, trivialising, and denial.

Orzechowska (2013) has looked into the collaboration record of Candidate Countries with the ICTY. Her findings include that the more precise the requirements and rewards on the part of the EU, the higher the willingness of the Candidate Country to comply. Further, pressure from the U.S. with regard to financial support also influenced the behaviour of the Candidate Countries. Lastly, cooperation with the ICTY has not resulted in a sustainable conflict transformation process, but has continued to divide public opinion. Peskin and Boduszyński (2003) demonstrate that nationalist actors in Croatia have raised the domestic costs for collaboration with the ICTY, so that even the new SDP led government at the time was not

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<sup>13</sup> Professor Diane Orentlicher has, apart from her academic career, also served in the Obama administration working on international and transitional justice issues and atrocity prevention.

able to extradite indicted war heroes, as such extradition would have been seen as an attack on the dignity and legitimacy of the Homeland War.

On historical circumstances, existing research demonstrates the heavy impact of transitional justice. Wars and war crimes have the potential to load bilateral relations or protract existing territorial conflict when events are ignored, trivialised or denied. Reconciliation is hardly possible under such circumstances. This is also relevant for the impact on contemporary and future EU enlargement, the second macro research question.

### **I.2.6 Maritime delimitation**

Existing scholarship on maritime borders in the Adriatic examines the new jurisdictional landscape of riparian States after the dissolution of Yugoslavia, provides some findings on the bilateral attempts of Slovenia and Croatia to settle their maritime border with a particular focus on the initialled Draft Agreement of 2001, and analyses recent developments in maritime delimitation case law.

Suknaic (2011) investigates the interplay between international law and international relations in the management of the Croat-Slovene border conflict up until the Arbitration Agreement. The legal arguments of both parties as to the delimitation of the border being mostly adversarial, some form of political decision was inevitable on the part of the arbitral tribunal. Šočanač (2010) analyses the balance between lexical ambiguity and precision in the Arbitration Agreement. She concludes that whilst procedural issues need to be as precise as possible, the main substantive issues may (have to) be characterised by a substantial amount of indeterminacy to accommodate the interests of both parties and not to prejudice the judicial award. Cataldi (2013) notes that the Arbitration Agreement assigns a significant role to the European Union (the acknowledgement of the European Commission's facilitation role in the Preamble, the Commission's role in the appointment procedure in Article 2, and the issue of Croatian accession to the EU in Articles 8 and 9). Further, he points out the atypical provision in Article 7(3) where there is express mention of the commitment of both parties to include the revision of national legislation for the purposes of implementation of the Final Award. That provision clearly indicated "an increased attention to the scrupulous enforcement of the decisions".

A comparative legal analysis of the bilateral Draft Agreement of 2001 ("Drnovšek-Račan") and the Arbitration Agreement of 2009 is provided by Sancin (2010). She highlights the essential relevance of State borders even for States aspiring to membership or being members of an intergovernmental-supranational organisation such as the EU, and she argues that the period of bilateral relations in question is one of transition between the old family of SFRY Republics and the new one of the EU. The Arbitration Agreement, according to Sancin, is a crucial contribution to the management of the border conflict due to the innovative features of the arbitration agreement that were found to meet the interests of both parties.

Avbelj and Čerňič (2007), in their discussion of the maritime delimitation case in Piran Bay, posit that there is a need for access to the high seas for all riparian States of the Bay suggesting that a condominium approach may be a solution. Further, they refute the Croatian argument that Article 2 of UNCLOS (territorial sovereignty over land determines the sovereignty over the adjacent sea) was *jus cogens*, i.e. a binding international legal norm.

Degan (2007), in his legal reasoning, holds that as a result of existing arbitral awards or ICJ judgements on maritime delimitation, the equidistance line (in Piran Bay) should be the

provisional starting point followed by considerations of special circumstances. Drawing on the coastlines of Croatia and Slovenia, Degan demonstrates that Slovenia as a land-locked State was not entitled to access to the high seas.

Klemenčić and Topalović (2009) deliver an overview of the development of the maritime borders in the Adriatic. As for Piran Bay, noting that both countries were to refrain from maximum positions for political reasons, such as good neighbourliness, Croatia had to recognise Slovenia's situation as a geographically disadvantaged State, whilst Slovenia had to give up its untenable position of full sovereignty over the Bay as that claim was beyond UNCLOS provisions. Blake and Topalović (1996), in their compendium on maritime boundaries in the Adriatic, argue that it would be difficult for Slovenia to justify a departure from the equidistance line in Piran Bay in order to achieve access to the high seas, as UNCLOS granted *innocent passage* of ships through the territorial waters of other coastal States (in this case Croatia) anyway, i.e. there were no restrictions of access to and from Slovenian ports. Vidas (2009) provides an analysis of the application of UNCLOS and the rule of law in the Adriatic. He highlights the traffic separation scheme adopted by the International Maritime Organisation (IMO) in 2004 applying to all ships in the northern Adriatic. This IMO scheme, jointly proposed by Italy, Slovenia and Croatia, establishes sea lanes including lanes to and from the Italian port of Trieste and the Slovenian port of Koper.

In his study on the delimitation of the territorial sea between Croatia and Slovenia, Arnaut (2002) provides an in-depth analysis of the bilateral Draft Agreement of 2001 (“Račan-Drnovšek”) which never entered into force. His findings on (i) the legality of the agreement under international law are that two States have contractual freedom for the delimitation of their common border as long as the rights of third States are not affected, for which reason the agreement was not to be questioned under international law. As for (ii) the legality of the 2001 Draft Agreement, had its provisions been determined by a third body, presupposing that such body was bound to “objective legal reasoning” (as opposed to the above contractual freedom of a bilaterally negotiated solution), he rules out the option of Piran Bay being classified as a “historic bay”, but allows for the possibility that special circumstances may be invoked. Further, the “corridor” (foreseen under “Drnovšek-Račan”) leading from the Slovenian territorial sea through the Croatian territorial sea providing contact to the high seas was *not* a novel solution as such. A corridor model already existed in a maritime delimitation agreement between France and Monaco from 1984.<sup>14</sup> The striking difference, however, was that whereas both the France-Monaco and the Senegal-Gambia agreement provided for full access to the respective territorial sea from the coast, the corridor in “Račan-Drnovšek” cut Croatia off an area of territorial waters, i.e. the country’s sea border with Italy, which would render the area between the corridor and the Croatian-Italian sea border an enclave of Croatian territorial sea which Arnaut considers highly questionable.

Šimunić (2010) argues that the Račan-Drnovšek Draft Agreement was bound to fail to command ratification in Croatia as it was *not* conducted by means of silent diplomacy. Too much of the content had been disclosed to the media. Further, public opinion fuelled by the political elite reasoned that Croatia was ceding parts of its territory to gain politically ‘the road to Europe’ and good neighbourly relations with Slovenia.

The extension of coastal State jurisdiction in enclosed and semi-enclosed seas in the Adriatic and in the Mediterranean is the focus of Grbec (2014). In his comprehensive study, he

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<sup>14</sup> Monaco was granted a corridor of territorial sea and continental shelf in order not to be cut off the high seas. The delimitation method was *sui generis* and did not follow any established method of delimitation. A similar solution had been applied by Gambia and Senegal in 1975 (Arnaut, 2002: 50).

scrutinizes, *inter alia*, maritime delimitation issues in the Eastern Adriatic, in particular the border bays of Slovenia-Croatia (Piran Bay), Croatia-Montenegro (Prevlaka/Outer Boka Kotorska) and Croatia and Bosnia-Herzegovina (Neum). He also analyses to some extent the 2009 Arbitration Agreement between Croatia and Slovenia. The provisions of the Agreement, according to Grbec, represent a skilful and *sui generis* approach for they employ individual criteria for different sets of issues. This fact and the full range of issues addressed lead him to conclude that one was to expect a comprehensive delimitation of the maritime boundary on the part of the PCA Final Award. Arnaut (2014) also looked at the delimitation issues Croatia has with Bosnia-Herzegovina and with Montenegro. Whereas the territorial sea of Bosnia-Herzegovina, strictly legally speaking, is cut off by Croatia's straight baselines, Croatia's agreement with Montenegro is a Protocol from 2002 which is only applied provisionally and needs to be transformed into a permanent agreement, not least as the security situation around Prevlaka has changed considerably.

Oude Elferink et al (2018) provide several very insightful research findings from maritime delimitation *case law* with a focus on consistency and predictability. Their assessments include findings on a more clearly defined role of equity over time, a critical account on the application of the provisional equidistance line, and on the subjectivity of the so-called disproportionality test within the three-stage approach of maritime delimitation. Oude Elferink et al have demonstrated that what is often deemed an objective method of delimitation in fact entails a great deal of subjectivity, both in terms of scope and application of the different stages of delimitation. To arrive at more consistent and predictable decisions of courts and tribunals, the subjectivity of the first stage in the delimitation process, i.e. the determination of the provisional equidistance, must be removed. The (dis-)proportionality test, according to Tanaka (2018), lacks any standardised calculation approach for relevant coasts and what is an acceptable ratio between coasts and maritime areas, for example.

The scholarly work on maritime delimitation aspects indicates that the law of the sea may, fundamentally, be seen as a toolbox for both the relaxation or the protraction of bilateral conflict. Existing research has to some degree explored individual aspects of the Arbitration Agreement between Croatia and Slovenia from 2009. However, no full analysis of the various phases of the border dispute since 1991 has yet been provided, let alone on the very genesis of the Arbitration Agreement. Research into maritime delimitation case law suggests that there may be a lack of predictability despite efforts to refine the delimitation methodology. On the issue of the conclusions of the Slovenia-Croatia case to be drawn with regard to present-day and upcoming EU enlargement, existing research has established that there are further maritime delimitation issues between Croatia and the Candidate Country Montenegro and the prospective Candidate Country Bosnia-Herzegovina. Yet, no recommendations have been made on how these maritime territorial issues can be tackled appropriately - and resolved.

### **I.2.7 EU enlargement**

In respect of EU enlargement, the pertinent scholarship covers conditionality considerations in the post-violent-conflict sphere in the former Yugoslavia. Existing research examines Europeanisation in South-East Europe, i.e. the relationship between national-identity perceptions and the compliance with EU political conditionality where the political compliance tends to be underestimated.

Bojinović Fenko and Urlič (2015) discuss the application of political criteria and additional conditionality during the EU accession negotiations of Slovenia and Croatia. Their empirical findings include, for instance, that both the European Commission and the European Council did put an emphasis on fulfilling *political* criteria (i.e. rule-of-law and democratic governance questions rather than the transposition of existing EU legislation referred to as *acquis*) more often with regard to Croatia than in the case of Slovenia. Whereas the political criteria for Slovenia were set before the beginning of the accession negotiations, Croatia was facing political criteria all along its accession negotiations. Also, the Commission showed greater determination towards Croatia than vis-à-vis Slovenia where the Council had been more of a driving force. Bojinović Fenko and Urlič's conclusion is that the difference as for the degree of political conditionality for Croatia and Slovenia stems not only from the more difficult post-conflict situation in Croatia, but also from the Commission's experience with the two previous enlargement rounds of 2004 and 2007.

Böhmelt and Freyburg (2015) have analysed the spatial interdependency of Candidate Countries with regard to compliance with EU criteria in their 'race to Brussels'. They demonstrate that there is a considerable amount of diffusion through competition and learning. As a result, what was once designed by the EU as the "regatta principle" (each country will be assessed by its individual merits which in turn determines the speed of accession negotiations, and thus the date of accession), in reality rather turns out to be the 'wave model' where a bunch of countries joins at the same time because the Candidate Countries influence each other.

In her stock-tacking of ten years of enlargement (with reference to the 'big bang' 2004 enlargement round), Grabbe (2014) provides a number of lessons learned, one of them being, in the same vein as Bojinović Fenko and Urlič's (2015) findings, that Croatia had to face additional political criteria compared to Bulgaria and Romania. Remarkably, the *acquis* compliance of the 2004 joiners had been very durable as a matter of fact outperforming the record of the 'old' Member States. On some *political* criteria, however, there were occasional, albeit hefty set-backs, such as Hungary (constitutional court reform and media act) in 2014, and notably Croatia where, only a few days before EU accession in 2013, parliament amended legislation to the effect that the EU arrest warrant was rendered non-operational to prevent the extradition of a former head of the Yugoslav secret police, Josip Perković, who was wanted in Germany for murder. The Croatian Parliament's decision "left a bad taste in the mouth" in EU quarters (interview Augustin Palokaj, 19-03-2018). After heavy outrage from the EU Commission and the German government, Perković was extradited in early 2014 after the domestic Croatian legislation had been amended.<sup>15</sup> The moral of that story, according to Grabbe, is that EU influence on a country tends to diminish greatly once its accession date is set. Another lesson of vital importance was "not to allow in a country with an unresolved conflict". Grabbe argues that the precedent had been Cyprus and that the EU had not learnt that lesson. "Time-bombs [can] disrupt accession talks at any point", in particular "with unresolved issues left over from the dissolution of Yugoslavia" (Grabbe, 2014: 50), such as the Slovenian-Croatian border dispute, the dispute between Greece and Macedonia/FYROM

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<sup>15</sup> Josip Perković and Zdravko Mustač, a former Yugoslav secret police officer, were both sentenced to life-long imprisonment by the Munich District High Court (Oberlandesgericht) on 03 August 2016 (7 St 5/14 (2)) for the murder of a Croat dissident in Bavaria in 1983. The trial was remarkable also in so far as the verdict was delivered on the grounds of presumptive evidence rather than hard-and-fast proof. The Federal High Court (Bundesgerichtshof) upheld the ruling on 28 May 2018. Perković and Mustač have referred their original extradition to Germany to the European Court of Human Rights (ECHR) on the grounds that it had infringed basic human rights (HINA News, 29 May 2018).

over the State name, and the risk of the SFRY successor States blocking accession over bilateral issues - a problem the EU was well aware of, but no answer was in sight.

Vachudova (2013) argues that EU enlargement still has a positive democratising effect on Candidate Countries regardless of the fact that it is the domestic actors who decide about the pace and the quality of reform, and that the challenges in terms of national sovereignty and identity are far greater in South-East European (SEE) States than in Central and East European (CEE) States. As for Europeanization effects on the ground, Vachudova refers to the reform-minded government in Croatia under Prime Minister Sanader after 2003 where attaining EU membership was at the heart of governance, and so was a pro-EU-minded government in Serbia after 2008 under the DS party leader and later State President Tadić, and Prime Minister Vučić who had been taking on the fight against corruption vigorously.

Assessing the consistency and effectiveness of the *political* criteria for EU accession after 2004 against the notion of “enlargement fatigue”, Schimmelfennig (2008) argues that the difficulties in the negotiations with Croatia, for example, relate to the legacies of ethnic conflict and caused high political costs as national identity was affected, i.e. in the case of the EU requirement to extradite General Gotovina to the ICTY. Whereas the political conditionality of the EU had been as consistent as with previous enlargements, Schimmelfennig diagnoses the *effectiveness* of the political criteria to have deteriorated, not least by the above-mentioned legacy of ethnic conflict. His advice to the EU is to reassure the candidate countries of the EU’s commitment to enlargement and to make the prospect of accession very real.

Delivering a process-tracing study on the relationship between identity and Europeanization in Croatia and Serbia, Subotić (2011) demonstrates that, as for Croatia, the process has been one of identity *convergence*, whereas for Serbia (at the time of her writing), identity *divergence* had been predominant. The three factors of convergence in Croatia, according to Subotić, were the ability of the Croatian political elite to (i) frame cooperation with the ICTY as part of the European idea - not at all an easy task - a “de-balkanized” Croatia belonged to, (ii) manage to isolate opponents (such as war veterans) of the governments’ pro-EU agenda, and (iii) portray Europe/the EU as “a friend” who has greatly supported Croatia, not least through early recognition of its independence. In turn, the factors shaping the divergence in Serbia were (i) the idea of the political Europe being a lot less shared within Serbia’s political elite, (ii) an alternative-identity narrative emphasizing the myth about Kosovo being an integral part of Serbia, and a sense of brotherhood with Russia, and (iii) Serbia’s previous relationship with Europe being portrayed and perceived as negative and painful (i.e. through punishing the country for trying to hold the old Yugoslavia together, encouraging the break-away of Kosovo, and the NATO bombings 1999). Collaboration with the ICTY proved extremely difficult to advance in a very patriotic environment in Serbia where the assassination of Prime Minister Zoran Đinđić in 2003 indicated, according to Subotić, that Đinđić as the only person in favour of cooperation with The Hague in the government was killed to stop further collaboration with the ICTY. Thus, the main difference between Croatia and Serbia, as for the role the EU requirement for collaboration with the ICTY played in the Europeanization process was that Croatia cooperated because it considered itself a European State with a natural acceptance for the rule of law, whilst Serbia cooperated because it had to and anything else meant depriving the country from attaining the prestigious goal of EU membership. In essence, the EU was seen as a “punisher [...] and an arrogant force” in Serbia, whereas in Croatia the EU was perceived as an institution representing “democracy [...] and civilization” (Subotić, 2011: 326).

Jović (2011) demonstrates how the mainstream nationalist narrative of the Croatian political elite was made compatible with EU membership. Despite the interventionism of the ICTY or the reduction of domestic sovereignty due to EU conditionality, pro-EU forces in Croatia strikingly managed to reconcile the traditional narrative with its long-term objectives: Croatia would leave the Balkans behind, by joining the EU it would have “a seat among the powerful nations of Europe, and will thus gain real power”. EU membership was to be seen as in direct continuity with the country’s independence back in 1991, and supposed to help move Croatia, “a winner and a victim”, away from the former Yugoslavia and from Serbia once and for all.

In a fine-grained process-tracing case study, Dolenc (2013) looks at the causal effects of regime change on subsequent democratisation in Southeast Europe, comparing notably Croatia and Serbia with the record of CEE countries. The varying degree of democratization is measured on the basis of, *inter alia*, socioeconomic parameters, statehood conditions, and EU conditionality. Her findings include that the rule of law is “the weakest link” mainly accounting for the difference between authoritarian rule and democratic governance. For the first decade from the early 1990s into the 2000s Dolenc traced three processes of “*power mutation*” as causal processes leading to stalling democratization in both Croatia and Serbia: (i) power concentration through power personalisation by Tuđman and Milošević, (ii) aggregation of economic power through privatisation and oligarchy only as far as to secure “insider advantages”, and (iii) State politicisation characterised by “clientelist relationships” and “informal networks of loyalty” resulting in “feudalist bureaucracies” (Dolenc, 2013: 189). Violent conflict, i.e. the Homeland War between Croatia and Serbia 1991-1995 and the war in Bosnia-Herzegovina 1992-1995 were intensifying these forms of power mutation.

As for differences between the two countries, according to Dolenc, State-building in Croatia was successfully completed in the early 2000s, whereas the State crisis in Serbia appeared to continue. In a similar vein, the Milošević regime was considerably more repressive than the semi-presidential rule of Tuđman in Croatia. The elections in the 1990s in Croatia she considers free and fair, whilst the same could not be said for Serbia. EU conditionality proved effective with regard to (imposed) collaboration with the ICTY, despite the tactics of delayed compliance on the part of both governments. Further, the rule of law in general and the level of corruption in particular “remain permanent weaknesses” in both countries (Dolenc, 2013: 191). Her main implication for the further democratisation of Croatia, Serbia and all SEE States is that democracy and the rule of law “cannot be engineered through smart design of formal institutions”. Rather, it is the socioeconomic level and regime legacy that determine how fast and sustainable democratization can go about (Dolenc, 2013: 195-6).

With regard to the specific circumstances of the Slovenia-Croatia border conflict (the first research question), the literature has established that political conditionality on the part of the EU was applied to a higher degree to Croatia than it was to Slovenia, not least due to the lessons learnt with Bulgaria and Romania from the 2007 enlargement. Further, existing research demonstrates that there is a strong political narrative in Croatia that joining the EU equals de-balkanization and a return to Europe, and that Croatia is both a winner (in terms of EU accession) and a victim (of Serbia and the former Yugoslavia altogether). In relation to the second research question, the implications of the Croatia-Slovenia border case on contemporary EU enlargement, research finding includes that, with regard to Serbia, the political role of Europe is a lot less established amongst the political elite, and that Serbia’s previous relationship with the EU is perceived as painful, not least during the 1991/1992 EC arbitration commission and, in a wider context, through the NATO bombings in 1999.

### **I.3 Research gap and contribution to the debate**

As the literature review has demonstrated, much has been written about EU enlargement and how conditionality on the part of the EU has been perceived by the Candidate Country, and to what degree the EU requirements have been met. The causal mechanisms of and effects on processes of compliance, for both *acquis* and political criteria, has equally been subject to solid research. It has been outlined that domestic costs weighed-up against the EU incentives (the rationalist perspective), and identity or legitimacy considerations (the constructivist perspective) of the Candidate-Country actors play a vital role as to the sustainability and pace of EU accession negotiations.<sup>16</sup>

The research gap in this context is about *how bilateral issues feed into ongoing accession negotiations* and are, as a matter of fact, able to stall the process, and about *whether and how it is possible to resolve these bilateral issues during accession negotiations*. The border dispute between Slovenia and Croatia is a prototype case and therefore the ideal research object. Accession negotiations being subject to an outright veto of one of the *current EU Member States vis-à-vis a Candidate Country* is a new matter. The Croatia-Slovenia case 2008/2009 is the first of its kind. What renders it a case worth analysing in greater detail is the particular salience of the issue in question: conflict over territory. It is worth noting that this piece of territorial conflict is a legacy of the dissolution of Yugoslavia, a country whose successor States all have an EU perspective. Slovenian and Croatia have already joined the EU, most notably in the context of the present study, however, *not* at the same time. In fact, the remaining SFRY successor States plus Albania already have the status of EU Candidate Country (except for Bosnia-Herzegovina and Kosovo), and EU accession negotiations have been underway with Serbia and with Montenegro.

To that end, and in view of the implications for the post-Yugoslav space in relation to the EU, an insight into how bilateral conflict between an EU Member State and a Candidate Country has been handled is urgently needed. The recent so-called Western Balkans Strategies of the European Commission from 2012 and 2018 have confirmed the *merits-based* approach meaning each Candidate Country will join the EU when it fully complies with EU conditionality individually and irrespective of the progress of other Candidate Countries. That merits-based approach, which also includes a re-prioritisation of Chapters (*fundamentals first*), is a sea-change in the history of the EU enlargement policy which, up until 2007 when Bulgaria and Rumania joined together, was based on the so-called convoy approach if there was more than one applicant country.<sup>17</sup> It follows from the current merits-based approach that it appears highly unlikely that the remaining SFRY successor States and Albania will be able to join at the same time. As a result, every time one Candidate Country has joined, it acquires the Member State veto power *vis-à-vis* another Candidate Country, so conflict over bilateral issues between Member States and Candidate Countries may become self-energising.

The Croatia-Slovenia case has produced novel ways and unique efforts of conflict management, whereas this process is far from being completed. This study<sup>18</sup> is going to analyse the roles of processes and the interplay between (i) the bilateral level Slovenia-Croatia, (ii) the (rotating) EU Council Presidency, (iii) the European Commission, (iv) the Arbitral Tribunal as the third party entrusted with the final substantive decision, and (v) the derailment of the arbitration process leading to the conflict on the common State border becoming ever more protracted.

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<sup>16</sup> For the analytical framework on EU enlargement and conditionality see II.2.

<sup>17</sup> For the development of the approaches and the operational level of EU accession negotiations see VI.2.1.

<sup>18</sup> For the research design see Chapter III.

The conclusions from the analysis of the border dispute between Slovenia and Croatia may be of particular and immediate salience to all Candidate Countries of the Western Balkans region. The ongoing accession negotiations between the EU and Serbia have already demonstrated that what is at stake as for bilateral conflict between the EU and prospective members is no less than (i) unresolved territorial issues from the times of Yugoslavia, and (ii) the legacy of the Homeland War. Whilst the first issue relates to border delimitation at land and at sea<sup>19</sup>, the latter touches on very straightforward and sensitive national identity issues in the aftermath of the violent break-up of the SFRY and the very painful experience of State-building in the 1990s, such as (regional/universal) war crime jurisdiction, missing persons, or minority rights, to name but a few.

Further, and looking ahead from an EU enlargement in Southeast Europe point of view, no research has been conducted yet as for the need to define a *new operational framework* for the resolution of bilateral disputes (i.e. institutionalised procedures, such as early-warning mechanisms or dispute-resolution units in the EU enlargement process), or *novel approaches to the substantive issues at dispute* (such as maritime and territorial delimitation issues between the SFRY successor States). The Croatia-Slovenia case constitutes a precedent in dispute resolution in general, and in handling particular circumstances and sensitivities of the post-Yugoslav region. After all, any of the current and prospective Candidate Countries (Turkey aside, for fairly obvious reasons of moving away from the EU) are located in the Western Balkans region. And it is the countries from this region for which we can postulate an utmost proximity to the EU both in a geographical and a time dimension.

The need to resolve bilateral disputes ahead of EU accession has been the mantra of the European Commission and the Member States for many years. Yet, *how* this can be achieved has remained highly obscure. This study will want to shed light on the efforts in that regard in the border conflict between Croatia and Slovenia, and on the way ahead by concluding with practitioner-proof recommendations.

#### **I.4 Map of the study**

Having gone through the point of departure, the literature review, and the research gap (contribution to the debate) in this introductory Chapter, the following Chapter II will present the underlying analytical framework. Several angles of conflict analysis and resolution will be discussed: Basic human needs some of which are posited non-negotiable, rational calculations, such as the distinction between negotiating positions and real interests, the dynamics of conflict arguing that there can be third-party phases of relaxation or protraction, and finally judicial dispute resolution, categorizing legal bodies as to their independence or the enforceability of their judgements, and the influence of the parties to the conflict on the work of such bodies. With regard to EU enlargement theory, rationalist and constructivist approaches will be synthesized, so that EU conditionality towards Candidate Countries is complemented by national identity and compliance behaviour considerations.

Chapter III is going to outline the research design touching on the case selection, the applicable research method of process tracing, and the means of data collection. As will be discussed, interviews and documents as the main data pillars are at the heart of this study.

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<sup>19</sup> Unresolved border issues include Croatia vs. Serbia (along the Danube in the Baranja/Bačka region), Croatia vs. Montenegro (final settlement of the provisional agreement on the sea border around Prevlaka/Outer Herceg Novi Bay), and Croatia vs. Bosnia-Herzegovina (maritime access to Neum); see VIII.1.2. and VIII.2.5.

Chapter IV will deal with a condensed outline of the history of territorial, political and violent conflict in the post-SFRY neighbourhood from the late days of the Venice Empire to the dissolution process of Yugoslavia. To that end, the role of the EU in the matter of the recognition of the successor States of Yugoslavia will be highlighted. The Chapter is also meant to help explain the historic background of the border dispute between Slovenia and Croatia, and to what extent the matter is loaded irrespective of EU enlargement considerations.

Chapter V is going to discuss maritime delimitation issues looking at the complex geographical situation in the Northern Adriatic. The legal bases for various methods of delimitation attached to them from the United Nations Convention of the Law of the Sea (UNCLOS) will be discussed. To that end, the ‘lawfare’ between Croatia and Slovenia (and the EU Commission) over maritime zones ahead of the 2008 deadlock at the EU accession stage is a vital prerequisite and collateral foreplay to the later development of the border dispute at the EU stage (which is why this Chapter needs to precede Chapter V). Further, Chapter IV addresses the methodologies used in maritime delimitation and its strengths and shortcomings. Lastly, this Chapter highlights the development of case law since international courts and tribunals have developed a rich body of jurisprudence on maritime delimitation issues.

Chapter VI is the focal point of the evolution and the containment efforts of the bilateral territorial conflict between Croatia and Slovenia and its causal mechanisms. The process is divided into three phases, the first one dealing with the *bilateral* efforts to overcome the conflict. The establishment of the Joint Diplomatic Commission between the two countries in 1993 marked the beginning of a phase which saw a Draft Agreement on the common State border in 2001 stopping short of ratification, and a bilateral summit in 2007 declaring the will to submit the issue to a judicial body whilst no agreement could be reached subsequently over the exact terms. The second phase marked the escalation of the conflict during the accession negotiations of Croatia with the EU in 2008/2009 when a Slovenian veto on the grounds that Croatian accession documents prejudged the bilateral State border triggered the need to defuse the situation. The process of drafting the later Arbitration Agreement in a trilateral set-up (the EU Commission and the two States) followed by a predominantly bilateral finalising of the Agreement will be the focus of tracing there. The last phase deals with the workings of the arbitral tribunal entrusted with a final verdict on the matter. From a smooth start with the selection of judges by the two parties, to the Croatian withdrawal from the arbitration procedure following a leaked conversation of Slovenia with their party-appointed arbitrator, to the Tribunal’s Partial and Final Award lacking the recognition of Croatia, and the follow-up period up until the Slovenian submission of the lawsuit before the European Court of Justice, the conflict has re-protracted.

Chapter VII, the first of two concluding chapters, discusses the repercussions of the empirical findings on the theory strands outlined in Chapter II, such as the dynamics of a conflict in terms of stages of protraction or relaxation, the interplay of bilateral and third-party conflict management modes, positions and interests, or new aspects of EU conditionality including national identity and legitimacy considerations.

The final Chapter VIII offers policy recommendations that are four-fold. First, they pinpoint matters of urgency with regard to implementation issues of the Croatian-Slovenian border. Second, the recommendations address several pressing bilateral issues of immediate relevance to the prospective EU enlargement with a clear risk of blockade vis-à-vis the Candidates Countries from the former Yugoslavia. Third, recommendations include a strengthening of

dispute settlement, both in an EU context and with regard to reform of international arbitration. Fourth, alarming findings from both Serbia and Montenegro suggest that there is a clear need to align EU funding with the rule-of-law track record not only of Member States, but also of Candidate Countries.

## II. Analytical framework

This Chapter is going to discuss several theory approaches in order to develop the analytical framework (research questions) which is to inform the process tracing in this study.<sup>20</sup>

The approaches below relate to (i) conflict analysis and judicial dispute resolution, and (ii) EU enlargement. The relevant theory strands will be outlined and discussed first before synthesising them into the research questions at the end of this Chapter.

### II.1 Conflict analysis and resolution theory

An in-depth analysis of a conflict requires an adequate tool-kit derived from conflict analysis and resolution theory. In the following, several major strands of conflict analysis and resolution will be discussed. They can be grouped into (i) conflict origins based on *needs*, (ii) conflict based on *rational* or strategic considerations, (iii) the *dynamic* aspect of conflict<sup>21</sup>, and (iv) *judicial* conflict resolution. It is important to note that the above strands are not clear-cut ‘alternatives’ to one another. Neither should they be seen as mutually exclusive. Yet, they do highlight distinctive features of conflict analysis and resolution, which is why it is a worthwhile exercise to look at each of them individually before venturing to merge some of the aspects into an appropriate framework of micro research questions.

#### II.1.1 Basic human needs

This strand of analysis focuses on the “ontological needs” of human beings (Azar, 1990; Burton, 1990). In his work “The management of Protracted Social Conflict” dealing with conflicts in post-colonial societies, such as South Africa or Lebanon (his country of origin), Edward Azar first of all posits that “individuals strive to fulfil their developmental human needs through the formation of identity groups” (Azar, 1990: 7). In the group aspect of conflict, Azar follows early writers such as Coser (1954), an American sociologist who would highlight the role of establishing and maintaining group identities. Azar, on his part, goes on to differentiate between three types of ontological needs. For him, the most obvious ones are what he labels *security needs* which are about “physical survival and well-being” and include physical security, nutrition and housing. The second category is *access needs* comprising “participation in political, decision-making or market institutions”. Participation he considers a “developmental need, rather than merely an interest which can be negotiated or denied”. Third, *acceptance needs* entails the recognition of “collective identity in terms of cultural values [...], language, religion, and [ethnic] heritage”. (Azar, 1990: 7-8).

A crucial point on *protracted social conflict (PSC)* appears to be that results of such conflicts (e.g. military victories or negotiated agreements) that do *not* satisfy basic needs “contain latent conflicts which cause further [...] manifest conflict, often involving a shift or spill-over in issues and actors”. He diagnoses that the intensification of conflict in developing countries “proved to be devastating in terms of physical, psychological, political and economic costs” (Azar, 1990: 13).

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<sup>20</sup> For an account of the process-tracing method as a distinct feature of the research design see III.2.1.

<sup>21</sup> The typology (i)-(iii) is taken from Wallensteen (2015), albeit in an individual fashion as for the order of the strands, and the choice of scholars’ works representing them.

John Burton is an equally genuine proponent of the needs strand of conflict analysis. He has worked as a diplomat for his home country Australia, and subsequently went into academia. Burton holds that there are several human individuals' motivations that are "socially and politically significant". He distinguishes between *needs*, *values* and *interests*. *Needs*, for Burton, are "non-negotiable" and "universal in the human species" as "the individual is conditioned to pursue" the needs. When the needs are not met, the individual's behaviour will inevitably lead to what is "outside the norms of the society". *Values* are "ideas, habits, customs and beliefs that are a characteristic of particular social communities" leading to the formation of "identity groups through which the individual operates in the pursuit of [...] security and cultural identity". He contends that it is the very values which have divided Northern Ireland and other multi-ethnic societies. *Interests*, according to Burton, "are negotiable [sic]" and it is very well "possible to trade an individual interest for a social gain", for example through taxation. He goes on to emphasize that, in contrast, "needs and values are not [sic] for trading" holding that frustrated needs "give rise to behaviours that are inconsistent with the normal behaviour" (Burton, 1990: 36-38).

It is the denial of human needs, such as ethnic or cultural identity, that lies at the heart of ethnic conflicts "where boundaries have been drawn as a result of colonialism or conquest". Fundamentally, "majority rule and power sharing" is something the individual has been "coerced to accept" as an "ideological misinterpretation of the notion of democracy" which became "a source of protracted conflict in many multi-ethnic societies" (Burton, 1990: 39).

The distinction between the concepts of needs, values and interests he calls "an insight gained primarily from facilitated conflict resolution processes [which] seek to be analytical and to reveal the underlying sources of conflict rather than merely to negotiate from fixed positions of relative power" (Burton, 1990: 39). Notably, this view is in stark contrast to neo-realist perceptions of international relations which are power-based and where peace tends to be equalled with military power (e.g. Morgenthau, 1962; see also Kriesberg, 1992: 6). The human needs approach, however, reflects "a transition in thought and practice from elite interests in the institutions of government, in property and in control, to the human needs of peoples who comprise societies" (Burton, 1990: 40).

Burton coined the new term of conflict *provention* [sic] meaning "getting to the sources of conflict and taking measures to avoid conflict, including alterations in institutions and [...] policies, rather than just *preventing* conflict by deterrent threat or suppression" (Burton, 1996: 11). "The term 'provention' is invented because 'prevention' has a negative connotation" (Burton, 1990: 3).

In his concept of "*Problem-solving Conflict Resolution*" 'traditional' forms of treating conflict are abandoned. This can be seen as a new paradigm in how behaviour and conflict are being looked into (Ramsbotham et al, 2015: 51-52; emphasis added).

Here is John Burton defining his alternative philosophy:

"Its practise is analytical, and designed to assist parties to conflicts *to understand and accurately to cost the consequences of their behaviours*. [...] It does not include deterrence strategies [...] or repression and containment of conflict. It is not concerned with the management of conflicts by arbitration [sic], or with mediation [sic] processes based on compromises. It is not concerned with peace-oriented reactions to deterrence strategies and the advocacy, for example, of peace through arms reductions. It is not concerned with just arriving at a consensus among disputants, for if there were an ill-informed consensus there would be no guarantee of a solution to a problem. Each of these [above]

approaches may have its own applications and justifications, but problem-solving conflict resolution is fundamentally different from them.” (Burton, 1990: 3; emphasis added)

Despite his above refusal to accept traditional forms of third-party involvement in conflict resolution, Burton (1990: 6) does acknowledge the need for a third party as such. However, problem-solving in Burton’s terms is “far more complex than a coercive process. The role of what he terms “facilitator” requires “a most knowledgeable and skilled third party”.

Third-party role in conflict resolution

Substantiating his problem-solving approach, Burton distinguishes conflict *management* from conflict *resolution*, the first being the ‘traditional’ way of invoking containment by means of third-party coercive power, the latter ‘truly’ overcoming the conflict by analysing its causes through the needs-based angle.

He sets out a three-component model consisting of

- *participation* by the parties,
- *communication* between the parties, and
- *third-party involvement* in terms of decision-making power (Burton, 1990: 188-9).

Burton then presents current ‘traditional’ forms of third-party involvement measuring the degree of the above components participation, communication and third-party power.

For a *direct conflict* he posits

Participation:           -----  
 Communication:       -----  
 Third Party:            -

Full participation being obvious, communication translates into high verbal or physical interaction, and third-party involvement can be assumed at zero.

A *court settlement* he portrays as

Participation:         -----  
 Communication:       -  
 Third Party:           -----

The actual participation of the parties to the conflict being at a low level, there is virtually no communication between the parties and the full authoritative power lies with the court with the arguments being based on legal norms and principles rather than an analysis of the values and needs of the parties.

*Arbitration* represents the following component degrees:

Participation:         -----  
 Communication:       -  
 Third Party:           -----

The measured degrees as for communication and third-party power stay the same, but the participation degree is somewhat higher as the parties have a say in nominating the members of the arbitration tribunal.

*Mediation* as the next “weaker” form of third-party power looks like:

- Participation: -----
- Communication: ----
- Third Party: -----

Here, there is more participation and communication by the parties as the agreed third party would consult ahead of its decision or proposal.

*Conciliation* is a “less formal process” with the third-party mediator offering little more than “good offices” to allow for the parties to communicate directly with one another.

- Participation: -----
- Communication: -----
- Third Party: -----

For *direct negotiations*, Burton assumes the same component degrees as for direct conflict. The process and the outcome reflects the relative power of the parties “and is likely to be short-lived [...] as the power relationship remains static”:

- Participation: -----
- Communication: -----
- Third Party: -

In conclusion, Burton (1990: 188-192) assesses the various traditional models as just making power-based bargaining more sophisticated, but in essence sustaining a conflict-management mode that serves the powerful parties.

Whilst he sees a trend towards “weaker” forms of conflict management, because “authoritative” third-parties obviously were not in a position to appropriately reflect on non-negotiable values, there still was a pressing need for “high-quality” participation and communication. In Burton’s view, this can only be achieved by a third party whose role “is quite different” to traditional third-party power (Burton, 1990: 195).

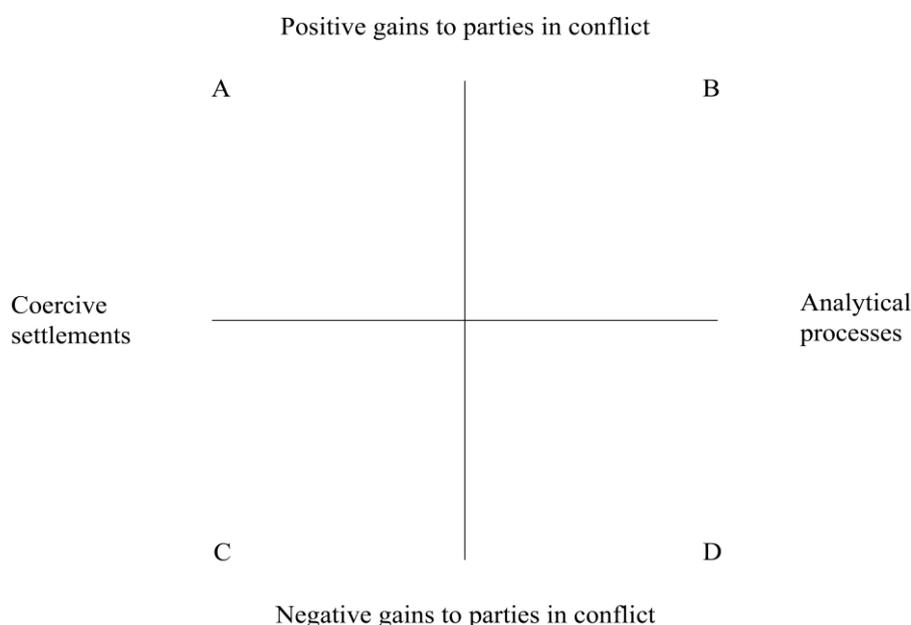
The *alternative* third-party’s role, according to Burton, “must become one confined to promoting communication between the protagonists, and helping them in their analysis of their relationships, and the discovery of options”. This translates into the following prototype component model:

- Participation: -----
- Communication: -----
- Facilitating Third Party: -----

It is essential for Burton that “we move from settlement toward analytical problem-solving conflict resolution, requiring outcomes that are positive for all” (Burton, 1990; 196). The differences between coercive and problem-solving approaches are demonstrated in fig. 2 below.

Segment A contains imposed settlements supposed to be favourable to the parties to the conflict, for example the Dayton Peace Accord for Bosnia-Herzegovina in 1995.<sup>22</sup> Segment D represents a win-lose scenario where the rules are accepted. Burton provides the change of government after elections as an example. Segment C stands for ‘classical’ authoritative-power settlements, and area B is the prototype result of the problem-solving approach (Burton, 1990; 196-7).

Figure 2: Coercive and problem-solving approaches (modelled after Burton, 1990: 197)



In his later practical guide he develops strong views on the qualification requirements of the intervening party:

“Interventions into conflictual relationships by persons who do not have the necessary knowledge and skills, must be regarded as dysfunctional behaviour, as unethical as pursuing a medical or any other professional calling without the necessary qualifications” (Burton, 1996: 45). He spells out a detailed set of 56 rules on what the facilitator and the parties to the conflict must and must not do. The most prominent of these are:

- The facilitator must not make any decisions on the parties’ needs and values;
- It is the facilitator who must approach the parties for “exploratory discussions” and not vice versa;

<sup>22</sup> This author concedes that it is indeed questionable whether the Dayton Accord has in reality been favourable to the statehood of Bosnia-Herzegovina as such. For a critical view on the dilemma between unworkable institutions created by Dayton and the agreement’s establishing of sustainable peace, see Chivvis (2010).

- Parties to the conflict must not enter into bargaining and it is the facilitator who must ensure that the dialogue is purely analytical (as human needs are not subject to compromise);
- No separate consultations with only one party; communication must always be simultaneous;
- Third-party panellists must be fluent in conflict theories, have a strong sense of teamwork, but must not be experts in the subject or the region the conflict is about;
- The degree of publicity, if any, is to be determined by approval of the parties;
- Face-to-face seating must be avoided when the conflict is about very tense issues, such as atrocities. Triangle-seating is a good option;
- Nothing of substance must be discussed outside the conference room;
- No fixed agendas as for issues due to the evolutionary nature of the exploration of perceptions and attainment of needs;
- Values and goals must be at the centre of the parties' statements;
- No proposals for solutions as long as the analysis stage is still ongoing (Burton, 1996: 51-82).

In summary, human needs theory can be seen as an approach beyond traditional forms of power politics. The main difference to classical conflict management by a third party appears to be that conciliatory or “facilitating” initiatives “replace coercive threats” (Kriesberg, 1992: 6), and that conflicts are sought to be cured at the roots and thus finally overcome rather than merely contained.

Recent critics of the human needs theory point to the fact that wanting to do away with the power-struggle aspect of conflict by rational problem-solving is somewhat out of touch with the real world where power imbalances do exist, particularly in the form of asymmetric intra-State conflicts in countries such as Chechnya, Mali, Sudan, or Syria (Avruch, 2013). Further, the ethics of problem-solving is put into question with regard to the facilitators taking the initiative. There seems to be a lack of solid justification and sophistication for intervening in what tend to be highly complex conflicts (Väyrynen, 2013; Kriesberg, 2013).

## **II.1.2 Rational calculations**

This strand of analysis centers around the idea of conflict escalation, its management and resolution being based on *rational* calculations. Both the parties to the conflict and the mediating third party are assumed to have their individual rationality, judgments, decisions and strategies. “Collaborative negotiation” (Fisher, Ury and Patton, 2012: xii) and the right timing for conflict management initiatives (Zartman and de Soto, 2010) are the main pillars of this approach.

### **II.1.2.1 Principled negotiation**

In their best-selling book “Getting to Yes” Roger Fisher, William Ury and Bruce Patton spell out the method of “*principled negotiation*” developed at the Harvard Negotiation Project. Here they are with a straightforward definition of their method:

“It is to decide issues on their merits rather than through a haggling process focused on what each side says it will and won’t do. It suggests that you look for mutual gains whenever possible, and that where

your interests conflict, you should insist that the result be based on some fair standards independent of the will of either side. The method of principled negotiation is hard on the merits, soft on the people. It employs no tricks and no posturing. Principled negotiation shows you how to obtain what you are entitled to and still be decent. It enables you to be fair while protecting you against those who take advantage of your fairness.” (Fisher, Ury and Patton, 2012: xxvi)<sup>23</sup>

Fisher, Ury and Patton start out by identifying “*positional bargaining*” as the major problem associated with ‘traditional’ negotiating. They contend that arguing over positions “produces unwise outcomes” the main difficulty being that “the more you clarify your position and defend it against attack, the more committed you become to it.” The more one tries to convince the other side that it is impossible to change their position, the more difficult it becomes to do exactly that. “Your ego becomes identified with your position. You now have an interest in ‘saving face’ [...] making it less and less likely that any agreement will wisely reconcile the parties’ original interests” (Fisher et al, 2012: xxvi; emphasis added).

They cite an enlightening example from 1961 from the breakdown of the talks about a ban on nuclear testing. One of the questions was how many on-site inspections per year should the U.S. and the USSR be allowed to carry out on the other party’s territory. Whilst the Soviet Union favoured three, the United States insisted on no less than ten. The talks actually broke down over this disagreement whilst the nature of the ‘inspection’ had never been discussed, so that it was not at all clear whether there would be “one person looking around for one day, or hundred people [...] for a month”. In fact, little attempt had been made to reconcile verification with the mutual aim of minimal intrusion (Fisher et al, 2012: 5).

Besides, positional bargaining, according to Fisher, Ury and Patton (2012: 6-7), is time-consuming and mostly inefficient. Starting out at maximum positions, it takes an awful lot of single steps to make concessions in order to keep the negotiating process open. At extreme opening positions and small steps of concessions (including mutual efforts to deceive the other party as to one’s own real intentions), it will be very difficult to assess whether an agreement is feasible at all. “Dragging one’s feet, threatening to walk out, stone-walling, and other such tactics become commonplace. They all increase the time and costs of reaching agreement as well as the risk that no agreement will be reached at all.”

Further, positional bargaining renders the whole process ever more confrontational. “Each side tries through sheer will-power to force the other to change its position [...]. Anger and resentment often result as one side sees itself bending to the rigid will of the other while its own legitimate concerns go unaddressed. Positional bargaining thus strains and sometimes shatters the relationship between the parties [...]. Neighbours may stop speaking to each other. Bitter feelings generated by one such encounter may last a life-time” (Fisher et al, 2012: 7). To avoid the high costs of ‘hard’ positional bargaining at the expense (quite literally) of the parties’ relationship, ‘soft’ negotiating may be used instead where a policy of offers and concessions sets the tone to highlight the need for agreement and to avoid confrontation. Such ‘soft’ positional bargaining, however, albeit rendering agreement more likely, may not be a wise one either. For two reasons: Amongst friends, the soft approach usually is about who is most generous, a strategy which does not necessarily focus on the points of substance, but on the agreement for the sake of an agreement. Second, if a soft bargainer is hit by a hard bargainer, there will also be an agreement, but it will certainly be in favour of the hard

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<sup>23</sup> This is the third edition of the book. The first edition was published in 1981 by Fisher and Ury. Patton joined as full co-author for the second edition in 1991.

bargainer. In other words: “If your response to sustained, hard positional bargaining is soft positional bargaining, you will probably lose your shirt.” (Fisher et al, 2012: 9-10)

Assuming that the game of negotiations always takes place at two levels, the substantive issue and the procedural rules of the negotiations<sup>24</sup>, Fisher, Ury and Patton (2012) suggest an alternative method which is beyond the notion of hard or soft bargaining.

The major aim of this new method is “to produce wise outcomes efficiently and amicably”.

*Principled negotiating* comprises four basic elements of negotiation:

- *People:* Separate people from the problem.
- *Interests:* Focus on interests, not positions.
- *Options:* Invent multiple options looking for mutual gains.
- *Criteria:* Insist that the result be based on objective standards.

#### II.1.2.1.1 People

The people on the negotiating table are supposed to “come to see themselves as working side by side, attacking the problem, not each other” (Fisher et al, 2012: 12). It is too easily forgotten that people - at the negotiating table and in real life - are first of all human beings with emotions, values, perceptions, backgrounds, viewpoints and egos.

Starting out from the assumption that negotiations actually take place against the background of an ongoing relationship (i.e. between family members, business partners, dealer and customer, or, between nation States), Fisher, Ury and Patton posit that in many cases the quality of the actual relationship is considered more important than the outcome of a particular negotiation by the negotiating parties. Whilst positional bargaining does automatically create conflict between the relationship and the points of substance, principled negotiation addresses the ‘people problem’ through looking at the three categories perception, emotion, and communication.

*Perception* is seen as the vital key to the other side’s thinking. The substantive differences between two negotiating parties are considered as the differences in their actual thinking. “Fears, even ill-founded, are real fears and need to be dealt with. Hopes, even if unrealistic, may cause a war. Facts, even if established, may do nothing to solve the problem [...]. Put[ting] yourself in their shoes [...] is one of the most important skills a negotiator can possess.” The major move in this context is that you can gain a new vision of the merits of a situation and that an understanding of the other party’s view is not a cost, but a benefit allowing to “reduce the area of conflict” (Fisher et al, 2012: 24-26). Further, no assumptions should be made as for the other side’s intentions. ‘Expecting the worst’ in a suspicious way will be counter-productive as it blocks fresh ideas being put into the negotiation process. In addition, blaming the other side for one’s own problems must be avoided as blame will cause counter-attack and disrupt any listening. An excellent way to change someone’s perceptions can be a surprise action by the other side, for example the unexpected visit of Egypt’s President Sadat to Jerusalem in November 1977. Flying to Israel’s then disputed capital which was not even recognized by the U.S. Sadat did not act like an enemy (as Israel could have expected), but like a partner. He was able to demonstrate that he was up for peace paving the

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<sup>24</sup> The second level, the one of procedural rules, tends to be taken for granted too easily. Only when we negotiate with a person from a different geographical or cultural background do we become aware of the need to establish some accepted process for the substantive negotiations (Fisher et al, 2012: 11).

way for the later Egyptian-Israeli peace treaty in 1979 (Fisher et al, 2012: 27-29). Last as for perception, ‘face-saving’ is a crucial ingredient to the acceptance of an agreement. Any notion of backing down to the other side’s proposals must be avoided. In fact, face-saving “reflects people’s needs to reconcile the stand taken in a negotiation or an agreement with their existing principles and [...] past words and deeds”. (Fisher et al, 2012: 30)

*Emotions* play an equally crucial role as quite often “feelings may be more important than talk”. Elements such as fear or threat may be expected, in particular when the issue at stake is a long-lasting protracted conflict. Fisher, Ury and Patton suggest that the emotions of both oneself and the other party need to be recognized and understood. As a core rule, nobody can be assumed to enter negotiations without any emotion, no matter whether they relate to the substantive points, oneself or the other side. In a tense environment, where both parties feel a constant threat to their existence, such as Israel and Palestine, even hard-and-fast practical issues, such as the distribution of water in the West Bank, can be extremely loaded by emotions and be seen as a “survival issue”.

There is a “core-set of five interests” that drive many emotions in a negotiation: autonomy (the ability to make your own choices), appreciation (to be valued as such), affiliation (a sense of belonging to a peer group as an accepted member), role (to have a meaningful task), and status (to be fairly recognized and acknowledged; Fisher et al, 2012: 31-2). Further, it is vital to consider the factor of identity. People usually get emotionally upset when confronted with their own “inevitable failings and inconsistencies” (Fisher et al, 2012: 33) which are perceived as threats to one’s own self-perception or identity. If your counterpart behaves oddly, it is worth thinking about the possibility of having questioned their identity. Making emotions explicit can help make negotiations more pro-active. “Freed from the burden of unexpressed emotions, people will become more likely to work on the problem.” Finally, symbolic gestures, i.e. a statement of regret, an apology, eating together, or, in a political-historical context, a visit to a cemetery, can be a most rewarding investment “to improve a hostile emotional situation” (Fisher et al, 2012: 34-5).

*Communication* obviously is an ingredient without which there is no negotiation at all. Fisher, Ury and Patton identify three major communication problem areas: A lack of direct communication between the parties, not enough attention to what the other side says, and, misunderstanding. One efficient remedy simply is “speak to be understood”. The main party to persuade is the one sitting at the table with you, not some third party or the constituents. To reduce the distracting effects of the media or the constituents, it is a good idea to “establish private and confidential means of communicating with the other side”. Shrinking the size of the delegations also potentially pays off. In the negotiations over the future status of Trieste in 1954, nothing much had progressed in the talks between Yugoslavia, Britain and the U.S. until the three negotiators had left their large delegations and retreated into a private location.<sup>25</sup> “No matter how many people are involved in a negotiation, important decisions are typically made when no more than two people are in the room”<sup>26</sup> (Fisher et al, 2012: 38).

Active listening is another major requirement, a task which is not always easy in an ongoing negotiation where one has to think about one’s next argument while the other side still speaks. Notwithstanding that difficulty, active listening “not only improves what you hear but also what they say” [sic]. This can entail asking the other side at some point to narrow things down or to repeat ideas to avoid ambiguity or misinterpretation. Rephrasing the other side’s

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<sup>25</sup> For the Free Territory of Trieste (FTT) and its subsequent partition between Yugoslavia and Italy see IV.4.

<sup>26</sup> The smallest-delegation-as-possible approach was used in an exemplary way in 2001 whilst negotiating the so-called Drovšek-Račan (draft) agreement between Slovenia and Croatia on the common State border. The two prime ministers were negotiating face-to face whilst the delegations were in separate rooms; see VI.1.4.

argument on the part of the listener is also a worthwhile tool. Acknowledging what the other side says demonstrates understanding whilst at the same time everyone is perfectly aware that this does not necessarily equal accepting the counterpart's view (Fisher et al, 2012: 36-7).

From a preparatory point of view, Fisher, Ury and Patton advise to build a working relationship *ahead* of the actual negotiations. It is much more difficult to "attribute diabolical intentions" to someone you know than to a complete stranger (Fisher et al, 2012: 39). And, it is easier to defuse a tense negotiating situation when there is already a substantial level of mutual trust. Finally, side-by-side seating in the actual negotiations rather than face-to-face helps avoid an unnecessary confrontational set-up (Fisher et al, 2012: 40-41).

#### II.1.2.1.2 Interests

There is a classic example of two people quarrelling in a library about how much to leave the window open. They are unable to agree. The librarian steps in asking why one of them would like the window open. "To get some fresh air", he replies. Asked why the other person would want the window closed, she answers: "To avoid the draft." The librarian then opened a window in the next room to bring in fresh air without a draft. Had the librarian focused on the expressed positions "open" and "closed", no solution would have been possible. Instead, she looked at the underlying interests of fresh air and no draft. This example highlights the crucial difference between positions and interests.

A similar, but slightly more complex example from politics is the Camp David summit of September 1978 leading to the peace treaty between Israel and Egypt in spring 1979.<sup>27</sup> Following the Six Day War 1967 Israel had occupied the Sinai peninsula. At the beginning of the Camp David summit, the maximum positions of Israel and Egypt were incompatible. Israel wanted to keep much of Sinai whereas Egypt insisted on a full return to Egypt. Looking at the interests behind the positions paved the way to an agreement. Israel's interest was security. It would under no circumstances see Egyptian tanks on Sinai within a few miles of the Israeli border. Egypt, in turn, wanted sovereignty over Sinai, a territory which had belonged to the country since the Pharaoh times. However, only lately after the end of the British Empire had Egypt regained full control over Sinai, and was therefore not ready to cede it to yet another conqueror. The solution at Camp David was such that Sinai came back under Egyptian sovereignty, but was demilitarized, so that Egyptian tanks were nowhere near Israel (Fisher et al, 2012: 42-44).

It follows that it is of utmost important to *identify* the interests. Fisher, Ury and Patton (2012) posit that each side has multiple interests and that some of them may be identical whilst others will quite obviously be different. Both the independent and the shared interests will have to be pursued in negotiations. The "most powerful" interests are "basic human needs" [sic] (see also II.1.1) which include "security, economic well-being, a sense of belonging, recognition, [and] control over one's life" (Fisher et al, 2012: 49). In the negotiations ahead of the Good Friday Agreement in Northern Ireland in 1998, for example, the Protestants had tended to ignore the Catholics' need for belonging and recognition whilst the Catholics had long ignored the Protestants' need for security. (Fisher et al, 2012: 50-51). The mutual interests need to be spelt out, and, for the sake of making them convincing, the legitimacy of those interests must be established. Likewise, the interests must be acknowledged to be an integral part of the overall dispute. And it is the interests (not positions) one should spend the most energy on in negotiations. "Two negotiators, each pushing hard for their interests, will often

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<sup>27</sup> For a seminal account of the Camp David negotiations see Quandt (2016).

stimulate each other's creativity in thinking up mutually advantageous solutions [...] Successful negotiation requires being both firm *and* open." (Fisher et al, 2012: 52-57)

#### II.1.2.1.3 Options

Inventing options requires overcoming traditional obstacles, such as "premature judgment", "searching for a single answer", "the assumption of a fixed pie", and, "the thinking that 'solving their problem is their problem'" (Fisher et al, 2012: 62).

First, the creative act of inventing options must be separated from selecting them. To do this, brainstorming comes in including a facilitator to structure it. Second, options must be broadened. This is best done through, for example, inventing agreements of different levels. There are means to achieve 'weaker' versions of an agreement instead of no agreement at all. If an agreement in substance proves impossible, then one on procedure could be at hand. If, for instance, a shoe factory cannot agree with a retailer on who pays for the shipment of a damaged pair of shoes, the issue can be transferred to an arbitrator. Alternatively, a provisional agreement can be concluded instead of a permanent one. Further, the scope of a proposed agreement can be adjusted to what appears feasible. This can go either way, limiting the scope or extending it. Review clauses or selected subject matters can make the former happen. The latter can be achieved in forging package deals, possibly involving an external sponsor, as was the case with a dispute between India and Pakistan over the Indus River. The World Bank got involved proposing grand joint watering projects and river dams meeting the interests of both parties including some World Bank funding (Fisher et al, 2012: 63-72).

Third, the search for mutual gains can overcome the "fixed pie" syndrome where the only measure is 'less or more' (Fisher et al, 2012: 73). The following example helps illustrate the issue. The mayor of a town wants to raise the taxes for the local oil refinery from two to four million dollars. The company thinks two million is enough. The shared interest here is not apparent at first glance. Taking a closer look, what the major wants is more money for city services or a tax break for employees whilst it is clear that not all the money can come from tax revenues from just this one company. In turn, the company which would have to re-invest to keep up with state-of-the-art refining anyway would like to see favourable conditions for business expansion. As a result, a mutual-gains approach could equal a reduction in taxes for existing industries that chose to expand, plus a publicity campaign to attract new companies. Even differences in interest can be turned into agreement. The different level of risk-aversion between mining companies and the international community when it comes to deep-seabed mining, for example, can be reconciled. Assuming that the mining companies have concerns about potential losses and that the international community is interested in revenues, the bargain to the benefit of both sides may be the following if risk is traded for revenue: The companies are charged low rates until they have reached a break-even in relation to their investment, i.e. as long as their risk is high. After break-even, the rates would be much higher, when their risk is low (Fisher et al, 2012: 74-77).

Fourth, the decisions of the other side should be made easy. This argument relates to the fact, that too often a negotiator only looks at advancing their own interest without bearing in mind that an agreement must also appeal to the other side. Fisher, Ury and Patton (2012: 73-77) provide a few general guidelines. Coming back to the earlier notion of "putting yourself in their shoes" (from the first criterion labelled "people" above), a negotiator has to look for terms to be attractive to the other side. This includes aspects such as reducing the number of

people whose consent is required, easy implementation, or reference to previous decisions or statements of the other side.

#### II.1.2.1.4 Criteria

Following the principal argument made earlier about the shortcomings of positional bargaining (each side trying to force the other side through sheer will-power to change its position being a costly and tiring exercise) differences of interest should be settled through *objective criteria*. Fisher, Ury and Patton argue that standards of fairness, efficiency or scientific merit are able to provide for a solid basis for agreement. In a fixed-price contract, for example, objective factors such as market value or replacement costs should be incorporated. “It is far easier to deal with people when both of you are discussing objective standards for settling a problem instead of trying to force each other to back down” (Fisher et al, 2012: 82). Usually, negotiators spend time more efficiently discussing standards and solutions. Another example from the Law of the Sea negotiations illustrates this point: India, representing the developing countries, proposed an initial fee of 60 million Dollar per site for deep-seabed mining. The U.S. insisted on no initial fee. The result was a contest of will-power producing no agreement. Only drawing on a model from the Massachusetts Institute of Technology (MIT) did make an agreement possible stipulating that some initial fee was economically feasible and how it was to be calculated (Fisher et al, 2012: 82-85).

Clearly, standards in negotiations need not only be independent from the will of the negotiators, but also legitimate and implementable. Testing against reciprocal application is a crucial component. If, for instance, a real estate company sells you a house using a standard form, it would be worth finding out whether *they* use the same form when buying property. Now, how can objective criteria be used in the actual negotiations? Fisher, Ury and Patton propose to “frame each issue as a joint search for objective criteria” (Fisher et al, 2012: 87). Buying a house, for example, the seller can be asked to elaborate on his theory as to what is a fair price. If it was to be based on the price of the house next door, the buyer may suggest to include in the calculation two other nearby houses in the neighbourhood, for example. This is to say that arguments using the same criteria employed by the other side are strong and valuable to reach agreement. Still, it is vital to keep an open mind as to what the joint standards are. There may be two standards (such as market value and depreciated cost) producing different results. Both parties, still, may agree that those standards are equally justifiable<sup>28</sup> (Fisher et al, 2012: 87-90). Finally, there must be no backing down to pressure. If the other side is applying forms of pressure, such as bribe, threat, or a refusal to move, “invite them to state their reasoning, suggest objective criteria you think apply, and refuse to budge except on this basis.” (Fisher et al, 2012: 92)

Critics of *principled negotiation* argue that it apparently does not work in *intractable* conflicts the fiercest category of which is termed “radical disagreement” (Ramsbotham, 2017: 27-8). Exploring each other’s interests rather than carrying on with positional bargaining - the core idea of principled negotiation - is very difficult to implement when tensions have

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<sup>28</sup> Another example where two standards were adopted rather than one is the 1998 initial phase of the European Central Bank’s monetary policy strategy in order to meet the ECB’s primary aim of securing price stability. As the newly composed Board of the ECB was apparently not in a position to adopt one sole criterion of money supply (as the Deutsche Bundesbank had done), a second criterion, inflation as such (used by most of the future Eurozone’s other national central banks up until then), was adopted. This resulted in the so-called two-pillar approach. For a detailed account on the reasoning within the ECB Board see Issing (2008: 9-23).

hardened over decades, such as in the Israel-Palestine conflict over Gaza, Ramsbotham's most recent case study. To soften radical disagreements between parties, he suggests to analyse and resolve the differences between the moderates and extremists *within* the conflicting parties respectively to get a clearer understanding of the positions, tactics and goals – what he calls *strategic negotiation* (Ramsbotham, 2017: 146-164). It is the within-party approach that appears to take Fisher, Ury and Patton's "idea about important interests that underlie surface bargaining positions" (Mitchell, 2014: 258) a step further.

### II.1.2.2 Timing of conflict management initiatives

Whilst Fisher, Ury and Patton focus on the role of the negotiators themselves as parties to the negotiations, little is said about the actual role of a facilitating or mediating third-party. This is where Ira William Zartman and Alvara de Soto from The Conflict Management Program at the John Hopkins University School of Advanced International Studies in Washington, D.C., come in with their peacemaker's tool-kit "Timing Mediation Initiatives". They introduce the argument of the *timing* for starting conflict management efforts by a *third-party mediator*. Here is their philosophy:

"If it is to succeed, a mediation initiative cannot be launched at just any time; the conflict must be ripe for the initiation of negotiation. Parties resolve their conflict only when they have to do so - when each party's efforts to achieve a unilaterally satisfactory result are blocked and the parties feel trapped in an uncomfortable and costly predicament." (Zartman and de Soto, 2010: 5)

Ripeness can be traced and has two main elements. First, the conflicting parties must *perceive* a stalemate. Whilst perception generally is based on subjective factors (see also II.1.2.1.1), it should still be related to objective conditions that are supposed to be brought to the attention of the conflicting parties by a mediator. Second and equally perceptual, the conflicting parties must have a sense of a solution through negotiations. Ripeness can be detected by research and intelligence action in order to filter indicators of ripeness, such as pain, the inability to bear the political or social costs of further escalation, casualties, material costs, and, expressions of a sense of a way out (Zartman and de Soto, 2010: 6-7).

The "mediator's toolkit" comprises five steps:

- 1: Assess the Existence and Perception of a Stalemate
- 2: Assess the Existence and Perception of a Way Out
- 3: Induce Recognition of the Stalemate and a Way Out
- 4: Ripen the Stalemate and a Way Out
- 5: Position Oneself as a Future Mediator

*Assessing the stalemate:* The crucial factor is whether parties have tried to escalate the conflict, but have failed thus producing a "hurting stalemate". South Africa in 1990, for instance, is a case in point where the newly elected National Party chairperson de Klerk realized he was no longer able to protect the white minority and 'control' the black majority. Besides, the legitimacy of his regime and its acceptance by the international community had been in decline. In the same vein, in the final stages of the second Iran-Iraq war in 1998, Iraq had repeatedly invaded Iran and then withdrew, calling on the neighbouring country to end to negotiate and to end warfare which actually happened. Beyond such objective factors, also

subjective factors need to be taken into account, such as reading between the lines of official statements or tracking changes in tone (Zartman and de Soto, 2010: 11-12).

*Assessing the way out:* Objective and subjective factors are closer to one another and require “a tuned ear and a sharp eye” on the part of the (prospective) mediator and her or his team (Zartman and de Soto, 2010: 24-26). Government statements or actions that indicate directly or indirectly a readiness to talks are to be detected. In early 2006, Hamas, after winning the Palestinian Legislative Council (PLC) elections, declared its intention towards a unilateral ceasefire vis-à-vis Israel, and also offered to include Fateh in a PLC unity government. In the same vein, in February 2009, the Algerian prime minister spelt out a few conditions to Morocco for the opening of the joint border *not* mentioning, for the first time, the Western Sahara conflict (Zartman and de Soto, 2010: 24-26).

*Inducing recognition of the stalemate and the way out:* The task of the mediator is to persuade the parties that a hurting stalemate and the possibility of a way out - the subjective perception of both facts by the parties being absent - do exist. The idea is to divert the parties from thinking about the conflict to future opportunities and positive scenarios, leaving the hurting stalemate behind. Zartman and de Soto recall the later president of the constitutional court of Benin, Robert Doussou, persuading the country’s dictator, Matthieu Kerekou, to conclude an agreement with NGOs who had been calling for constitutional reform. Kerekou is reported to have been impressed by TV reporting on the fate of the former Romanian dictator Ceausescu when he would not give in to similar popular pressure. Persuading the parties of the attainable goal of a way out worth working towards the mediator has to devise forward-looking solutions using every creativity he or she has to promote attaining the post-conflict stage. In Ivory Coast in 2003, all conflicting parties were brought together to discuss questions such as “Where is our country now? Where do we want it to be five or ten years from now? What prevents us from attaining these goals? How can we overcome these obstacles?” Discussions then kept going beyond these questions (Zartman and de Soto, 2010: 29-33).

*Ripening the stalemate and a way out:* At this stage the mediator has to play a more intrusive role as they must change the conditions and create a situation where neither side feels too weak to enter into negotiations with the other conflicting side. This requires a powerful mediator and Zartman and de Soto suggest that this is “not for smaller States and NGOs” (2010: 35). Suitable tools include threats and warnings, such as hinting at positive prospects if mediation is accepted, and negative outlooks if it is turned down. France, for example summoned the conflicting parties of Ivory Coast to Paris in 2003, and they turned up as they feared relations with France would otherwise deteriorate. Former U.S. President Carter would always announce at the beginning of his mediation that he expects honest efforts by the parties and that if they did not act sincerely he would terminate the process and name and shame the responsible party which he did in 1988 in the Ethiopian civil war over Eritrea.

Further, economic measures, positive and negative, can be powerful means to an end in that respect. The participation of Slobodan Milošević in the Dayton negotiations and the agreement over Bosnia-Herzegovina in 1995, for instance, was, according to Zartman and de Soto, only possible through the use of sanctions and even military measures.

To raise the appetite for negotiations, the conflict must be reframed, for example in turning its management into a process, starting off with a truce followed by a roadmap to talks. UN resolution 435 served as a roadmap for the independence of Namibia which brought the parties to negotiations and an agreement in 1987. A constant floating of ideas and suggestions on the part of the mediator helps, not least to assure the parties to the conflict that the negotiations are carried out in manageable proportions (Zartman and de Soto, 2010: 36-42).

*Positioning oneself as a future mediator:* This is a fallback-option in case negotiations do not kick off shortly. The mediator should remind the conflicting parties on a regular basis that he or she is at their disposal, that the stalemate is already there and that it has become impossible to win the conflict anyway. The mediator should use formal and informal occasions, channels and diplomatic contacts to carry on ventilating fresh ideas and new thinking about overcoming the conflict. In meeting the Secretary General of the Organization of American States, UN Secretary General Pérez de Cuéllar positioned himself as a prospective mediator of the El Salvador conflict as early as two-and a half years before he was actually given the green light by the UN Security Council in 1989 (Zartman and de Soto, 2010: 43-4).

Critics of the *ripe-moment* approach contend that even when there is an apparent hurting stalemate, successive negotiations may not prove successful, as in the case of Cyprus. Further, it is virtually impossible to define how long a stalemate has to last or how much it is supposed to hurt. In addition, a stalemate tends to hurt the population a lot more than the political leaders. Finally, the distinction between ‘ripe’ and ‘not yet ripe’ may be too coarse to fully reflect the (mostly) gradually changing circumstances, or, attitudes or behaviours in transformation (Ramsbotham et al, 2015: 210). Besides, in some cases, the ripe moment for the beginning of negotiations has ‘un-ripened’ by the time and after the agreement was concluded which led to a huge number of casualties - more than 300.000 in Angola 1992 and over one million in Rwanda in 1994 (Stedman, 1997: 5).<sup>29</sup>

### II.1.3 Dynamics of conflict

The basic assumption of this approach is that conflict is a *dynamic* process where parties to the conflict act and react to one another, and that it is indeed possible (and desirable) to influence the dynamics of a conflict and to overcome it, either the parties to it themselves, or by means of a third party.

#### II.1.3.1 Johan Galtung’s Conflict Triangle

Johan Galtung is one of the founding fathers of peace research. He founded the International Peace Research Institute (PRIO) in Oslo in 1959, has lectured at many universities around the world, and is still active in TRANSCEND, a peace and development network which he founded in 1993.<sup>30</sup> Here is Johan Galtung’s notion of conflict as a dynamic phenomenon:

“Human history is the history of contradictions that crystallize into conflicts, are acted out, resolved in various ways thereby transforming social reality; in this new reality new contradictions start building up, crystallize into conflicts that in turn are acted out, and so on and so forth. The process goes from infinity to infinity, it has no beginning and no end [...] But the condition for this to happen is that actors act [...]” (Galtung, 1978: 7)

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<sup>29</sup> The forces undermining a peace process on the domestic level are referred to as *spoilers* and are usually amongst those groups to whom peace is not perceived as beneficial. Stedman (1997) demonstrates that in the case of poor diagnosis and inadequate strategy on the part of the mediator(s), spoilers can succeed (as they indeed did in Angola, Rwanda, and in the State of Cambodia), but can also be contained (Mozambique and Cambodia Khmer Rouge) if the diagnosis of the situation and its implementation are correct. Wallensteen (2015: 51) argues that spoilers must in the long run be integrated into peace-building settlements.

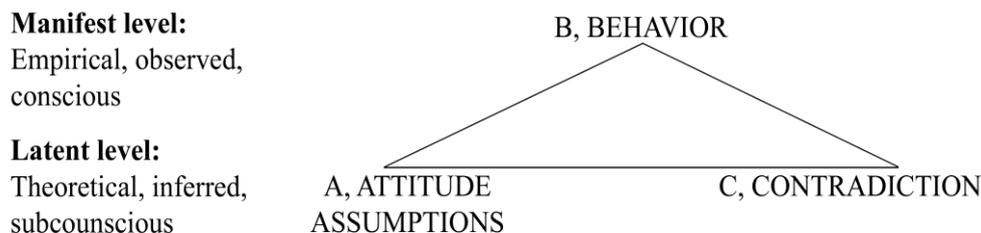
<sup>30</sup> TRANSCEND is a Peace Development Environment Network; see <https://www.transcend.org>.

A conflict, according to Galtung, has its own life-cycle. It can escalate, reach a violent climax in a verbal or physical meaning, disappear and reappear. Assuming that individuals and groups, such as nations or States, have goals, the following logic applies:

- Goals may be incompatible, “like two States wanting the same land, or two nations wanting the same State”;
- Incompatible goals create a *contradiction*;
- If an actor’s goals cannot be attained, they feel frustrated. The more basic the needs or interests underlying the goal, the higher the level of frustration;
- Frustration can lead to aggression, meaning an inward *attitude* of anger or hatred, or an outward *behaviour* “of verbal or physical violence” (Galtung, 2000: 13);
- Positively, however, non-attainment of a goal can also lead to dialogue and cooperation (Galtung, 1996, 71);
- Violence (also verbal) is intended at the other party and can cause an escalation of counter-violence (Galtung, 2000: 13).<sup>31</sup>

Galtung’s notion of conflict is best illustrated through the so-called conflict triangle. Conflict may thus be seen as a triangle with Contradiction (C), Attitude (A) and Behaviour (B) at its vertices (see fig. 3). He distinguishes between *manifest* conflict where all three elements (Contradiction, Attitude and Behaviour) have to be present, and *latent* conflict where Contradiction and Attitude are present, but not Behaviour. As a result, not every conflict is necessarily a manifest or full conflict (Galtung, 1996: 73).

Figure 3: The Conflict Triangle (modelled after Galtung, 1996: 72)



It is important to note that dynamic flows can be traced in all segments of the triangle. This is to say that, e.g. starting out at C, some aggression is born out of frustration because a goal cannot be attained as it is blocked by something or somebody (the other party). This would, as a result, lead to aggressiveness as an attitude. That aggressive behaviour may be incompatible with the other party’s state of ease leading to “a new contradiction on top of the old one”. A conflict cycle can also start in A or B, if there is some accumulated negative attitude (hostile emotions from past experience, for example), some incident comes along which looks like a problem, then A or B may be activated leading to a negative cognition of the other party and an activation of C.

<sup>31</sup> The potentially *positive* and collaborative effects of goal frustration are - for obvious reasons - not included in Galtung’s work from 2000 as it is a “United Nations Disaster [sic] Management Training Programme” manual. Conversely, Galtung’s 1996 piece is concerned with conflict interventions in a broader sense.

In a dispute, the assumption is that the two actors will observe each other's behaviour, and possibly also their own. The awareness of A and C is raised, and this conscious way of looking at things by the parties is what Galtung calls an "actor conflict". If A and C is perceived in a subconscious way, there is a "structural conflict". He goes on to posit that conflicts can generally move from the conscious to the subconscious level, but can subsequently be retrieved when necessary. Some kind of selectiveness is a condition for human survival, as keeping a conflict at the manifest level all the time would take up too much energy (Galtung, 1996: 74-75).

Galtung holds that a conflict can hardly be fully 'solved' in terms of resolution or dissolution: "'Solutions' are not final resolutions or dissolutions, only more or less stable equilibria in the life-cycle of a conflict" (Galtung, 1996: 99). Instead, a conflict 'solution' he defines as a "new formation" which is "acceptable to all actors [...] or sustainable by the actors" (Galtung, 1996: 89). In what he calls conflict *transformation*, the concepts of *simplification* and *complexification* come in. His examples from international relations are the following:

**Simplification:** During the 1974 UN Conference on the Law of the Sea (UNCLOS) around 5000 delegates from around 150 countries were debating 150 issues or so. As nobody would have been able to handle a complexity of that magnitude, some simplification was necessary - and the way to do it was through grouping of actors (countries) and themes (issues). Three groups of countries emerged: land-locked (no coast), coastal countries (with coastlines), and islands (coasts only). The issues were grouped along territorial limits and rights, seabed and below, and military issues (see also V.2 and V.2.1).

**Complexification:** The preparatory meetings leading to the Conference on Security and Cooperation in Europe CSCE (today the OSCE) in Helsinki 1975 were handled in a remarkable way. First, to soften the adversarial stance of Cold War East-West confrontation, the third group of Non-Aligned (NA) countries was introduced (regardless of the actual varying degree of alignment). Second, the issues were divided up into three baskets: military-political (including borders), economic (including joint ventures), and other (including human rights). The outcome of the CSCE conference was such that the Cold War was thawing away to some degree in that borders were confirmed, economic cooperation across blocs came into being, and the human rights process was started. In conflict triangle terms, A and B were blunted (Galtung, 1996: 90-93).

#### II.1.3.1.1 Types of conflict intervention

Galtung (1996: 103-148) offers a typology to highlight how conflict resolution works operationally (see table 1 overleaf). His "typology of conflict interventions" broadly distinguishes between four categories:

- A: conflicting parties communicating only with each other;
- B: minimal involvement of an outside party<sup>32</sup>;
- C: active communication-involvement of an outside party;
- D: imposed conflict 'solution' by means of mediation or arbitration.

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<sup>32</sup> The parties coming from outside the parties to the conflict he labels "outside parties" rather than "third parties", simply to allow for the application of his model also to multi-party conflicts instead of being tied to just two-party conflicts.

Table 1: Typology for conflict intervention (modelled after Galtung 1996: 104-105)

<b>A</b>	<b><i>No communication with outside parties</i></b>
Type 0	Parties keep separate, no communication with anyone
Type 1	Parties communicate with each other
<b>B</b>	<b><i>Asymmetric communication to outside parties</i></b>
Type 2	Outside parties provide the neutral meeting ground
Type 3	Outside parties are present encouraging the dialogue
<b>C</b>	<b><i>Symmetric dialogue-communication with outside parties</i></b>
Type 4	Outside parties enter dialogue on conflict diagnosis
Type 5	Like 4, but + conflict prognosis
Type 6	Like 5, but + conflict therapy
<b>D</b>	<b><i>Asymmetric imposed communication from outside parties</i></b>
Type 7	Mediation: outside parties listen and propose solution
Type 8	Arbitration: like 7, but + commitment of parties to accept
Type 9	Rule of law: like 8, but + procedural rules and enforceability
Type 10	Rule of Man: Conflict dictator imposes solution

Under the heading *No communication with outside parties* (A) Galtung posits two types. Type 0 refers to a zero-level of communication. Neither is there any communication of the parties to the conflict with outside parties, nor do the conflicting parties communicate with each other at that stage. There is a standstill with no conflict development going whatsoever. Type 1 posits communication inside the conflict formation. The parties are in touch. This can, in principle, range from informal dialogue to real talks or negotiations.

*Asymmetric communication to outside parties* (B) is the second category. Type 2 refers to outside parties providing the venue. Yet, they do not take part in the talks. The UN, for instance, tend to offer such neutral meeting ground. Type 3 describes the outside parties as an “empathetic ear”. They keep the dialogue going, if necessary, but do not chair the talks.

The following category C is labelled *symmetric, dialogical communication with outside parties*. Now the outside parties enter the talks. Type 4 identifies a diagnostic role for the outside parties as for the roots of the conflict. Type 5 adds a prognostic role of the outsider, and type 6 suggests an additional therapy approach. Galtung suggests the person(s) acting on behalf of the outside parties had a compassionate and holistic approach and got the parties into a mind-set of leaving the past behind and producing a better future.<sup>33</sup>

The last category D relates to varying degrees of active influence or coercion on the part of the outside parties and is termed *asymmetric imposed communication from outside parties*. Type 7 refers to mediation. The principle arrangement for this set-up is that the outside parties listen to the conflicting parties and then propose a solution. UN special envoys are a typical

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<sup>33</sup> On the face of it, types 4 to 6 appear to be the most delicate ones when it comes to the role of the outside party as a ‘mediator light’. This may be the reason why they tend to play a relatively minor role in the operational business of third-party involvement. Therefore, the subsequent level after providing good offices (type 2 or 3) in practise tends to be active mediation (type 7).

example from the field of diplomacy for this type.<sup>34</sup> Type 8 draws on arbitration adding the notion of prior consent by the parties to the conflict that they are going to accept the final verdict.

Type 9 refers to the Rule of Law adding, according to Galtung, a higher degree of predictability or procedural certainty. In practise, this type represents a binding enforceable court decision. Type 10 is labelled Rule of Man positing a “conflict dictator, who imposes a solution, backing it up with stick and carrot” (Galtung, 1996: 105). Military action deriving from UN Security Council resolutions may be seen as a type-10 example.

The above types are not ‘steps’ in the sense that some kind of ‘progress’ should be assumed from lower to higher numbers. A conflict-intervention process can start, pause or re-start at any point. Further, the degree of *autonomy* of conflict resolution decreases considerably from types 3 to 10. The same holds - potentially, but not necessarily - for the levels of *acceptance* and *sustainability*. There is a potential risk that “all that has been obtained is acceptance at the top, with a few signatures” (Galtung, 1996: 111).

Critics of Galtung’s approach point out a potential weakness in its understanding of why conflict actually starts. Relating to the conflict triangle, is *Attitude* probably not the very beginning of a conflict, but rather a product of previous *Behaviour*? And is there perhaps a need for a more basic ingredient to conflict than an incompatibility in goals? (Wallensteen, 2015: 41-42) In other words, “where does the conflict come from and how does it arise?” (Mitchell, 2014: 27).

### II.1.3.2 Contingency approach

An empirical contribution to the dynamics approach to conflict is the contingency model by Jacob Bercovitch and Allison Houston. They have developed a model of third-party mediation looking at factors of *context* and *process*. Mediation being the most popular means of third-party intervention (Bercovitch and Gartner, 2006: 321), here is the contingency model approach:

“We see international mediation as a reactive process of conflict management whereby parties seek the assistance of, or accept an offer of help from, an individual, group, or organization to change their behaviour, settle their conflict, or resolve their problem without resorting to physical force or invoking the authority of the law.

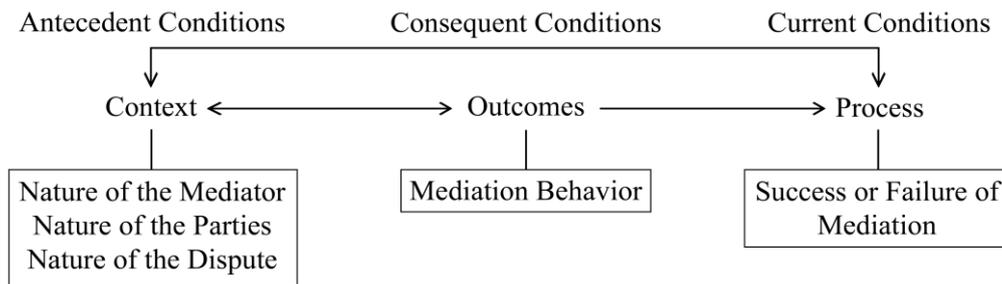
[...] We feel [this] forces us to recognize that mediation is a dynamic and complex social process comprising parties in dispute, a social environment or a context, a particular dispute or problem, and a mediating agent. Our basic contention here is that the success or failure of any mediation is ultimately dependent on each of these clusters or categories of factors.” (Bercovitch and Houston, 1996: 13-4)

The contingency model (see fig. 4 overleaf) can be used to look at a single case of mediation, or at a large number of mediation cases.

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<sup>34</sup> In the contemporary world of consumers or companies - business-to-consumer (B2C), or business-to-business (B2B) - out-of-court redress, also known as alternative dispute settlement (ADR), has become a popular type-7 means.

Figure 4: The Contingency Model of Mediation (modelled after Bercovitch and Houston, 1996: 15)



Relating to an empirical examination of a data set of international disputes from 1945 to 1990 Bercovitch and Houston identified 241 cases the vast majority of which was subject to mediation. The above conceptual framework unfolds in the following way:

#### II.1.3.2.1 Context

(i) The *parties*: Three characteristics play into the parties aspect:

a) parties' *political context*, looking at whether the type of political system (e.g. monarchies, one-party States, military States, multi-party democratic States) affects the chances of successful conflict management. Distinguishing between “systematic dyads” (where the parties to a dispute share the same political system) and “asymmetric dyads” (where the political systems are different) mediation proves to be more successful in same-system disputes. As regards the internal composition of a party, mediation can only be successful if a party to the dispute is united and in full command of its constituents. This fact accounts for many mediation efforts having failed during the civil war in the former Yugoslavia 1991-1995.<sup>35</sup> Generally, the less “culturally fragmented” one or both of the parties, the higher the probability of successful mediation (Bercovitch and Houston, 1996: 20-21);

b) parties' *power*. The core assumption here is that the smaller the power differences between the adversaries the greater the probability for successful mediation. The logic behind this is that the more powerful party may be less ready for concessions. The empirical findings were such that for a set-up where the parties are on an equal level of power, the chances of successful mediation were at 51 percent whereas in cases with substantial power disparities, those chances were only at 33 percent (Bercovitch and Houston, 1996: 22);

c) parties' *previous relations*. This notion takes into account the dynamics of the relationship, i.e. whether it is one of a history of collaborative partnership or rather of confrontational clashes. In fact, the previous relationship can be categorized into “friendly”, “antagonistic” (unfriendly, but no conflict), “conflictual” (previous low-level conflict), and “more than one dispute”. Whilst between friendly nations the probability rate of successful mediation was at 80 percent, the one for countries with a conflictual record (including armed conflict) was at only 40 percent (Bercovitch and Houston, 1996: 22).

(ii) The nature of the *dispute*: Generally, when “vital interests”, such as sovereignty and territorial integrity are at stake, it will be very difficult for intermediaries to have any impact,

<sup>35</sup> It has been observed that the dispersion of the local population (Serbs, Croats and Bosniaks) had led to a localized war with many fronts where negotiators in a mediation often had no control over the local command on the ground (Webb et al, 1996: 175).

when physical violence and war-fare have already broken out. As for the three dispute variables:

a) *timing of intervention*: mediation ideally takes place ‘at the right moment’ and is, according to Bercovitch and Houston, “more effective when it follows rather than precedes some ‘test of strength’” between the parties;

b) *casualties and intensity at intervention time*: empirical findings demonstrate that there is a clear correlation between a low number of fatalities and successful mediation. Low-fatalities (100-500) disputes show a 64-percent rate of successful mediation outcomes, whereas the percentage drops to 39 percent in cases with a high number of fatalities (more than 10.000; Bercovitch and Houston, 1996: 23-24);

c) *issues*: five categories are listed: “sovereignty”, “ideology”, “security”, “independence”, and other (including “ethnicity”). Clearly, sovereignty (36 percent of cases) and security (24 percent of cases) disputes are such that the parties to a conflict have mutually incompatible claims over a specific piece of territory, or borders, such as Britain and Argentina in the Falklands war in 1981, or the India-Bangladesh dispute over Kashmir. Ideology disputes relate to strongly diverging views about political systems or values, such as North vs. South Korea at the time. Independence conflicts are obviously about self-determination. As for mediation success, conflicts over resources were at 70 percent, and those over ethnicity at 67 percent. Ideology conflicts rated at 50 percent with sovereignty being at 45 and security at 41 percent. It follows that some issues are considerably more amenable to mediation than others (Bercovitch and Houston, 1996: 25).

(iii) The *mediator* being the third vital contextual factor, its characteristics are

a) *rank*: This factor looks at what organizations or governments a mediator represents and how this empirically affects the mediation outcome. Leaders and representatives of *regional* organizations feature highest on the success league table (62 and 50 percent respectively). Leaders and representatives of small governments follow closely (55 and 57 percent). Remarkably, the record of leaders and representatives of larger states is much worse (40 and 31 percent) as is the case with representatives of *international* organizations (24 percent). A suitable explanation appears to be that regional organizations, such as OAU (Organization of African Unity) or the EU know the customs of the same cultural system;

b) *previous relationship with the parties*: Looking at the (party-) political structure of the mediator-parties relationship, the findings are that a successful mediation outcome is most likely if the mediator comes from the same bloc as both parties (62 percent). The probability is much lower when the mediator can be assigned to the bloc of one party to the conflict (31 percent) whilst if the mediator is from a different bloc altogether, the chances of success are at 51 percent (Bercovitch and Houston, 1996: 27-28).

#### II.1.3.2.2 Process

The *starting point* of mediation: there is as much agreement on the fact that mediation should start at the best possible *moment*, as there is doubt over the question *who* should take that decision. Bercovitch and Houston’s analysis shows that mediation is most likely to succeed when both parties to the conflict initiate mediation (62 percent). If only one party requests mediation, that rate drops to 41 percent. Remarkably, a 60 percent success rate appears when a regional organization kicks off the mediation proceedings. Their knowledge of the region and its culture and value system is asserted to be the explanation. When a mediator or an international organization initiate mediation, the success rate is at only 41 and 30 percent respectively.

As for the mediation *environment*, the more neutral the environment, the better. External pressure from the media or from constituents are the best conditions for the mediator to have full procedural control and for the parties to focus on the substantive issues, and for all participants to have a full flow of communication. Mediation conducted on neutral ground, i.e. on the mediator's territory, is the most promising avenue (54 percent of successful outcome), whilst when the mediation takes place on the parties' territory, the success rate drops to 45 percent. Worse, still, is a situation where the mediation is carried out on different sites (36 percent).

The *strategies* of mediation are the third, and probably most crucial factor. They can be classified in terms of the level of intervention. First, in a facilitating role with almost zero intrusion, the mediator, in providing good offices, is a communication channel with little active control over the process and the substantive issues. Second, in a procedural role the mediator 'sets the agenda', i.e. decides on the number and type of meetings, and the meeting venue. In a third and most straightforward strategy, the mediator directly steers the issues of substance, tables proposals, and makes use of 'stick and carrot', such as rewards or sanctions. The active strategy accounts for 52 percent success rate, procedural activities produce a 49 percent chance of a successful outcome and the low-level facilitator role rates at only 32 percent (Bercovitch and Houston, 1996: 28-30).

A general criticism made towards most third-party mediation models is that they tend to focus on States and international or regional organizations. This school of thought, based on what is labelled "multi-track diplomacy" (Diamond and McDonald, 1996) argues that much mediation and peace-building tends to be conducted successfully and in a complementary way *outside* 'official-diplomacy' governance channels in a formal and informal manner by means of non-governmental organizations (NGOs) or individual citizens (see Böhmelt, 2010; Woodhouse, 2010).

A prominent scholar-practitioner in this regard is Adam Curle who, after his academic life, engaged in intra-community "peace-building from below" (Woodhouse, 2010: 6). His work is based on the idea that 'true' peace in terms of reconciliation after ethnic conflicts is only possible in a partnership with *local* actors rather than through the 'neutral outsider' approach. Here is Curle's philosophy:

"Since conflict resolution by outside bodies and individuals has so far proven ineffective (in the chaotic conditions of contemporary ethnic conflict [...]), it is essential to consider the peace-making potential *within* the conflicting communities themselves." (Curle, 1994: 96; emphasis added)

Curle founded the *Osijek Centre for Peace, Nonviolence and Human Rights* to help fight conflict traumas and the vast side-effects in a region suffering heavily from the Serb-Croat War in 1991/1992 (Ramsbotham et al, 2016: 275).<sup>36</sup>

#### **II.1.4 Judicial conflict resolution**

In view of the flourishing use of international judiciary bodies for the settlement of disputes, the following approach provides a typology of judicial dispute resolution looking at elements such as who controls adjudication, who is entitled to submit a dispute to interstate or

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<sup>36</sup> Osijek in Eastern Slavonia (Croatia) with its substantial Serbian minority suffered from heavy shelling during the Serb-Croat War in 1992 (see also IV.5.2).

transnational courts or tribunals, and, who has the power to enforce the implementation of a judgment.

#### II.1.4.1 Legalized dispute resolution

Robert O. Keohane, Andrew Moravcsik, and Anne-Marie Slaughter (2000), two professors of International Relations and a former president of the American Society of International Law, have provided a comprehensive analysis of the various types of international dispute resolution bodies. The particular value of their study is to have identified the main features of international adjudication and the causal mechanisms of and between the control of adjudication, access to the judicial bodies, and the enforcement power relating to a judgement or an award.

Keohane, Moravcsik and Slaughter employ a typology of dispute resolution with three “explanatory variables” to assess the nature of delegating the management of a conflict to a third-party judicial body. *Independence* describes the degree of autonomy of the judicial body, *access* measures what hurdles there are for the submission of a dispute, and *embeddedness* marks the means of implementation.

##### II.1.4.1.1 Independence

This first variable looks at who is in charge of adjudication, i.e. the extent to which a judicial body and its members can carry out their reasoning and reach a judgment independent from national governments. Keohane et al (2000: 459-461) divide this up into two main categories. The first category deals with “independent selection and tenure”. There is a continuum ranging from direct representatives of governments to fully independent experts from a specific area in international law. What also deserves some attention is whether the future career of a judge nominated depends on a national government or whether they belong to a group of legal academics. The rules for selection and tenure do vary considerably. At the World Trade Organization (WTO), for example, there exists a stable of experts pre-selected by groups of States. The experts to sit on a particular panel will then be nominated on demand on a case-by-case basis. Generally, the more independent the judges, the longer the tenure. In ad-hoc international arbitration, such as the PCA case between Slovenia and Croatia, the selection of the tribunal members is in the hands of the parties to the dispute. The spectrum of independence as for selection and tenure is shown in fig. 5.

Figure 5: The independence continuum (Keohane et al, 2000: 461)

<i>Level of independence</i>	<i>Selection method and tenure</i>	<i>International court or tribunal</i>
Low	Direct representatives, perhaps with single-country veto	UN Security Council
Moderate	Disputants control ad hoc selection of third-party judges	PCA
	Groups of states control selection of third-party judges	ICJ, GATT, WTO
High	Individual governments appoint judges with long tenure	ECJ
	Groups of states select judges with long tenure	ECHR, IACHR

For legal discretion, the second category, the contents of the mandate submitted by the parties to the dispute to the judicial body is the decisive element. Very few legal bodies, such as the European Court of Justice (CJEU/ECJ<sup>37</sup>), or the European Court of Human Rights (ECHR), have virtually no restrictions by a mandate at all, whereas arbitral tribunals do face mandates where the legal norms and other requirements tend to be precisely fixed (Keohane et al, 2000: 461-2). It is important to note that the fiercest kind of inter-State bargaining usually ensues over the terms of the mandate for the tribunal’s establishment (Keohane et al, 2000: 470).

II.1.4.1.2 Access

The second variable relates to the actors who have the legal right to approach a judicial body, i.e. whether the possibility to submit a dispute is restricted to governments, or whether it is also open to individuals. Access is particularly crucial with regard to dispute resolution bodies as they are ‘passive’ institutions that cannot initiate the treatment of a dispute themselves. The differences between the various judicial bodies in relation to access is enormous, as can be seen in fig. 6 below.

Figure 6: The access continuum (Keohane et al, 2000: 464)

<i>Level of access</i>	<i>Who has standing</i>	<i>International court or tribunal</i>
Low	Both states must agree	PCA
Moderate	Only a single state can file suit	ICJ
High	Single state files suit, influenced by social actors	WTO, GATT
	Access through national courts	ECJ
	Direct individual (and sometimes group) access if domestic remedies have been exhausted	ECHR, IACHR

At the high end of access, every individual citizen from a Member States of the Council of Europe can file a suit with the ECHR. The system of the Inter-American Commission on Human Rights (IACHR) is on an equal level.<sup>38</sup> The CJEU is of a more restricted nature as access is only possible through national courts, or by the EU institutions or by individual Member States. However, an individual may be present before the CJEU during the hearing of their case. At the lower access end, the submission of a dispute to the PCA or the ICJ is restricted to States meaning that only State governments are entitled to take legal action against one another. As for the PCA, both States need to agree on the terms (the mandate) of the dispute resolution the judicial body is going to be entrusted with.<sup>39</sup> It follows that with

<sup>37</sup> The Court is now officially referred to as the Court of Justice of the European Union (CJEU) since the entry into force of the Lisbon Treaty on 01 December 2009. Previously it was the European Court of Justice (ECJ).

<sup>38</sup> The IACHR is an autonomous organ of the Organization of American States (OAS) to which all 35 States of the Americas are members. The IACHR’s main activity is the *Petition and Case System* open to individuals who perceive themselves as having been subject to a human rights violation. The Commission investigates the situation and can make recommendations to the Member State responsible to restore the enjoyment of human rights. For full details on the IACHR see <http://www.oas.org/en/iachr/mandate/petitions.asp>.

<sup>39</sup> Disputes can be brought before the ICJ, a United Nations organ, either (i) through an agreement (mandate) of the two parties to the conflict, or (ii) by means of a unilateral application of one State filing suit against

regard to issues that are *not* regulated by means of a treaty the two conflicting States are party to, either State, as a matter of fact, enjoys the right of a veto (Keohane et al, 2000: 462-464).

### II.1.4.1.3 Legal Embeddedness

This variable denotes the crucial role of the *enforcement* of judgements, and the question of whether a judicial body depends on international or domestic actors for the implementation of a judgment. Keohane et al (2000: 466) posit that issues of *implementation* and compliance are much more problematic in international disputes than they are in well-functioning domestic legal systems.

The spectrum, again, is very wide-ranging from strong to weak control. At the low end of enforcement power is the right of member countries to an *ex-post* veto, as used to be the case with the old GATT (now WTO) system. Rulings of GATT dispute resolution panels were subject to subsequent consensus of the parties to the conflict. The current WTO system is more advanced in this respect and has no *ex-post* veto. The only way a WTO panel decision can be reversed is by unanimous vote of all WTO members - a rather distant possibility.

Figure 7: The embeddedness continuum (Keohane et al, 2000: 467)

<i>Level of embeddedness</i>	<i>Who enforces</i>	<i>International court or tribunal</i>
Low	Individual governments can veto implementation of legal judgment	GATT
Moderate	No veto, but no domestic legal enforcement; most human rights systems	WTO, ICJ
High	International norms enforced by domestic courts	EC, incorporated human rights norms under ECHR, national systems in which treaties are self-executing or given direct effect

On the enforcement side of things, however, there is no domestic enforcement for WTO panel decisions. In the same vein, judgements of the ICJ do not enjoy domestic enforcement either. Yet, ICJ decisions may be actively enforced by the UN Security Council which only happens very rarely (Scott, 2014: 27-8). At the high end of legal embeddedness spectrum are the quasi-self-enforcing judgements of the CJEU. The most striking example is indeed the legal system of the EU where national governments are considered fully bound by CJEU judgements that can, according to Keohane et al, be enforced by independent national-domestic courts<sup>40</sup> (see fig. 7).

another State in relation to a treaty the two States are party to. That treaty must be subject to the jurisdiction of the ICJ. For a full account of the workings of the ICJ, see <http://www.icj-cij.org/court/index.php?p1=1&p2=6>.

<sup>40</sup> This notion, however, is somewhat over-deterministic. Whilst it is true that all national (EU domestic) courts can be expected to accept rulings of the CJEU as the domestic courts *perceive* them as binding, there is no semi-automatism of enforcement. Most cases are brought before the CJEU through the so-called preliminary ruling procedure whereby a national court asks the CJEU to interpret CJEU legislation. The CJEU delivers its judgement which is subsequently considered and reflected in the domestic court's final judgment.

In cases where there is no possibility of domestic implementation, there is still a possibility that governments refusing the implementation of an international legal judgement may face some pressure by domestic actors and/or the public sphere as non-implementation may damage the legitimacy of a domestic government (Keohane et al, 2000: 466-467).

#### II.1.4.2 Judicial politics

The selection of judges has been subject to political interference in many domestic judicial systems. Yet, open political interference is seen more rarely, but has been common in the Arab world throughout the 1990s. With regard to the selection of judges, the appointment of Supreme Court judges in the U.S. is openly politicised by hearings before the Senate. In Italy and Germany, the appointment of Constitutional Court judges has been subject to political balance (Keohane et al, 2000: 470-1). In Japan, the selection of judges by the government has considerably affected judicial decisions in the 1990s (Ramseyer and Rasmusen, 1999).

Generally, trust in and public support of an independent judiciary has somewhat diminished in recent times. The perception that judges “are influenced by more than ‘law’ traditionally understood” has grown. To preserve public support for an independent judiciary, it is vital not to deny that there is some external influence, but to allow for more transparency as to what the external factors of influence are (Geyh, 2012: 252-3).

Poland, notably, and most recently also Hungary, are particular cases in point. In early 2016, the PiS government amended the law on the constitutional court substantially infringing and containing the judges’ independence. The constitutional court itself had declared the amendment unlawful in the first place, an act the government refused to publish in Poland’s Official Journal. The government appointed a new president of the constitutional court on 21 December 2016. Despite high-level efforts of the European Commission to defuse the situation in the context of the Rule-of-Law Framework<sup>41</sup>, the open conflict between the government and the constitutional court over its independence could not be overcome. On the contrary, the Commission asked the Council to start an Article 7 Procedure<sup>42</sup> against Poland for a serious and persistent breach of the EU’s basic values on 20 December 2017<sup>43</sup>. At the time of writing, the Article 7 procedure is pending in Council. The European Parliament triggered an Article 7 procedure against Hungary on 12 September 2018.<sup>44</sup> Council discussed Poland (for the second time) and Hungary (for the first time) on 16 October 2018.<sup>45 46</sup> On a

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<sup>41</sup> The European Commission has a monitoring role in the Rule of Law Framework introduced in March 2014. Once it identifies a “systemic threat” to the rule of law in an EU Member State the Commission can issue a “Rule of Law Opinion” followed by a (first) “Rule of Law Recommendation” which it issued on 27 July 2016 vis-à-vis Poland. After the appointment by the government of a new president of the constitutional court on 21 December 2016 the EU Commission issued a (second) “Complementary Rule of Law Recommendation”. See European Commission press release: [http://europa.eu/rapid/press-release\\_IP-16-4476\\_en.htm](http://europa.eu/rapid/press-release_IP-16-4476_en.htm).

<sup>42</sup> Article 7(1) of the Treaty on European Union provides for the Council, acting by a majority of four fifths of its members, to determine that there is a clear risk of a serious breach by a Member State of the EU’s common values. The Commission, one third of the Member States, or the European Parliament can trigger the process.

<sup>43</sup> See European Commission press release: [http://europa.eu/rapid/press-release\\_IP-17-5367\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5367_en.htm).

<sup>44</sup> For the European Parliament Resolution see <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0340+0+DOC+XML+V0//EN>.

<sup>45</sup> See General Affairs Council press release: <https://www.consilium.europa.eu/en/meetings/gac/2018/10/16/>

<sup>46</sup> Freedom House downgraded Hungary from “free” to “partly free” in their 2019 Report. The assessment on academic freedom and the educational system reads: “The Fidesz-led government has accelerated efforts to bring schools and universities under its close supervision. A gradual overhaul of the public education system has raised concerns about excessive government influence on school curriculums, and legislation adopted in

party-political level, the European Peoples Party (EPP) suspended the membership of Fidesz, the ruling party in Hungary, until further notice on 20 March 2019.<sup>47</sup>

The four-fifth majority required in Council to actually go ahead with an Article 7 procedure (at the very end of which the voting rights of the Member State in question could be suspended - requiring unanimity except for the culprit State) makes any further steps in the process unlikely. However, in the case of judiciary ‘reform’ in Poland, there is also the much more effective tool of an infringement procedure. On 24 September 2018, the European Commission referred Poland to the CJEU (in an urgency request) for lowering the retirement age for judges at the Polish Supreme Court. The new law prematurely ended the term of the judges and was therefore, according to the Commission, incompatible with EU law as the forced retirements undermined the principle of judicial independence, including the irremovability of judges.<sup>48</sup> On 19 October 2018, the CJEU, in an urgency ruling, ordered Poland to reinstate the Supreme Court judges retroactively,<sup>49</sup> a decision the CJEU confirmed in its ruling proper on 17 December 2018.<sup>50</sup> The Polish parliament adopted the respective changes to the domestic law on 21 November 2018 (Reuters news, 21 November 2018).

In summary, the theory strands on conflict analysis and management suggest that with regard to conflict *issues* it is useful to look at the underlying interests of the parties rather than their positions in the bargaining process and to structure negotiations accordingly (Fischer et al, 2012). In a similar vein, it may be vital to distinguish between interests and needs, the latter being non-negotiable (Azar, 1990; Burton, 1990). As concerns the *dynamics* of conflict, periods of relaxation, protraction or even transformation can be expected (Galtung, 1996). Further, there are specific circumstances under which the *management* of a conflict is most promising, depending on the timing of bilateral or third-party initiatives (Bercovitch and Houston, 1996; Zartman and de Soto, 2010). Once a dispute is to be referred to a judicial body, the struggle over the mandate for a court or a tribunal tends to become the focal point of contention (Keohane et al, 2000).

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2014 allows for government-appointed chancellors empowered to make financial decisions at public universities. Selective support by the government of certain academic institutions also threatens academic autonomy. In 2018, the government revoked accreditation from all gender studies programs, and senior officials—including Orbán, through a spokesperson—have questioned the rationale for this field of academic study. The government’s continued refusal to sign an international agreement on the status of CEU, a postgraduate institution with dual American-Hungarian accreditation that was founded by the Hungarian-born American financier and philanthropist George Soros, effectively forced the university out of Hungary at the end of 2018. Earlier in the year, CEU had closed its free non-degree program for asylum seekers and refugees as a consequence of new anti-immigration legislation. Pro-government media outlets have published lists of activists, academics, programs, and institutions and labeled them as ‘Soros agents’ or ‘mercenaries.’ The ideological attacks have targeted gender studies programs, but also broader research on inequality, or simply criticism of various government proposals. The effort has encouraged self-censorship. The government’s decision to assume control of a large portion of funding for the Hungarian Academy of Sciences left the entity, the leading network of research institutions in the country, uncertain about its future.” (<https://freedomhouse.org/report/freedom-world/2019/hungary>).

<sup>47</sup> The Hungarian government had recently launched a poster and billboard campaign against the European Commission contemptuously - and in an anti-Semitic tone - portraying Commission President Jean-Claude Juncker as actively conspiring with George Soros, a major critic of Fidesz and a sponsor of the Central European University (CEU). For the EPP suspension decision see <https://www.epp.eu/press-releases/fidesz-membership-suspended-after-epp-political-assembly/>.

<sup>48</sup> See European Commission press release: [http://europa.eu/rapid/press-release\\_IP-18-5830\\_en.htm](http://europa.eu/rapid/press-release_IP-18-5830_en.htm).

<sup>49</sup> See CJEU press release: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-10/cp180159en.pdf>

<sup>50</sup> See CJEU press release: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-12/cp180204en.pdf>

## **II.2 EU enlargement approaches**

This strand of literature examines under which circumstances Candidate Countries are able or ready to meet the EU's political or legislative (*aquis*) requirements and how the interplay between domestic actors and the EU unfolds. Rationalist models have solidly served to explain the enlargement round of the Central and Eastern European States (CEE) in terms of compliance, whilst identity issues tend to be grasped best by a constructivist angle. To assess the compliance record for *South East* European States (SEE), in particular the successor States of Yugoslavia, a combined rationalist-constructivist view appears appropriate.

### **II.2.1 EU conditionality model**

A rationalist approach related to Liberal Intergovernmentalism<sup>51</sup> and concerned with EU rule transfer to Central and Eastern European countries in that context is the *membership conditionality* or *external incentives* model. Candidate Countries are assumed to comply with conditionality if EU membership is seen by the domestic actors as a credible incentive which compensates the compliance costs borne by the incumbents. The EU is widely seen as having successfully transformed EU candidates, also referred to as democratic change or *Europeanization*<sup>52</sup> (e.g. Zhelyatzkova et al, 2019; Schimmelfennig and Sedelmeier, 2004; Vachudova, 2005; Ladrech, 1994). By and large, EU enlargement is perceived as the most successful “external relations tool” (Phinnemore, 2006; Giandomenico, 2015).

The constituent logic of EU conditionality is “a bargaining strategy of reinforcement by reward, under which the EU provides external incentives for a target government to comply with [the EU's] conditions.” The rule transfer can happen in a two-fold manner: first, during the process of political and economic transformation, a Candidate Country “might consider EU rules as effective solutions to domestic policy challenges such as the opening up of markets, or administrative reform, and thus adopt these rules independently of EU conditionality and their desire to join. Second, while the EU might provide [political and financial] incentives for the adoption of its rules, the mechanism through which the [candidate] countries adopt these rules might relate to processes of persuasion and learning in

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<sup>51</sup> Liberal Intergovernmentalism (LI) as a rationalist model rests on a two-stage model of (i) preference formation and (ii) intergovernmental bargaining. It combines a liberal theory of preference formation with an intergovernmental approach of States engaging in power-based bargaining. States are seen as rationalist self-interest actors. In the first stage, national governments aggregate the interests of their constituencies and their own interests and spell them out as domestic preferences vis-à-vis European integration. In the second stage, the governments bring these interests to the EU negotiating table (Pollack, 2001: 225; Caporaso, 1998: 9). Liberal theories of international relations mean individuals and voluntary associations having autonomous interests and constituting the most fundamental actors in politics. The relationship between society and the government is one of principal-agent and the main interest of the government is to remain in power (Moravcsik, 1993: 483). Eising et al (2017), in their empirical study on interest representation in the EU multi-level system with regard to 20 EU draft directives, have found that interest groups apply different interest representation routines and address national governments and/or the EU-level depending, *inter alia*, on whether they need to mobilise opposition against or support for a European Commission proposal. The authors conducted their research on interest groups from five EU Member States: Germany, The Netherlands, Slovenia, Sweden, and the United Kingdom.

<sup>52</sup> According to Ladrech, “Europeanization is an incremental process reorienting the direction and shape of [domestic] politics to the degree that [the] political and economic dynamics [of the EU] become part of the organisational logic of national politics and policy-making” (Ladrech, 1994: 69). Ladrech used this definition - way before the accession negotiations with the CEE countries - as early as in his analysis of the 1992 referendum campaign in France over the Maastricht Treaty. Only later on did the term Europeanization become key terminology in enlargement literature.

which EU actors socialise [Candidate Countries'] actors rather than coerce them" (Schimmelfenning and Sedelmeier, 2004: 662; for the external-incentives and social-learning aspects see also Zhelyatskova et al, 2019: 20-1).

There would be cases where the domestic costs of complying with EU conditionality are too high for the incumbent (authoritarian) governments in terms of *democratic* conditionality threatening the existence of those very governments. Examples from the 1990s include Slovakia under the Mečiar government, Croatia under Tuđman, and Serbia under Milošević where democratic conditionality proved insufficient for successful rule transfer. It only became possible through a change of government (Schimmelfenning and Sedelmeier, 2004: 670). Such change could also be brought about through domestic pressure by the societies in the respective countries when the threat of exclusion from the EU was felt by the domestic electorate mobilizing a momentum bringing reform-minded parties to power (Vachudova, 2003), such as the Račan and Đinđić governments respectively in Croatia and Serbia in 2000.

As for *acquis* conditionality, Zhelyatskova et al (2019: 19-23) and Schimmelfenning and Sedelmeier (2004: 671-6) contend that, with regard to compliance with the legal-technical adoption and implementation of hard-and-fast EU legislation, the CEE countries' record for EU rule adoption has been comprehensive and consistent. This is because the incentives of the EU were particularly credible since EU membership as such constituted the driving factor in domestic cost-benefit calculations and became the top priority with domestic policies. Domestic opposition to *acquis* rule adoption at best affected its timing, but not the implementation as such. After all, it was obvious that the European Commission and the Member States would monitor the *acquis* implementation strictly. In sum, whilst democratic conditionality depended considerably on the domestic power costs of incumbent governments, *acquis* conditionality could be seen as very successful due to the credibility of the EU incentives.<sup>53</sup>

However, with regard to *rule-of-law* conditionality vis-à-vis the contemporary Candidate Countries from the former Yugoslavia, the record appears to be a lot less sound. Looking at judiciary reform in Macedonia and media freedom in Serbia, Kmezić (2019: 96-106) demonstrates that whilst there is a lot of obstructionist potential and action by gate-keeper elites and legacies of the past domestically, there is a lack of clarity and credibility on the part of EU conditionality. When every allowance is made that it is indeed difficult to quantify the level of achievement as for political criteria, the EU has predominantly engaged in technical issues or financial support. Yet, the main obstacles to rule-of-law reform in the region "is not technical or financial, but rather political". To that end, the EU should stop (i) ignoring some of the evident shortcomings in the Candidate Countries, and (ii) refraining from a name-and-shame approach vis-à-vis the politicians responsible for obstructing democracy. For one must fear that, if rule-of-law progress remains low or non-existent, "democracy in the region will remain an empty shell despite the ongoing EU accession process" (Kmezić, 2019: 105).

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<sup>53</sup> In a non-enlargement context, Kaeding and Mastenbroek (2006) dismiss the hypothesis of 'Goodness of Fit' (stipulating that adaptation to prospective EU legislation or implementation of agreed EU legislation is only possible if it fits the existing domestic policies and institutions). Kaeding and Mastenbroek advocate that empirical evidence suggests that it is not the primary interest of domestic actors to maintain the *status quo* (i.e. EU legislation is only accepted or implemented when it fits the domestic regulatory framework). Rather, the main driving factors are domestic preferences and beliefs on the part of the actors. These - the beliefs and the actors - can and do change, for instance with regard to the opening-up of gas or electricity markets after a change of government.

## II.2.2 National identity filter model

The most significant impact of Social Constructivism<sup>54</sup> on European integration theory appears to be on EU enlargement. In analysing the enlargement round of 2004 of the CEE states, the readiness of EU Member States to embrace a new intake can be explained to some degree through the notion of “collective identity” of the existing club. Heads of States and Government and Foreign Ministers, by means of rhetorical speeches, had been preaching about the re-unification of the European continent for many years. As a result, they were bound not to oppose enlargement, despite the effect that certain Member States may have had other domestic preferences in the first place, especially for the (justified) fear of having to down-size their slice of the financial EU cake. Then again, the actual negotiations with the Candidate Countries were going about in a rather tight-fisted manner on the part of the Member States. In other words, “the EU [looked] more like an exclusive club dictating the terms of accession to new members.” On balance, the concept of collective EU identity serves to explain the general readiness to welcome newcomers, whereas the EU’s conduct in the accession negotiations as such proved a rather different affair (Risse, 2009: 157).

The CEE enlargement can be explained fairly consistently with the rationalist conditionality model of LI (see II.2.1), where compliance with the EU requirements can be expected, as long as the domestic costs for the candidate country government do not exceed the credible incentives of EU membership. There is broad acceptance amongst scholars, that democratic change has successfully been brought about with this model (e.g. Zhelyatskova et al, 2019; Schimmelfennig and Sedelemeier, 2004; 2005; 2008; Vachudova, 2005).

However, the tide turns when we look at the *Southeast* European (SEE) states, including the successor States of the former Yugoslavia (with the exception of Slovenia which already joined in 2004 with the CEE wave). In most of the remaining Candidate Countries of the region, governments have increasingly shown some substantial reluctance to comply with democratic conditionality. Freyburg and Richter (2010: 264) argue that, in order to explain the lack of compliance with democracy promotion, one has to go beyond entirely rationalist reasoning and introduce a constructivist variable: *national identity*.

Drawing on a concept by March and Olsen (1998), the basic concept is that national identity works as a *filter* distinguishing between whether a government follows a cost-benefit calculation (“logic of consequentialism”), or acts in line with socially constructed norms and identities (“logic of appropriateness”). To Freyburg and Richter (2010: 264), referring to rationalist considerations when looking at the compliance record of political membership

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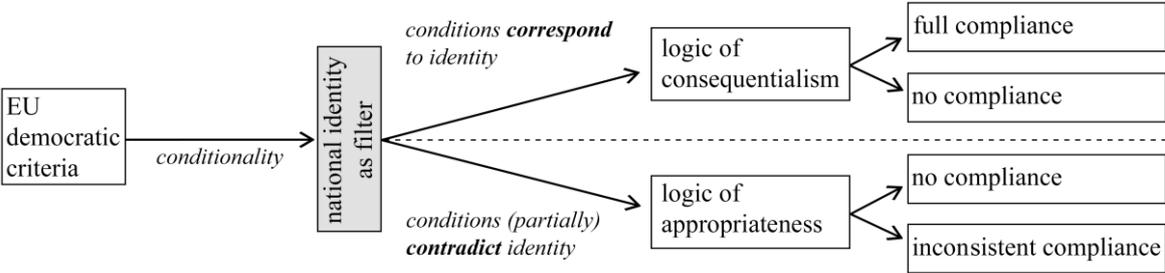
<sup>54</sup> The main assumption of Social Constructivism is that there is an interdependence between human agents and the institutional structure they are involved in, and that there are norms and identities arising from working and collaborating in those very structures (e.g. Checkel, 1998; Wendt, 1999; Diez and Wiener, 2009: 10). In EU terms, the fact that Member States’ representatives work with one another, together with supranational European Commission officials, and - if it is about legislation - with Members of the European Parliament, all actors adhering to the formal and informal ‘rules of the game’, does create common “intersubjective understandings” (Pollack, 2001: 234). Likewise, this creates some form of identity beyond given domestic preferences (e.g. Sandholtz, 1996; Checkel, 1999; Miošić-Lisjak, 2006: 102). In other words, Social Constructivism posits that there are “institutional effects on social identities and fundamental interests of actors”. Thus, constructivists would not be able to explain the coming about of EU institutional reform (such as the treaties of Maastricht, Amsterdam, Nice, or Lisbon) “without taking the feedback effects of previous institutional [reform] on the identities and interests of the Member States’ governments and societies into account” (Risse, 2009: 146). As a result, EU institutions not only shape the behaviour and identities of actors, but also influence their *preferences* - an effect which rational-choice approaches would hardly be able to grasp (Pollack, 2001: 234). In short, “membership matters” (Sandholtz, 1996).

criteria is insufficient. Rather, there is a clear need to employ the constructivist concept of national identity as a decisive factor as to whether an issue is subsequently put to pure cost-benefit calculations or not.

The reasoning behind Freyburg and Richter’s bridge-building approach is that rationalist and constructivist explanatory factors are not contradictory. Rather, they must be *complementary* and can help explain the effectiveness of EU conditionality. National identity is regarded as a cognitive model defining the way in which actors see their interests, and to what degree they are legitimate and appropriate to fit a given national identity. In other words, government decisions about external incentives, such as EU membership conditionality, have to pass the “identity test”. If an EU requirement proves partly or fully at odds with the national identity, compliance will follow the appropriateness reasoning. In turn, if a requirement is filtered as non-problematic, its further consideration can go down the consequentialist cost-benefit path. It is vital to note, that either way can lead to non-compliance. It is the *reasoning* that is different (Freyburg and Richter, 2010: 265-6; see fig. 8).

Empirically, Croatia serves to illustrate the above argument. During the 1990s Croatia was not able to tune into EU membership conditionality as it was bound by the war with Serbia.<sup>55</sup> As war tends to foster authoritarian ways of governance due to the state of emergency, the country could be regarded as a semi-authoritarian, semi-presidential system during Franjo Tuđman’s term (Dolenec, 2013: 133-4, 146; Sedelius, 2006: 89) with a “dismal democratic and human rights record in the 1990s” (Razsa and Lindstrom, 2004: 629). The environment for compliance with external EU conditionality did, however, substantially improve after the death of Tuđman. In 2000, a Social Democrat government under reform-minded Ivo Račan took over. His successor, Ivo Sanader who had in the meantime reformed the HDZ strengthened and sustained the reform path directed at EU membership after winning the 2003 and the subsequent 2007 elections.

Figure 8: Filter model for conditionality compliance (modelled after Freyburg and Richter, 2010: 266)



The credible membership perspective on the part of the EU existed, albeit it was clear that on top of the Copenhagen criteria there would have to be full co-operation with the International Criminal Tribunal for the former Yugoslavia (ICTY). Yet, Croatia was facing a two-fold identity: the prospect of joining a privileged group such as the EU was paralleled with the notion of a “heroic, innocent nation that fought a defence war against Serbia” (Freyburg and Richter, 2010: 269). On the one hand, winning this war (without support from the EU) had strengthened nationalism in Croatia to such degree that any conditionality approach from the EU had a hard time to achieve compliance. On the other hand, a new narrative was constructed in 2000 presenting EU membership as the final step in the transition of Croatia to

<sup>55</sup> For the Homeland War 1991-1995 see IV.5.2.

an independent and sovereign State (Jović, 2012: 5-7)<sup>56</sup>. EU accession was also linked to the narrative of a “de-balkanised” Croatia returning to Europe (Subotić, 2011: 315). The EU was portrayed as a friend greatly supporting Croatia, not least through early recognition of the newly independent State in early 1992. In other words, identity convergence between the EU and Croatia was at work, a process that was started by Račan and Mesić, later to be driven forward and completed by Sanader, following the indictment of the Croatian army generals Ademi and Gotovina by the ICTY in July 2001 (Subotić, 2011: 317-8).

Coming back to the concept of national identity as a filter, the persecution of war criminals is highly sensitive in Croatia (as it is in Serbia, and Bosnia-Herzegovina). It is important to note that the perception of the war against Serbia was subject to a declaration of the Croatian parliament in October 2000 where it was described as “[...] a legal, legitimate, defensive, liberatory armed conflict in which Croatia defended its internationally recognized borders” (Sabor declaration 13 October 2000; see IV.5.2).

In a first phase, it proved extremely difficult for the Croatian governments to fully co-operate with the ICTY and, as a result, to extradite General Ante Gotovina, a *conditio sine qua non* for the opening of accession negotiations with Croatia by mid-March 2005 the EU leaders had set at its Summit in December 2004 (European Council, 2005: 5). ICTY chief prosecutor Carla del Ponte had repeatedly claimed during 2003 and 2004 that the government would know the whereabouts of Gotovina, but not take action, so there must have been tough cost-benefit calculations by the government in Zagreb as to whether to extradite Gotovina and still remain in power (Dolenec, 2013: 152). As no extradition had taken place EU leaders postponed the start of the accession negotiations. The Croatian government has shown *non-compliance* since the prevailing national identity, mainly nurtured by the perception of the Homeland War and the popular support of the ‘heroes’ who helped defending the country in the war (Roter and Bojinović, 2005: 451), rendered the extradition of war criminals inappropriate. On balance, national identity can be justifiably seen to be the crucial factor for *non-compliance* in this case (Freyburg and Richter, 2010: 273).

In a second phase, after the EU leaders’ postponing of the accession negotiations, the Sanader government increased its efforts by setting up an action plan for ICTY-cooperation. By October 2005, del Ponte had declared full co-operation on the part of Croatia, so that the European Council was able to decide in favour of beginning accession talks in December 2005. Gotovina was subsequently arrested in Spain in December - subject to a decisive hint on the part of the Croatian government, according to del Ponte. The move behind the arrest of Gotovina can, according to Freyburg and Richter, be best explained in constructivist terms. Confronted with the two conflicting identities of Croatia as the innocent, heroic nation on the one hand, and the desire to join the “in-group” EU, Sanader was facing a dilemma. A ‘face-saving’ solution, however, was on offer through Gotovina’s arrest in Spain thus avoiding a humiliating extradition from Croatia (Freyburg and Richter, 2010: 274-5)

Still, bringing Gotovina before the ICTY was the toughest decision for Sanader as Prime Minister (interview Ivo Sanader, 19-05-2016). Ante Gotovina was convicted to 24 years in prison in April 2011 by the ICTY, but was found not guilty by the court of appeal a year-and-a-half later.<sup>57</sup>

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<sup>56</sup> The sovereignty of Croatia since its independence 1991 was infringed in a number of ways. A part of its territory was for some time under *de-facto* control of Serbia, followed by UN peace-keeping forces in the areas of Krajina and Eastern Slavonia. Through the pressure of the ICTY and the related EU conditionality, Croatia’s political and justice system was affected, too (Jović, 2012: 7).

<sup>57</sup> ICTY judgement 15 April 2011 (IT-06-90-T), decision of appeal 16 November 2012 (IT-06-90-A).

### II.2.3 Compliance behaviour model

A further conceptual model is that of Noutcheva (2012) who looks at the compliance patterns of Candidate Countries - Bosnia-Herzegovina, Bulgaria, Serbia-Montenegro (2002-2006), and Kosovo (2002-2008) - by “giving equal consideration to both rational and constructivist approaches when seeking to account for the results observed”. There are three new aspects in Noutcheva’s model: First, there may be cases of compliance *reversal*, i.e. compliance is not assumed to be an ever-progressing trend. Second, along the lines of Freyburg and Richter (2010), *legitimacy*-based constructivist explanations must be taken seriously. And third, the EU’s influence in “quasi-protectorate States”, such as Bosnia-Herzegovina and Kosovo (the latter before 2008), through *legal coercion* (Noutcheva, 2012: 17).

As for mechanisms of Europeanization in the “Balkans”, Noutcheva outlines conditionality (see II.2.1), EU socialization and legal coercion. Socialization works two-fold: First, the EU has an interest in shaping the normative orientations, interests and identities of the political elite in the Candidate Countries for these interests and identities to become sustainable and long-term. Second, the EU needs to teach the Candidate Countries the ‘rules of the game’ as once the new members sit on the table they will fully take part in the decision- and policy-making. In a nutshell, existing EU members want reliable partners who are accustomed to the code of conduct through social learning. As for legal coercion, Bosnia-Herzegovina and Kosovo account for the extraordinary powers the EU has/had in those countries. However, it has not been easy for the EU to insist on the domestic ownership of the reforms whilst at the same time maintaining the threat of legal coercion (Noutcheva, 2012: 24-7).

The compliance patterns in Candidate Countries Noutcheva (2012: 23-34) explains as follows: The basic assumption is that compliance depends on “rational calculations and/or normative considerations of political leaders in power” which drive the compliance behaviour of candidate countries’ governments vis-à-vis EU conditionality (see fig. 9).

Figure 9: Compliance behaviour of EU Candidate Countries (modelled after Noutcheva, 2012: 29)

		Legitimacy	
		High	Low
Rationality	Benefits > Costs	<b>Genuine compliance</b>	<b>Rationality-based compliance</b>
	Costs > Benefits	<b>Legitimacy-based compliance</b>	<b>Non-compliance</b>

When rationality and legitimacy contradict one another, the difference is obvious. If an actor complies in a case against their interests, i.e. costs exceed benefits, but the perceived level of legitimacy is high, then legitimacy can be regarded as having triggered compliance. In a way,

“belief change” is there ahead of policy change which is to follow later. So, *legitimacy-based* compliance can be seen as substantial. In the same vein, if actors see their interests in line with the EU demands for reform, e.g. benefits exceed costs, but are not convinced by the persuasive nature of the argument, the response can be seen as *rationality-based* compliance. The problem with this type of compliance is that once the material benefits have arrived, the (only selectively implemented) changes may be reversed at some point. Further, such cases may increase the heterogeneity of the membership and the institution altogether.

Lastly, when the benefits exceed the costs and EU conditionality is perceived as appropriate, high, and legitimate, there is *genuine compliance*. Political actors will carry out reforms quickly and they will be sustainable. A high level of trust in the appropriateness of measures are likely to boost norm-binding State behaviour. Conversely, when the rational cost-benefit ratio for compliance is very high whilst at the same time the level of legitimacy is very low, we are going to see *non-compliance*, which is a distinct possibility in cases of popular issues of national identity (Noutcheva, 2012: 28-30). Looking at the legitimacy of EU norms through the eyes of the actors at the receiving end makes us realize that whatever EU conditionality there is, it may not automatically be seen as a given, but rather be subject to contestation (Križić, 2012: 64).

Putting things into perspective, both the *filter* model and the *compliance behaviour* model as inclusive approaches are able to combine different explanatory modes. This is good news as it helps overcome the often artificial distinction between rationalist and constructivist perspectives. The main and most vital benefit appears to be to bring theoretical frameworks closer to reality.

### **II.3            Research questions**

Whilst there usually is only one single research question with a piece of research, the research project before us has two sets of analysis: First, the causal mechanisms of the development of the border dispute between Croatia and Slovenia, and second, the implications or policy recommendations for existing or upcoming cases in the context of EU enlargement. Thus, two research questions are at hand. Within the first macro question, several micro process-tracing questions are synthesised from the analytical framework discussed in II.1 and II.2.

#### **II.3.1            Macro research questions**

The umbrella or *macro* research question of the analytical-framework is two-fold.

For the single-case study Slovenia-Croatia:

- What are the specific circumstances and causal mechanisms of a bilateral conflict between an EU Member State and a Candidate Country - Slovenia and Croatia - with regard to conflict resolution?

For the implications on EU enlargement and the related policy recommendations the research question reads:

- What are the conclusions that can be drawn from the Croatia-Slovenia case with regard to other latent or upcoming cases of bilateral conflict and its management in an EU context under very similar circumstances?

On the analytical process-tracing *micro* level, how then can one adventure to reconstruct the causal mechanisms of the border conflict between Croatia and Slovenia? As a reminder, the conflict under scrutiny is a territorial dispute between two independent States, there is no use of arms, and the power resources are not equally distributed. By the time the Arbitration Agreement was signed (04 November 2009) Croatia was not yet an EU member, but a Candidate Country. Yet, Slovenia was able to use its veto power as an EU member bearing in mind the Member States unanimity requirement for enlargement issues. The fact that there was an arbitration procedure reflects the asymmetric bilateral power distribution that existed in the time-span between Slovenian accession to the EU on 1 January 2004 and Croatian accession on 1 July 2013. Further, an international organization (EU) - in its supranational (EU Commission) and intergovernmental (Member States) fashion - and a judicial third-party (Arbitral Tribunal), and lately the Court of Justice of the EU are involved.<sup>58</sup>

### **II.3.2 Analytical-framework micro questions**

In view of the conflict theory modes and EU enlargement approaches discussed in II.1 and II.2 above, it appears useful to employ the following theory-informed micro research questions for the analytical process tracing in this study:

#### **II.3.2.1 Conflict issues**

It is indeed vital - both for the parties to the conflict and for third parties involved - to investigate into the real issues at stake. Too often, parties 'by-talk' one another as the *interests* have not been clearly spelt out. Sometimes they are not put on the table in a straightforward way which can lead to positional bargaining rather than real negotiations based on those underlying interests (Fischer et al, 2012).

It appears equally worthwhile to find out whether those interests may even represent basic human *needs*, some of which are hardly negotiable (Azar, 1990; Burton, 1990). Thus, the questions to follow relating to conflict issues are:

- What are be the origins of the conflict?
- What are the issues at stake in the conflict?
- Have the real interests of the parties been put on the table?

#### **II.3.2.2 Conflict dynamics**

Virtually no conflict is a lock-in of the parties' positions/interests right from the beginning. Most of the time the conflict is not static. Rather, it has been moving, from latent to manifest, and has probably taken in new issues.

There may be periods of protraction, or relaxation, or even transformation in the life-cycle of a conflict where there often is no clear beginning or end (Galtung, 1996). Therefore, the causal mechanisms to trace are:

- How has the conflict been moving *en route* and has it perhaps transformed?
- What can be regarded as the different stages of the conflict?
- How did deadlocks or face-saving opportunities arise?

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<sup>58</sup> For an outline of the conflict line-up see I.1.

### II.3.2.3 Conflict management

Only rarely do conflicts disappear ‘out of the blue’. To be contained or resolved, they require some form of management. To try to do that successfully, one needs to look at the environment of a conflict in a comprehensive way (Bercovitch and Houston, 1996).

On an operational level of the Croatia-Slovenia case, the choice of a third-party, and subsequently their decisions as for the timing of their initiatives/involvement may play a significant role (Zartman and de Soto, 2010). Further, the choice of the judicial resolution body entails a first-hand power struggle over the mandate for the arbitral tribunal (Keohane et al, 2000). The roles of the EU Commission and the Council Presidency also need to be assessed. It appears, therefore, that the following issues need tracing:

- Under which conditions did third parties get involved?
- What third parties did get involved, why, and in what role?
- What were the causal mechanisms for the timing for third-party involvement?

### II.3.2.4 Actors in the conflict

There may be salient issues of a large number for potential and real conflict. It takes people, however, to make them open conflicts, to choose which issues to actively pursue or not in a real-life context. This is why we need to take a close look at the *actors* in a conflict on the ground. This entails intra-State actors, governments, the EU institutions, and judicial bodies. After all, it is the actors who shape the conflict, move it, manage it, and may overcome it, or fail to do so. The relevant causal mechanisms to address in this context appear to be:

- Who ran, escalated, or dampened the conflict, and by what means?
- What was the behavioural conduct of the parties and the third parties?
- Who initiated the bilateral and the third-party-involvement phases?

### II.3.2.5 EU power issues

The border conflict between Croatia and Slovenia heavily surfaced during Croatia’s accession negotiations with the EU. Such negotiations usually entail commonplace political and *acquis* conditionality issues (Schimmelfennig and Sedelmeier, 2004). Yet, it is always an asymmetric and delicate power relationship between the EU as a whole and the Candidate Country.

All the more so when EU accession negotiations, which require unanimity on the part of the Member States to open and close negotiating Chapters, are loaded with a vital national interest on the part of the Candidate Country (Freyburg and Richter, 2010; Noutcheva, 2012). Thus, the following issues in need of tracing are:

- What were or have been the voluntary and coercive aspects in the resolution efforts?
- What were the issues sensitive to national identity or legitimacy concerns?
- In what way did the conflict turn into a piece of *de-facto* add-on EU conditionality?

### **III. Research design**

It is useful to bear in mind that there is no ‘case’ as such. Rather, every case is constructed by the researcher (e.g. Lauth/Pickel/Pickel, 2014: 35-6; Gerring, 2011: 15; Peters, 1998: 146). Therefore, it is necessary to define the limits and features of the present case under scrutiny.

#### **III.1 Case selection**

The dependent variable of this single-case or “within-case” study (Bennet, 2010: 207; Collier, 2011: 823) constitutes the development of the territorial conflict between Croatia and Slovenia. The spatial boundaries are defined by the two countries’ territory and their common State border area (i) at land, land-bound from Piran Bay in Istria along the hinterland up to the tripoint with Hungary, and (ii) at sea in Piran Bay and in the Gulf of Trieste.

The time period covered ranges from the independence of Croatia and Slovenia in 1991 to the Final Award of the Arbitral Tribunal at the Permanent Court of Arbitration (PCA) in June 2017 and up until the filing of the lawsuit before the CJEU by Slovenia in July 2018. The starting date can be considered an obvious choice as there were no sovereignty issues between the SFRY Republics prior to the independence declarations of Slovenia and Croatia on 25 June 1991 (and of other Republics a little later). The internal borders between the SFRY Republics were not so much of a territorial, but rather of an administrative and political nature. The chosen end-date of this study, on the one hand, reflects the original timetable of the thesis which was tuned to the presumed bilateral finalisation of the implementation of the Final Award around the spring of 2018. On the other hand, the study takes into account as much as possible unforeseen developments extending the coverage to the beginning of the CJEU case in the summer of 2018. A full coverage of the CJEU case, however, appears not to merit a real-time extension of two-and-a-half years or so. In fact, the Court has decided to split the proceedings into (i) admissibility and (ii) the merits of the case, so the final judgement on the merits (presuming admissibility) may only be handed down by the end of 2020 or the beginning of 2021. It is worth recalling that the genesis of the Arbitration Agreement and the unfolding of the arbitration procedure are the major focus of this study.

The independent variables are the conduct of the actors at (i) the national, bilateral government level in Slovenia and Croatia after 1991, (ii) the EU level in terms of the role of the EU Commission, the EU Council Presidencies, and other Member States between 2008 and today, and (iii) the level of the third-party judicial body, the Arbitral Tribunal 2012-2017. In terms of (i) national bilateral, actors include the political-level (prime ministers, foreign ministers) and the technical level (prime minister’s office and foreign ministry civil servants of Croatia and Slovenia). The (ii) EU political level is represented by the Commissioner for Enlargement 2004-2009. The technical level comprises the Commission services involved in drafting the Arbitration Agreement, the French EU Council Presidency staff at the Permanent Representation to the EU, and Member State civil servants working in the Council Working Group on Enlargement (COELA) and the foreign ministries. The (iii) Arbitral Tribunal was composed of the three members appointed jointly and two party-appointed members (end of January 2012 to end of July 2015), and of five members of the reconstituted Tribunal (the two party-appointed members that resigned were replaced by ordinary members) as from late September 2015.

The particular salience of this case, also referred to as the research gap (see I.3) is the hitherto non-existent situation of two EU Member States facing an unresolved conflict over territory,

here a so-called mixed dispute (maritime and land). This single-case study reconstructs the bilateral conflict over territory and its management covering the period from the end of Yugoslavia (SFRY) to the most recent stage of the lawsuit before the CJEU with a focus on the events 2008-2018. Prior to Croatia's EU accession on 01 July 2013, this very conflict had led to a *de-facto* blockade of the accession negotiations of one party to the conflict (Croatia) by the other party to the conflict that was already an EU member (Slovenia). The distinctive feature of the present case is that an issue of national interest has been pursued by means of the Member State veto power inherent to the EU accession process. That leverage is indeed at hand not least when bilateral attempts, of which there actually were several, have failed. Slovenia's determination loaded the accession negotiations with this bilateral conflict with the Candidate Country Croatia. As a result, the asymmetric power relationship between the two countries at the time produced some coercive momentum to 'solve' the conflict, or to initiate such solving, *during* Croatia's accession negotiations. These features are unique in the history of EU enlargement<sup>59</sup> and deserve some in-depth research of the processes involved.

All the more so, since the odds are that we are going to see more of the same with regard to the remaining Candidate Countries of the former Yugoslavia. It must be noted that the State's dissolution has left a substantial conflictual heritage in a number of areas, not least due to the violent break-up of the country along most of its former internal borders. In fact, a very similar pattern of a bilateral issue being introduced into accession negotiations appeared to emerge in the ongoing negotiations between the EU and Serbia. In the first half of 2016, Croatia vetoed the opening of Chapters 23 (Judiciary and fundamental rights) and 24 (Justice, freedom and security) in the EU accession negotiations with Serbia for a few months. Croatia had reservations on the grounds that the Serbian law on regional/universal war-crime jurisdiction (ZORZ) interfered with the sovereignty of other States. Zagreb's blockade materialised also vis-à-vis the non-implementation of a guaranteed seat for the Croatian minority in the Serbian Parliament, and with regard to Serbia's co-operation with the ICTY. The blockade lasted from April to July 2016.<sup>60</sup>

As a matter of fact, there are further bilateral open issues between Croatia and Serbia, such as missing persons (from the 1991-95 war), and it is no secret that Croatia appears determined to insist on them being solved ahead of Serbia's EU accession (see e.g. interview Kolinda Grabar-Kitarović with N1 TV, 27-01-2019). As for territorial issues, Croatia has open ones not only with Serbia, but also with Bosnia-Herzegovina and with Montenegro. The recommendations in Chapter VIII are going to address these issues providing the link in light of the findings from the Croatia-Slovenia case.

### **III.2 Method and data collection**

To analyse a rather pluri-causal phenomenon such as the border dispute between Slovenia and Croatia in the context of EU enlargement, it is appropriate to opt for an *inductive* approach.

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<sup>59</sup> It may be argued that Greece used the Member State leverage to (successfully) press for Cyprus' EU accession as early as during the 2004 enlargement round. It must be noted, however, that the Cyprus issue is not about a bilateral matter between a Member State and a Candidate Country on an unresolved conflict, but one where another *de-facto* entity, the so-called Turkish Republic of Northern Cyprus, existed on the territory of the Candidate Country. What matters here, too, is that no diplomatic relations between Greece and the *de-facto* entity of Northern Cyprus, and between the Republic of Cyprus and the entity in the North were had, i.e. there was an unresolved (territorial) conflict *within* the Candidate Country. For the EU-Cyprus issue see e.g. Demetriou (2008), and Rumelili (2008).

<sup>60</sup> For the war crime jurisdiction issue see VIII.2.2.

This is to say that the present qualitative within-case study is going to aim at hypothesis-*generating* theory building (as opposed to *testing* of an existing theory which is usually referred to as a *deductive* approach). For the purpose of this study, the state of play, i.e. the protracted conflict between Croatia and Slovenia, is examined to establish the *causal mechanisms*, or causal pathways, leading to the present situation (e.g. Gerring, 2011: 10; Bennet, 2010: 207-8, Muno, 2016: 81).

### III.2.1 Method

The method employed in this study is *process tracing*. It appears to be the appropriate method as, first, it is a single-case study, and the task is to distil meaningful context from a dense layer of information related to several micro issues. Second, the case examined is a development over time, so naturally there are processes unfolding. The availability of both (i) actors for interviews and (ii) documents from these processes renders process tracing a suitable method.

In view of the fact that the scope of definitions for process tracing has considerably broadened over time with some of them becoming increasingly detached from real research (Trampusch and Palier, 2016: 2), process-tracing shall be understood as

“the systematic examination of diagnostic evidence selected and analysed in light of research questions and hypotheses posed by the investigator” (Collier, 2011: 823), and the discovery of “who knew what, when, and what they did in response” (Bennet, 2010: 209) in a diachronic way (Gerring, 2011: 7).

According to Collier (2011: 823-4), process tracing is distinctive by means of three features:

- *Causal-process observations (CPOs)* as the results of a *qualitative* research method corresponding to the activity of process tracing *per se* are in contrast to *quantitative* research such as data-set observations (DSOs).
- *Descriptive inference* is an indispensable component of process tracing. What matters here is a comprehensive and thorough description<sup>61</sup>, i.e. “taking good snapshots at a series of specific moments” to account for the unfolding of events over time, precisely “why it occurred, when it did, and in the way it did” (Gerring, 2011: 18).
- *Diagnostic evidence* gained through holistic process tracing requires prior knowledge. It does so in a two-fold way: (i) some solid and fine-grained knowledge of the case including its history is indispensable (e.g. Trampusch and Palier, 2016: 14); (ii) a conceptual framework is needed “to know in advance where to look for causal mechanisms” (Trampusch and Palier, 2016: 6), and to secure the comparative merit (e.g. Muno, 2016: 88).<sup>62</sup>

It is important to note that *qualitative* research, such as process tracing, must be informed by theory in order to be able to look for causal mechanisms (Trampusch and Palier, 2016: 6).

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<sup>61</sup> The concept of “thick description” (Geertz, 1987), in much the same vein, entails a detailed perception of a case including apt interpretations of the observations made and a familiarity with the codes of communication (Lauth/Pickel/Pickel, 2014: 55).

<sup>62</sup> A single-case study is indeed comparative in itself if the applicable method includes an analytical framework that is measured against the selected case.

Without a theory-based approach, an analysis rests purely descriptive (Muno, 2016: 84; Falleti, 2006) and may be reduced to “lazy story-telling” (Hedström and Ylikoski, 2010: 10).

### III.2.2 Data collection

It follows from the process-tracing method outlined above that the qualitative approach applies to the two main data collection pillars of this study, interviews and documents.

#### III.2.2.1 Interviews

The most apt tool for a relatively small sample of respondents with highly specific expertise is qualitative interviewing. Accordingly, there are specific issues the researcher wants to cover with individual interviewees. This is because hardly any of the interviewees plays the same role in the conflict development process of the Croatia-Slovenia border dispute as anyone else from the sample group involved in the process. Therefore, the best type of interview is the *semi-structured interview*. For two reasons: First, a standardised interview obviously makes no sense since not only the individual role in the process differs (as already mentioned above). Second, one has to bear in mind the individual background of the individual members of the sample group and the fact that some of the questions address sensitive issues (Barribal and While, 1994: 330). Further, completely un-structured interviews are off the mark, either, as they would run the risk of not capturing the research questions under consideration. Rather, the researcher will want to explore specific topics and “hear the stories” of the interviewees (Rabionet, 2011: 564). Personal views and anecdotal evidence are of great interest, can open up further research issues and lead to unexpected and revealing findings.

*Elite interviews* carried out as “in-depth interviews” with a relatively small sample of respondents (Gerring, 2011: 15) play a central role in process tracing and are at the heart of this study as elite actors are vital sources of information. They can help reconstruct an event and the causal mechanisms between events. Often, these elite actors are the only source of first-hand testimony from people directly involved in the events in question. Interviewees, provided that they were/have been central to the event, have got a strong memory, and are able to produce an impartial recollection of events, also referred to as “oral history” (Grele, 1996), are instruments of utmost importance in a process tracer’s toolbox (Tansey, 2007). It is vital to recall, however, that expert interviews ought to be conducted in an objective-critical spirit towards both the subject matter and the expert. To that end, the interviewer-researcher must possess “co-expert” knowledge to be able to appropriately put the interview content into perspective, become aware of the interviewee’s personal opinion or bias, and identify the issues of particular relevance (Pickel and Pickel, 2003: 304-306; 313).

With regard to the appropriate and pertinent group of interviewees, it would include all major actors on the political and technical level in the period between 1991 and today. The crucial feature is involvement in the border issue. Target actors include (i) the national level of the parties to the conflict, and (ii) the European level. With regard to the judicial third-party level, no interviewees have been available for this study simply due to the fact that proceedings at the Arbitral Tribunal and at the European Court of Justice are confidential. Yet, another category of interviewees is of interest here: (iii) scholars who have a profound insight into political, historical or legal developments related to the subject matter or the region.

On the (i) national level in Croatia and Slovenia, the interviewees were former and sitting prime ministers or foreign ministers who were directly involved in the various phases of the border dispute. They can deliver a high-level account of events, not least from the tête-à-têtes with their counterparts and informal communication outside official meetings. As the tenure of government office tends to be limited, senior civil servants who have worked on the file play an equally crucial role for the researcher. They tend to be able to provide expertise across government terms and independent of the personal or sometimes party-political lens of the actors at the political level. Further, civil servants have a profound insight into the technical details and how they have evolved over a longer period of time (i.e. covering more than one phase of the border conflict) at the working level. This is a vital point for the process tracer since bilateral relations at the technical level tend to be very robust and sustainably good-neighbourly independent of phases of clouding or brightening at the political level. After all, diplomacy is the established channel of communication in the community of States worldwide. It is important to note in terms of traceability that, whilst political-level actors speak on a personal account, civil servants need to stay anonymous according to the unwritten rules of diplomacy.

On the (ii) European level, interviewees from the supranational level include the Commissioner for Enlargement 2004-2009 on the political level, and civil servants from the European Commission who have worked in the Commission Services involved in enlargement tasks and areas in a wider sense, such as screening, benchmarking, and the operational conduct of accession negotiations, but also the areas of the judiciary, fisheries, or regional development. Members of the European Parliament were chosen on the grounds of Committee or Delegation chairpersonship or Rapporteurship relevant for countries or subject matters of this study. On the intergovernmental level of the Council, the author has spoken to Member State civil servants working in the Council Working Group on Enlargement (COELA), the body where the individual Candidate Country's accession negotiation Chapters are debated and decided by unanimity<sup>63</sup> once accession negotiations have started.

With regard to (iii) scholars, the author was able to interview experts from the field of the international law of the sea, and of international relations with particular expertise in the post-Yugoslav space.

I conducted 70 qualitative, semi-structured interviews altogether. A relatively small sample of respondents together with the individual specialist knowledge of the interviewees requires tailor-made questions related to the individual area of expertise. Divided up by the above categories, I interviewed 30 actors from the political level, 31 civil servants, and seven scholars. Further, I conducted interviews with two journalists. Two civil servants whom I have interviewed wished to remain fully incognito and are therefore not included in the figures or the list. For a full list of interviewees see the bibliography at the end of the study.

As for arranging and conducting the actual interviews, I felt it was helpful to explain the background of my study and to narrow down my issues of interest as much as possible beforehand. Also, it is important to inquire the amount of time the interviewee is going to be able to set aside. At the beginning of the interview it is vital to agree, first, whether it can be attributed *ad personam* or if the respondent is going to stay anonymous, but attributed to a category (such as "civil servant"), and second, whether it may be useful to distinguish between 'on the record' and 'off the record'. The latter issue tends to naturally unfold as the interview progresses.

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<sup>63</sup> For the institutional line-up and decision-making procedure of EU accession negotiations see VI.2.1.2. On unanimity in accession negotiations see VIII.4.1.

As to the means of keeping records, I have decided not to record the interviews live, but to take notes instead. The huge advantage of this mode is that there is no focus on how something is being phrased, but rather on the contents of what is at issue. Further, this allows for an open conversation where also anecdotal evidence or lighter points can be raised and discussed. The disadvantage is that the researcher is under considerable pressure to take notes very quickly and to grasp the essential points on the spot. In addition, the interview notes should be transcribed as soon as possible after the interview when the notes still ring the bell of what the full wording of the interviewee was on any of the points taken down.

### III.2.2.2 Documents

Documents are the second pillar of the data collection this study is based on. In fact, documents are a first-hand primary source (Trampusch and Palier, 2016: 6) and an equally crucial instrument alongside interviews in the process tracer's toolbox. The various units of a case under scrutiny tend to spend most of their life-times outside the public domain and thus resemble an iceberg. The tip of the iceberg is the final and official document. The much bigger part most vital to the process tracer consists of draft documents or internal documents, the invisible rest of the iceberg. The draft and internal side of documents, i.e. the genesis of documents and the relation between internal and official documents, obviously is most helpful for detecting causal mechanisms.

To that end, the author analysed (i) documents from the public domain, and (ii) draft or unpublished documents. The particular relevance of (i) official or published documents with regard to a bilateral conflict is that they constitute either a unilateral piece of communication, such as an oral or written statement, a bilateral agreement on the disputed issue, or a mandate for dispute resolution by a third party. Further, an official document can also constitute a decision of a third-party judicial body, and of a piece of communication of any third party on the conflict issue. Such documents tend to mark a particular stage of the conflict. Sometimes they are also a good reference when compared to actions or declarations of the political level to see whether these actions/declarations fully or partly correspond to or contradict the actual document.

The particular value of (ii) draft or unpublished documents is that they, first, highlight the dynamics of a process over time compared to the final official or non-official document, especially if there is a series of drafts ahead of the final document or if there is no final document altogether. Second, draft or unpublished documents provide additional information to achieve both a maximum of precision and accuracy in the process tracing as such, as well as novel and cutting-edge or investigative research findings.

Draft or non-official documents analysed in this study include individual pieces of national diplomatic communication, European Commission drafts, or internal drafts, submissions or notes from the government domain in Slovenia and Croatia and the relevant EU Council Presidencies. Of particular interest here, to mention but a few, were the bilateral Initialled Draft Agreement from 2001, and the internal drafts of both Slovenia and Croatia for the submission of the dispute to the International Court of Justice (ICJ) in the aftermath of the Bled Agreement 2007. Further, the French EU Council Presidency's draft letter on the non-prejudging nature of the Croatian accession negotiations documents was crucial from the late-2008 stage of the blockade of the Croatian EU accession negotiations. The major bulk of documents relates to the period of the drafting stage of the later Arbitration Agreement (January to November 2009), such as the many non-public drafts and internal notes from the

European Commission as the third-party mediator, the non-public submissions or notes from Croatia or Slovenia. In addition, pieces of internal communication from the European Commission or between the Swedish EU Council Presidency and the European Commission add to the very useful file. From the stage of the arbitral proceedings (2013 to 2017), letters and *notes verbales* from Slovenia or Croatia, any communication between the Tribunal and the parties, and submissions from the parties (as far as they were made available to the author by the parties) constitute resourceful material. The Tribunal's (public) Partial Award and Final Award are also a vital data source as they neatly reveal *ex post* some of the submissions of the parties. With regard to the implications of bilateral dispute for EU enlargement, internal notes from the government domains of Croatia, Serbia, Montenegro, Kosovo, and the U.S. were of substantial analytical value.

It must be noted in the context of data collection, that the interplay between, on the one hand, the data from the interviews conducted with the persons involved in the drafting of or negotiations on the documents and, on the other hand, the data from the actual documents was of enormous value for the analysis of the processes. Only when actors and the related documents can be brought together, a maximum of causal mechanisms and inference can be traced and reconstructed.

### Research-design Summary

In view of the above:

- ❶ To distil meaningful context from a dense layer of information related to several micro issues in the border conflict between Croatia and Slovenia, an apt method must be able to reconstruct causal mechanisms. As the case examined constitutes developments over time (processes), and since both (i) actors and (ii) documents are available to the researcher, the chosen method is process tracing.<sup>64</sup>
- ❷ First as for data collection, elite interviews with actors directly involved in the process provide for first-hand testimony. Interviewees include heads of governments, government ministers and national civil servants, the Commissioner for Enlargement and European Commission civil servants, MEPs, and academic experts in the field.
- ❸ Further to data collection, process-tracing items include draft, internal and official documents from Member State, Candidate Country and European Commission level from the various stages of the border dispute.

This author strongly believes in the benefits of genuine interdisciplinary collaboration. With an international relations, international law, or history angle exclusively, it would hardly be possible to bring out the full research potential of this single-case study on the border conflict between two of Yugoslavia's successor States. Political scientists, international law experts, and historians must be fellow travellers in an enterprise of process tracing of a within-case analysis. For there is a lot of real-life context in what aims to be a holistic process-tracing method. It is in this spirit that the present study has been conducted.

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<sup>64</sup> For the analytical framework and the related process-tracing research questions see Chapter II.

#### IV. The history of territorial, political and violent conflict in the region

The aim of this Chapter is to provide a grasp of why territorial and political issues have been a source of conflict throughout the more recent history of the region. A brief outline of the history of the North-Eastern Adriatic in general, and the birth and the dismemberment of Yugoslavia<sup>65</sup> in particular, including the role of the then European Community (EC), may help bring to light a few underlying contextual dimensions and causal mechanisms pertaining to territorial conflict and frontier-making in the area.

The “disputed and changing frontier” (Lederer, 1963: ix) has been a salient issue in Southeast-Central and Southeast Europe for a long time in recent history. In looking at past events, we must bear in mind that territorial conflict is the most serious thing over which governments or States can be at odds with (Gibler, 2012: 9; Huth and Allee, 2002: 32).

There is hardly a region in Europe that has experienced as many territorial conflicts and subsequent border changes in the 19th and 20th century as the Julian Region<sup>66</sup> (see fig. 10 below). Almost all boundary changes followed armed conflicts in what were outright wars. This Chapter’s outline focuses on what can be considered relevant periods and events over time. The goal is to raise the awareness for political and territorial conflict, and frontier-making, and how these processes were driven by or may have affected political entities, State actors, and citizens’ lives. Still, it is beyond the scope of this paper to give a full account of the region’s history.

In view of the fact that Slovenia and Croatia have not been independent entities for most of their history during the contemporary international system after 1648, there is a need to review the joint history of Yugoslavia where appropriate to trace convergent or divergent processes and conflictual issues in relation to the joint statehood between 1918 and 1991. Another emphasis will be put on the events around the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY, or “Yugoslavia II”), and the independence of Slovenia and Croatia (and the other Yugoslav Republics).

Issues of particular relevance in this respect are the processes of

- (i) changing territorial sovereignty and political conflict before and during Yugoslav times;
- (ii) conflict management efforts by the EC/EU during the dissolution of the SFRY;
- (iii) the establishing of international borders between the successor States, and the new borders’ effects on violent conflict;
- (iv) the successor States of Yugoslavia negotiating and implementing a pluri-lateral treaty on succession issues (e.g. assets and liabilities, State property, or pensions).

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<sup>65</sup> This author follows Sabrina Ramet’s (2006) labels: “Yugoslavia I” for the interwar kingdom 1918-1941 (referred to as “Yugoslavia” only after 1929, initially “Kingdom of Serbs, Croats and Slovenes”). “Yugoslavia II” for the communist federal republic 1945-1991, since 1974 known as the Socialist Federal Republic of Yugoslavia SFRY. “Yugoslavia III” for the rump Yugoslav State 1992-2003 consisting of Serbia and of Montenegro labelled Federal Republic of Yugoslavia (FRY). The country was subsequently re-branded “Serbia and Montenegro” before it split into “Serbia” and “Montenegro” in 2006 following the independence referendum in Montenegro.

<sup>66</sup> *Julian Region* is the most suitable term as all other designations have a particular national and emotional connotation, such as *Venezia Giulia* or *Julijska Krajina* (Julian March). Julian Region is used as a purely geographical term along the North-Eastern Adriatic ranging from *Grado* west of *Trieste/Trst* to *Rijeka/Fiume* covering the coastal areas and the hinterland Karst region including the peninsula of Istria. All place names reflect the present-day language regime unless specified otherwise.

## IV.1 Border changes between the Republic of Venice and World War I

For the following brief sketch of the history of the Julian Region in the North-Eastern Adriatic, the end of the Venice Empire (1797) seems a reasonable starting point.<sup>67</sup> For two reasons: First, the Peace of Westphalia in 1648 is widely considered the beginning of the contemporary international system with territory-bound sovereign States (e.g. Hobson, 2013). This system was already up and running in the Venice Empire's phase of decline after 1669 (McNeill, 1974). Second, the Venice Empire has had the most lasting civilization impact on the Northern Adriatic still visible today. Third, frontier-making as an exercise for diplomacy craftsmanship through treaties following (armed) conflicts was established in the region around that time.

Figure 10: The Julian Region and border changes between 1866 and 1954 (Novak, 1970: 261)

### IV.1.1 Late Venice Empire and Napoleon's interregnum

The Venice Empire came to an end through the Treaty of Campo Formio in 1797 when the Republic had to cede its eastern Adriatic territories to Austria and France (Lederer, 1963: 9). During the foregone centuries, Venice, as a hegemonic power in the Adriatic with her naval and merchant fleets, had ruled over most of the eastern Adriatic coast and its surrounding hinterland, such as Dalmatia and what is today the coastal area of Croatian and Slovenian Istria. The city of Trieste, however, had remained under Habsburg rule. The Venetian-Mediterranean civilization had been the predominant culture along the eastern coast of the Adriatic for a few centuries, had also affected Trieste to some degree, but was very different to the form of civilization in the inland settlements of the other parts of the (Habsburg-ruled) Julian Region (Prunk, 1996: 32-3). Today, the impact of Venice in the eastern Adriatic is still very much visible in the distinctive architecture of the



<sup>67</sup> Substantial surveys on the pre-19th-century history of the Julian Region can *inter alia* be found in Duroselle (1966: 52-69), Moodie (1945: 46-96) and Rojnić (1945: 75-115). For the developments of the historical units of the later Yugoslav State from early settlements to the Balkan Wars 1912/13, see Hondius (1968: 30-76).

old towns of Kotor (Montenegro), Dubrovnik, Split, and Rovinj (Croatia), or Piran and Koper (Slovenia), to name but a few.

Venetian rule in Istria was perceived by the local Slavic population in a two-fold manner. On the one hand, the comparably refined administration of Venice was widely appreciated. On the other hand, there was a strong sense of exploitation of both human power and raw material for the Venice fleet. Deforestation in Istria and on the islands of the Kvarner region was substantial (Krebs, 1907: 137; Rojnić, 1945: 108-112), and its long-term effects are still noticeable today on the islands of Krk, Cres, Rab, and Pag, and in the karst hinterland on both sides of the land border between present-day Croatia and Slovenia.

Following Napoleon's victory over Venice<sup>68</sup>, Austria, through the Treaty of Campo Formio 1797, was granted the territory of Istria. Beating Austria and Russia in the Battle of Austerlitz in 1805, Napoleon subsequently took over in Istria - with the exception of Trieste which he gained only in 1809 through the Schönbrunn Treaty (Duroselle, 1966: 58; Rojnić, 1945: 114). Napoleon included the Istrian peninsula and Slovenia in his so-called Ilyric Provinces. The cultural gains of the French administration were noticeable. The free use of the native language, also in schools and for the Italian population in the coastal towns, was introduced for the first time in the area (Moodie, 1945: 94-95; Prunk, 1996: 72-73), and the French administration was trying to get rid of the Habsburg-style privileges of the church and the aristocracy (Rojnić, 1945: 115). It is worth noting, that Trieste and Fiume (Rijeka), for the very first time, were granted control of their hinterland regions enabling them to fully function as port cities (Moodie, 1945: 98).

#### **IV.1.2 Return of Habsburg rule**

Following the Battle of Leipzig in 1813 Austrian rule returned to Istria and Slovenia, a fact confirmed by the Vienna Congress in 1815. Subsequently, Austria rolled back the French administrative reform and re-introduced their previous system (Prunk, 1996: 73). Moodie argues that, through destroying the Venetian Republic, Napoleon had strengthened Italian unity in its early stages. The Austro-Hungarian role in the Upper Adriatic had indirectly also been strengthened. As a result, "the stage was set for the Austro-Italian struggle in and around the Julian Region which was to have important effects on later boundary disputes" (Moodie, 1945: 95). Further, the dualistic set-up of a re-enforced Austria and the dominance of large parts of the Balkans peninsula by the Ottoman Empire resulted in barriers to the independence of the Southern Slavs altogether (Hösch, 2011: 30-1). A contemporary leftover of the Ottoman Empire, Bosnia-Herzegovina's access to the Adriatic, the so-called Neum corridor (see VIII.2.5), is a result of the 1699 Treaty of Srjemski Karlovci and the 1718 Treaty of Požarevac where Venice ceded two buffer areas that separated it from the Republic of Ragusa (today Dubrovnik) to the Ottoman Empire (Fuerst-Bjeliš and Zupanc, 2007: 43). In particular, establishing an independent Slovenia or Croatia proved virtually impossible as the newly acquired taste of many Croats and Slovenes for the French ideas of Enlightenment and autonomous government clashed with the views in Vienna (Moodie, 1945, 95-6) who would not compromise on the concept of centralist rule (Rojnić, 1945: 116; Prunk, 1996: 73-4).

The frequency of *boundary changes* in the Julian Region between the Campo Formio Treaty in 1797 and the Vienna Congress in 1815 is substantial and highlights the borderland

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<sup>68</sup> Venice's alleged and mythical decadence as portrayed in the contemporary British and French press at the time contrasts sharply with the necessity of Venice having to give in to French military determination, as was contended in informed diplomatic circles back then (Laven, 2011).

character of the area at the time. After the defeat of Venice, Austria took over Istria and Dalmatia (in addition to the domestic Venice ‘homeland’ area). Eight years later, when the Kingdom of Italy was founded, Austria had to hand over its newly acquired territories. In 1809, after a successful French military campaign, Austria had to cede Trieste, Fiume (Rijeka) and Dalmatia to Napoleon. Further, between 1811 and 1814, internal boundaries were re-arranged following military-administrative considerations. After the lands had come back to Austria, the region termed Illyrian Kingdom - to be re-branded “Küstenland” (Littoral) in 1849 - remained largely intact until after the end of World War I in 1919. In 1866, however, Austria had to cede so-called Venetian Slovenia in the north-west to Italy as a result of the defeat in the war against Prussia and Italy (Novak, 1970: 15; Prunk, 1996: 87-8). Whilst the Ljubljana plain had been of strategic importance for Napoleon looking to the north-east facing Austria as the main rival, the comeback Austrian rulers in the Julian Region now shifted their focus towards the Adriatic coast with Pola (Pula) on the southern tip of Istria becoming the naval base for the Habsburg fleet (Moodie, 1945: 96-9; Duroselle, 1966: 59).

### IV.1.3 Treaty of London

By the end of 1914, World War I had become a stalemate and the Triple Entente (Great Britain, France and Russia), in their fight against imperial Germany and its ally Austria-Hungary, were trying hard to gain momentum (Djokić, 2010: 40; Lederer, 1963: 5). Italy which had stayed neutral was, in the view of the Entente, to be persuaded to join the war, or, in the view of Austria-Hungary, to stay neutral. This put Italy in a strong bargaining position (Novak, 1970: 23). At the end of the day, the Entente Powers managed to gain Italy’s support through the secret Treaty of London. As a result, Italy, after six weeks of negotiations (Djokić, 2010: 41), entered the war joining the Entente in May 1915. The Treaty of London from the same year promised Rome key territories in the Eastern Adriatic by the time the war was over (Moodie, 1945: 140-2; Novak, 1970: 23-4; Von Reiszwitz, 1954: 69).

The territories assigned to Italy by the Treaty of London were as follows:

(i) Trentino, South Tyrol, Trieste, the counties of Gorizia and Gradisca; (ii) the whole of Istria including Trieste<sup>69</sup>; (iii) the Quarnero (Kvarner) Bay including Volosko (Opatija) and the Kvarner islands of Cherso (Cres) and Lussino (Lošinj; all under Article 4); and (iv) the province of Dalmatia (Article 5).<sup>70</sup>

The remainder of the eastern Adriatic territory including the coast and Fiume/Rijeka<sup>71</sup> was assigned to Croatia, Serbia, Montenegro, and Albania respectively (Articles 5 and 7). Serbia, notably, had not been informed about the treaty as the odds were that it would never have accepted Dalmatia (which was considered South Slav land<sup>72</sup>) to go to Italy. The Serb leaders were, however, not able to persuade Russia to block the treaty (Djokić, 2010: 41-2).

Putting things into perspective, it could be argued that Italy, by means of the Treaty of London, seemed enabled to re-establish the earlier hegemony of the Republic of Venice in the Adriatic (Moodie, 1945: 136), or, at least strengthen its leading role in Southeast Europe (Lederer, 1966: 9).

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<sup>69</sup> Fiume/Rijeka, however, was not assigned to Italy, but to Yugoslavia (see IV.2.2).

<sup>70</sup> Place names in brackets added by the author to reflect current place names.

<sup>71</sup> The port city became a thorny issue during the Paris Peace Conference only to be settled later on; see IV.2.2.

<sup>72</sup> According to Lederer (1966: 9), Dalmatia had become “the cradle of Yugoslav nationalism, the center of the Illyrian Movement, and subsequently the fountainhead of Serbo-Croat cooperation” in the 19th century.

To sum up, the phase between the end of the Venice Empire 1797 and the end of World War I saw an unparalleled time of near-constant violent conflict in the upper Adriatic. Slovenes and Croats were under foreign rule, and many thousands of them lost their lives in the battles fought for the occupying rulers. The enormous frequency of boundary changes which the Croats and Slovenes themselves had no say on meant having to arrange from scratch for the local population. On top of the alterations of territorial sovereignty came the varying degrees of appreciation of cultural autonomy. For the first time, the Napoleonic administration allowed for the use of the native language (Slovenian, Croatian and Italian) in schools. Whilst not cutting back on language autonomy, the comeback of Habsburg meant the return of centralist rule. These processes may suggest that the appetite for shaking off heteronomy has constantly grown for the South Slav people over that period.

## **IV.2 Yugoslavia I**

During World War I, preparations had been underway for the eventual founding of a South Slav, i.e. Yugoslav, State. Major efforts on the diplomatic front had to be made in order to achieve this goal. Yet, the views within the southern Slav communities on the future State's disposition and constitution differed substantially (Newman, 2015: 15-6; Hondius, 1968: 92-94). Yet, the common aim prevailed to live in a joint State of some kind and to emancipate from foreign rule (such as Habsburg, Italy, or the Ottoman Empire), aggression, the massive loss of lives<sup>73</sup>, and exploitation (Newman, 2015: 14; Calic, 2014: 74-78; Sekulić, 2004: 465).

### **IV.2.1 Founding a new State**

Many political leaders from the Slovene, Croat and Serb community respectively left their home regions after the start of World War I. In May 1915, they founded the South Slav or Yugoslav Committee (*Jugoslavanski odbor*) in London organized by the Croats Frano Supilo and Ante Trumbić (Novak, 1970: 25; Calic, 2014: 78-9; Djokić, 2010: 37). What the Yugoslav Committee founders had in mind was a Yugoslav State as an equal partnership of Serbs, Croats and Slovenes (Lederer, 1963: 5). By 1917, there were three in-exile-groups of actors determined to shape the stakes of a future Yugoslav State. Apart from (i) the *Yugoslav Committee* in London, there was the (ii) *Serbian government-in-exile* on Corfu<sup>74</sup> headed by Nikola Pašić. His approach was the liberation and unification of Serbs, Croats and Slovenes into one State, but within a Serbian national framework (Lederer, 1963: 5; Djokić, 2010: 20; Ramet, 2006: 42). The third strand of South-Slav unification was represented by the (iii) *Yugoslav Club* under the chairmanship of Antun Korošec of Slovenia, with a Croat and Serb Vice-President respectively. The Yugoslav Club explored ways of uniting the areas of Slovenes, Croats and Serbs within the realm of Austria-Hungary (Calic, 2014: 79; Djokić, 2010: 53; Ramet, 2006: 40).

The initially competing camps of (i) the Yugoslav Committee, and (ii) the Serbian government-in-exile finally joined forces. What might have united them was the view that a future Yugoslavia was the best means of protection against Italian expansion and German

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<sup>73</sup> During World War I, according to (Calic, 2014: 76), Serbia lost 1.2 million lives (soldiers and civilians). 300.000 Slovene, Croat and Bosnian soldiers fighting for Austria-Hungary were killed on the Isonzo/Soča front in the battles against Italian troops in the north-west. Serbia lost a fifth of its population on the battleground and due to disease and starvation during the war (Newman, 2015: 14).

<sup>74</sup> The Serbian government had retreated from the temporary capital Niš through the mountains of Montenegro and Albania to Corfu in late 1915 (Djokić, 2010: 47).

aggression (Djokić, 2010: 46). The details of the Treaty of London (which had become public knowledge in the meantime) on Istria and Dalmatia - and with it some 500.000 South Slavs<sup>75</sup> going to Italy - did play a role. The joint Corfu Declaration of both exile bodies from July 1917 stated the plan of setting up a *Kingdom of the Serbs, Croats and Slovenes* under the Karadjordjević dynasty after the end of the war (Calic, 2014: 79; Von Reiszwitz, 1954: 70). Pašić and Trumbić, however, had not reached agreement on whether the State should be decentralised or not.<sup>76</sup> In October 1918, the Yugoslav Club founded the Zagreb-based *National Council* which was to be in charge of the South Slavs in what still was Austria-Hungary. The National Council announced the founding of a State of Slovenes, Croats and Serbs (Djokić, 2010: 49-53) as an independent entity within the Habsburg jurisdiction (Newman, 2015: 127-9; Lederer, 1966: 25).

Notwithstanding the failure of a joint meeting of the Serbian Government, the main Serbian opposition parties, the Yugoslav Committee and the National Council on the terms of Yugoslav unification in Geneva in early November 1918<sup>77</sup>, Prince Regent Alexander of Serbia proclaimed the *Kingdom of Serbs, Croats and Slovenes*<sup>78</sup> on 01 December 1918 (Djokić, 2010: 54-55; Calic, 2014: 81; Newman, 2015: 129). It has to be noted that such unilateral pre-determination of the constitutional nature of the common State did not go down well with Croats and Slovenes (Calic, 2014: 86; Ramet, 2006: 44). Yet, Serbia naturally played a strong role in practice, not least because it had been an independent State since 1878 (as opposed to the other two entities) and had a victorious recent past in the 1912-18 Balkan Wars with Prince Regent Alexander Karadjordjević as the perceived peoples' liberator (Newman, 2015: 16-7). During the debate in the Constituent Assembly, alternative structures for the State were discussed. Korošec of the Yugoslav Club presented a model of six provinces determined by political-historical criteria, i.e. three Catholic and three Orthodox provinces. Trumbić introduced a federal province-based devolution of legislation away from the central parliament. In the final vote on the draft constitution on 28 June 1921, however, the parliamentary-monarchy model, the so-called *Vidovan Constitution*, was adopted by 223 votes in favour, 35 votes against, and 152 abstentions (Hondius, 1968: 96-7). The subsequent introduction of the *oblast* system in 1922, i.e. new administrative territorial units thus rejecting the former regional entities from Austrian-Hungarian times, could indeed be seen as a centralist move which was meant to discourage disunity and separatism. The 33 *oblasti* constituted a large number of relatively small units that had nothing to do with former historical or cultural borders (Radan, 1999: 138-9; Jović, 2009: 48).

The young State had lately been under heavy territorial pressure. Following the armistice of the Allied Powers with Austria-Hungary and Germany on 31 October 1918, Italy was entitled to occupy the former Austrian-Hungarian territory up to the 1915 Treaty-of-London line (see IV.1.3). As a matter of fact, however, the Italian navy and army went further taking over Trieste, Pula, the whole of Istria, Fiume/Rijeka<sup>79</sup>, Zara/Zadar and large parts of Dalmatia

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<sup>75</sup> The figures slightly differ. Moodie (1945: 149-150) posits "477.000 Yugoslavs". This figure is substantiated by Calic's (2014: 84) "almost half a million Slovenes and Croats". Čermelj (1945: 245) accounts for "600.000 Croats and Slovenes". Cresciani (2004: 4) reports 325.000 Slovenes.

<sup>76</sup> Trumbić was against a centralised State, but would also reject federalism since it was too complex. Pašić favoured centralism. The compromise solution was to leave the issue open (Djokić, 2010: 49-52).

<sup>77</sup> Serbian troops liberated Belgrade and the entire Serbian State by 03 November 1918 (Djokić, 2010: 53; Lederer, 1963: 46).

<sup>78</sup> Notwithstanding the fact that the *Kingdom* was renamed *Yugoslavia* only in 1929, the author uses *Yugoslavia* for reasons of clarity and coherence.

<sup>79</sup> Fiume was expressly not part of the 1915 Treaty of London, but had recently become a demand by Italian nationalists no Italian government could ignore (Novak, 1970: 29-30).

including its respective hinterlands within days. Almost the entire Austro-Hungarian naval fleet was finally under the control of Italy (Novak, 1970: 27; Lederer, 1963: 54-59).

#### **IV.2.2 Paris Peace Conference and Treaty of Rapallo**

The first Yugoslav State was facing a tough struggle for recognition<sup>80</sup>, not least at the Paris Peace Conference commencing in January 1919.<sup>81</sup> The Paris Conference marked the first of two phases of efforts to settle the borders in the Julian Region after the end of World War I. The second phase constituted direct negotiations between Yugoslavia and Italy between March 1920 and January 1924 (Moodie, 1945: 166).

The U.S. who had entered World War I only in April 1918 attempted to broker compromise at the Paris Conference. President Wilson, whose 14 Points<sup>82</sup> stipulated the principle of self-determination, had become a pivotal factor for the post-war political order in East-Central and Southeast Europe (Calic, 2014: 83). He tabled a number of detailed proposals<sup>83</sup>, but neither the Yugoslav nor the Italian delegation were ready to accept them, so the delimitation of the Italo-Yugoslav border had to be left to a future agreement (Novak, 1970: 29-30). What had further complicated the talks at Paris was the fact that the Yugoslav delegation led by Nikola Pašić with Ante Trumbić as deputy chair was not united and had no common approach to (i) self-determination and (ii) the Yugoslav territorial claims at the beginning of the conference (Djokić, 2010: 74-80). In the end, the Yugoslav claims in the eastern Adriatic vis-à-vis Italy turned out to include the province of Dalmatia (with around 600.000 inhabitants, predominantly Yugoslav and a mere three percent Italians), the town of Rijeka (Fiume) with 50.000 inhabitants (Yugoslavs and Italians), and Istria including Trieste and Gorica (780.000 inhabitants) with 55 percent Yugoslavs and 37 percent Italians (Djokić, 2010: 82).

As mentioned above, the future of the Italo-Yugoslav frontier was still open when the Paris Conference ended in June 1919. By November 1920, the Yugoslavs accepted an Italian invitation to a bilateral conference to settle what was termed the Adriatic question. The Yugoslav delegation went to Rapallo under fairly unfortunate conditions: U.S President Wilson, who had been sympathetic to the Yugoslav cause<sup>84</sup>, reached the end of his term, and a Republican was to succeed him. As a result, any interest in the Yugoslav destiny on the part of the United States was gone for the time being. In mid-October 1920, the Klagenfurt plebiscite resulted in the Klagenfurt Basin being assigned to Austria despite its substantially Slovene character.<sup>85</sup> That event was a bitter blow to the Yugoslav prestige weakening the country's claims to Slovene territories. Further, citizens in Yugoslavia and Italy had, by and large, become annoyed by the endless conferences on border issues (Moodie, 1945: 186-188). On the diplomatic front, Italy had acted skilfully in retreating from Albania, thus doing away with

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<sup>80</sup> The U.S. recognized Yugoslavia in February 1919, Britain and France did so only in early June followed by Italy at the end of that month (Lederer, 1970: 205; Hondius, 1968: 91).

<sup>81</sup> Representatives of the new state were formally accredited as the delegation of the "Kingdom of Serbia", despite of the fact that such state politically no longer existed. The delegation members themselves would always refer to "Kingdom of Serbs, Croats and Slovenes" (Djokić, 2010: 53). On the question of whether the Serb-Croat-Slovene delegation was indeed a new State, there were many different views (Hondius, 1968: 91).

<sup>82</sup> The Wilson Points are reprinted in Djokić (2010: 50-51).

<sup>83</sup> For an analysis of the sophisticated U.S. boundary proposal, the so-called Wilson line, see Moodie (1945: 168-184). Lederer gives an insight into Wilson's handling of the delicate boundary issue (1963: 184-217).

<sup>84</sup> Wilson has acted as a strong champion of self-determination and rejected secret treaties, such as the Treaty of London (Djokić, 2010: 110).

<sup>85</sup> The Yugoslav army occupied the plebiscite zone but had to humiliatingly retreat within two days after a joint Franco-British-Italian ultimatum (Lederer, 1963: 296-7).

the 'Italian threat' on Yugoslavia's southern border. Equally unfavourably for the South Slavs, Britain and France had become increasingly reluctant with Yugoslavia (Lederer, 1963: 300-1).

With no allies at hand, foreign minister Trumbić had to accept a deal which had largely and secretly been prepared between the two capitals over the preceding months. Italy's military strength had certainly played its role, too. The Yugoslav government, however, instructed the negotiating delegation for Rapallo with far-reaching goals, and, remarkably, *arbitration* [sic] under the auspices of Britain, France and the U.S. was to be the option in the case of non-agreement (Lederer, 1963: 301-2).

The Rapallo conference was to last for only four days, from 08 to 12 November 1920. The main results as for the Adriatic were:

(i) Istria including Trieste went to Italy; (ii) Yugoslavia retained Dalmatia except for Zara/Zadar; (iii) Fiume/Rijeka was to become an independent State with a small corridor to Italian-held Istria; and (iv) the Kvarner islands of Cres/Cherso and Lošinj/Lussino went to Italy. Krk/Veglia was assigned to Yugoslavia (e.g. Hondius, 1968: 92).

Italy gained considerably more than it could have expected. The territorial gains in the north-east of the Julian Region, which cannot be covered here in detail, were substantial and exceeded those promised by the Allies in the Treaty of London. All railway traffic to and from the two Adriatic ports of Trieste and Fiume/Rijeka came under the control of Italy<sup>86</sup> meaning that transport outlets for most Yugoslav exports did depend on Italian non-interference. Road links between Fiume/Rijeka and Ljubljana also came under Italian control (Moodie, 1945: 191-193; Novak, 1970: 31-2).

The status of Fiume/Rijeka, the second largest port in the Upper Adriatic after Trieste, was a special case in point. According to the Rapallo agreement, the city was to be an independent State linked by a tiny strip of coastal land to Italian-controlled Istria. In 1924, following internal power struggles between local Italian nationalists in Fiume and the government in Rome, and after Mussolini had come to power in the meantime, Fiume became Italian by means of the Treaty of Rome (Hondius, 1968: 92). Notably, Sušak, the eastern suburb of Fiume across the river Eneo/Rejčina, was assigned to Yugoslavia, including Baroš pier<sup>87</sup> (Novak, 1970: 33-4; Calic, 2014: 84). As a result, the river Eneo/Rečina became an international boundary between two parts of a conurbation that had for centuries been one single settlement and functionally coherent. Frontier permits (*cartes frontalières*) and temporary permits (*cartes de passage*) were supplied to dampen inconveniences for Yugoslavs from Sušak and its hinterland commuting into Fiume or visiting relatives there. Still, the new arrangement seriously hampered the day-to-day activities of tens of thousands of Yugoslavs, creating a feeling of bitterness and anger (Moodie, 1945: 207-8).

Overall, the Rapallo and Rome provisions may be seen as a major boost to Italian claims at the expense of Yugoslav territory. Whilst the Allies were relieved that the struggle over the Adriatic was finally over, the government in Rome was in a triumphant mood. The opposite spirit prevailed in Belgrade, although there was also some sense of relief (Moodie, 1945: 208; Lederer, 1966: 307). Novak (1970: 34) argues that, in terms of the moral of the story, "to gain a territory one must occupy it by force. A *de facto* occupation is better security than awaiting settlement at a peace conference". The cost of the Italian territorial expansion, however, was the poisoning of the future relations between the two countries. It appears fair to say that the

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<sup>86</sup> Except for the Fiume/Rijeka-Karlovac-Zagreb line.

<sup>87</sup> Yugoslav access to the Baroš port facilities had been secured already at Rapallo, albeit not in the treaty provisions proper, but in a secret exchange of letters (Lederer, 1963: 306).

territorial settlements in the Julian Region after World War I resulted in the birth of Yugoslav irredentism (Moodie, 1945: 212; Lederer, 1963: 307; Novak, 1970: 42-3).

### IV.2.3 Italian rule in Istria

As a result of the massive territorial shifts in favour of Italy<sup>88</sup>, around 500.000 Slovenes and Croats came under Italian rule in Istria. The following years marked a policy of systematic neglect of minority rights on the part of the Italian authorities in Istria. The new rulers operated a policy of assimilation or so-called 'ethnic homogenisation' (*bonifica etnica*) towards or "colonisation" of the Slavic population (Wörsdörfer, 2004: 221-223; 241). Other scholars speak of "persecution", "denationalisation" (Novak, 1970: 34-37), or "occupation" and "cultural subjugation" (Cesciani, 2004: 3).

The Italian policy of forced assimilation proved particularly heavy in the fields of schooling, education and language use, not least because the Treaty of Rapallo did not entail any provisions on minority rights for the newly acquired Italian territory in Istria and the Julian Region, whereas the Italian minority in Dalmatia was to enjoy minority protection (Slovene-Italian Report<sup>89</sup>, 2004: 14). Many Croat and Slovene institutions were shut down in the first ten years after Italian expansion. 488 primary schools were closed alongside some 400 cultural, social or professional organisations. Equally, 31 newspapers were banned between 1918 and 1928. The use of Slovene and Croatian was prohibited in public, all State institutions and in churches (Cresciani, 2004: 4; Novak, 1970: 37). By the beginning of the 1923/24 school year, Italian was the only language in all primary schools in Istria (Čermelj, 1945: 261). By 1928, the Italian Regime forced Croats and Slovenes in Istria to 'italianise' their names and surnames (Cresciani, 2004: 4; Novak, 1970: 37; Čermelj, 1945: 265-268).<sup>90</sup>

As a result, the ethnic relations in the peninsula deteriorated drastically and the traditional 'borders' between the towns and the countryside were fortified. Istrian cities became more or less completely italianised, whereas the Croatian and Slovenian political and cultural life in Istria was pushed to the small villages in the countryside (D'Alessio, 2006: 26). Still, the Croat and Slovene population would show an interest in the Italian language and literature, many people being bilingual<sup>91</sup>, whereas the Italian speakers' interest in the language of the local population was virtually zero (Schiffner, 1946: 22; Slovene-Italian Report, 2004: 17).

Despite of the fact that a good 100.000 Slovenes and Croats left the newly acquired Italian territories in the Julian Region, the Kvarner and Dalmatia between the two World Wars (Slovene-Italian Report, 2004: 16), the relative demographic strength of the Croats and Slovenes would not change, but even slightly increase (D'Alessio, 2006: 26-7).

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<sup>88</sup> Moodie cites two studies (an Italian one from 1920 and an American one from 1937) which account for 9.000 square kilometres having been annexed to Italy (Moodie, 1945: 191, 211-2).

<sup>89</sup> A joint bilateral Historical and Cultural Commission was established in October 1993 by the foreign ministers of Italy and Slovenia. The Commission worked for seven years and produced the remarkably frank report "Slovene-Italian Relations 1880-1956" in July 2000. The report was meant to be included in the secondary-school curricula of both countries. To that end, the curricula in Slovenia are being amended for the moment (information obtained from the Slovenian Ministry of Education, 07-01-2019). Schools in Italy have a high level of autonomy since the reform in 2000, so that the decision on the selection of curricula items is a matter for the individual schools at local level (information obtained from the Italian Ministry for Education, 18-01-2019).

<sup>90</sup> In the Province of Trieste, the surnames and names of 60.000 people were italianised (Cesciani, 2004: 4). In Pola/Pula, 100.000 people had to change their surname (Čermelj, 1945: 265).

<sup>91</sup> In Fiume/Rijeka, for example, the first bilingual classes started as early as 1521 (Kobler, 1896 [sic]: 185).

The Italian fascist assimilation policy, often carried out in a merciless manner, "sowed [...] the seeds of hatred and a yearning of revenge" (Cresciani, 2004: 11) fostering the spread of an anti-fascist spirit and subsequent action - peaceful, violent and sometimes terrorist. Such action, in turn, provoked severe repression on the part of the Italian authorities, including prison sentences and executions.<sup>92</sup> The Italian Communist Party came to realise only step by step that the Yugoslav irredentist movement was an ally, despite differing notions of what self-determination meant in practice. In 1936, an Action Pact between the Communist Party of Italy and the National Revolutionary Movement of Slovenes and Croats (TIGR<sup>93</sup>) materialized leading to a solid anti-fascist movement (Slovene-Italian Report, 2004: 17-8) on the eve of the heavy impact of World War II on Yugoslavia.

In a nutshell, the birth of the first Yugoslav State was a delicate and difficult task for the South Slav leaders. There was nothing much to gain on the negotiating table at the end of World War I. On the contrary, the secret territorial concessions given to Italy by the Entente Powers already *during* the war meant the humiliating loss of the Istrian territories for the newly founded Yugoslavia, and a source of future irredentism. Domestically, the constitutional nature of the common State was disputed between centralists and federalists, and the 'compromise' was to simply continue the pre-existing Serbian parliamentary-monarchy model as a three-named kingdom. A weak State and the external threat of the fascist movement appear to have paved the way for a more unifying political force not least determined to regain territorial sovereignty over the lost territories in Istria.

### **IV.3 Yugoslavia and World War II**

The Kingdom of Yugoslavia collapsed with the unconditional surrender on 17 April 1941 following the German air raids on Belgrade on Easter Sunday 1941<sup>94</sup>, and the subsequent German-Italian invasion of Macedonia, Serbia, Slovenia and Croatia respectively from 07 to 15 April 1941 (Calic, 2014: 136; Matl, 1954: 101).

#### **IV.3.1 Partition of Yugoslavia**

Hitler and Mussolini tore Yugoslavia apart. On 03 May 1941, in a move breaking international law banning the annexation of territory before a peace treaty has been signed, Italy raked in the province of Ljubljana with more than 5.000 square kilometres of Slovenia including around 350.000 people. In addition, Dalmatia including the islands of Arbe (Rab) and Veglia (Krk) were incorporated into Italy accounting for another 5.000 square kilometres and 380.000 inhabitants of whom 280.000 were Croat, 90.000 Serbs and 5.000 Italians. The Italian territorial 'enlargement' accounted for a total of around 700.000 Slovenes, almost half of the Slovene nation (Cresciani, 2004: 5; Slovene-Italian Report, 2004: 19; Calic, 2014: 137).

Germany equally unlawfully annexed Lower Styria and Upper Carniola from Slovenia including Maribor and Bled (Ramet, 2006: 113). Croatia without Istria, Dalmatia (except for the islands of Brač and Korčula) and the Kvarner islands became the semi-autonomous, so-

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<sup>92</sup> The Special Tribunal for the Protection of the [Italian] State "passed fourteen death sentences, ten of which were executed" (Slovene-Italian Report, 2004: 17).

<sup>93</sup> Representing the initials of Trieste, Istria, Gorizia, Rijeka (Cresciani, 2004: 4)

<sup>94</sup> The city was bombed on 06 April 1941 without prior notice (Pirjevec, 2018: 62). 3.000 people lost their lives exceeding the total casualties of the WW-II bombings of Warsaw, Rotterdam, and Coventry (Calic, 2014: 136).

called Independent State of Croatia (NDH), led by Ante Pavelić, incorporating Croat lands (save for the coastal territories held by Italy) and including Bosnia-Herzegovina, under the *de-facto* control of the Axis powers (Newman, 2015: 245; Calic, 2014: 137-8; Ramet, 2006: 113-4, 128-9; Matl, 1954: 103-5)<sup>95</sup>. Serbia was stripped off most of its recent territorial gains, and, after a brief period of German direct rule, was run by the pro-Axis government of Milan Nedić, albeit with very little domestic support (Newman, 2015: 245-9).

By means of the Vienna agreement from 22 April 1941 drawn up between the foreign ministers of Germany and Italy - including treaties with Hungary, Bulgaria and Albania - the whole of what was the Kingdom of Yugoslavia ended up as a sphere of interest divided up between Germany and Italy (Novak, 1970: 46; Wörsdörfer, 2004: 350-2)<sup>96</sup> for around two-and-a-half years. Whereas Mussolini considered Southeast Europe as Italy's natural sphere of interest and *spazio vitale*, Hitler was driven by the desire to destroy the post-World-War-I order, secure transport corridors and economic resources relevant for warfare, and to prevent an Allied landing in the region (Calic, 2014: 137-8; Ramet, 2006: 128).

### IV.3.2 Resistance movement

Whilst the Yugoslav surrender marked the peak of German and Italian power and territorial expansion in the region, it may also be considered as the starting point for a strong and sustainable Yugoslav resistance movement against fascist occupation. In short, two resistance organisations emerged: the royalist *Chetniks* and the communist *Partisans*.

The Chetniks under the leadership of Draža Mihajlović, a former colonel of the (royal) Yugoslav army, consisted of former army officers who recruited volunteers after they had retreated into the mountains as from mid-April 1941. Mihajlović also became war minister in the Yugoslav government-in-exile resident in London whilst he stayed on the ground, largely in the Chetnik headquarters in Ravna Gora, Serbia. The Chetniks would avoid open warfare with the occupant powers (Newman, 2015: 249-50; Novak, 1970: 47-8; Ramet, 2006: 142; Calic, 2014: 145-6).

The Partisans, the armed units of the National Liberation Movement, fought for a new and communist order in Yugoslavia. Their leader was Josip Broz, known as Tito. The Partisans organized a network of regional Liberation Committees with the Anti-fascist Council for the National Liberation of Yugoslavia (*AVNOJ*) becoming the supreme body for the whole country acting as a quasi-federal government by 1943 (Pirjevec, 2018: 89-93, 111-115; Đilas<sup>97</sup>, 1985: 27; Novak, 1970: 48-49; Calic, 2014: 147). The Partisans, like the Chetniks, would gather in the mountains, but not in an attentive, but in an attacking conduct (Newman, 2015: 259-60; Wörsdörfer, 2004: 336-8; Calic, 2014: 147).

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<sup>95</sup> On the rise of the fascist *Ustaše* movement in Croatia see Newman (2015: 176-183).

<sup>96</sup> Hungary (following Bulgaria and Romania) had, in March 1941, become party to the German-Italian-Japanese Triple Pact of 1940 and was assigned the south-west of Slovenia (Prekmurje), the western part of Vojvodina and Baranja (along the Danube). Bulgaria was authorized to rake in Macedonia (Calic, 2014: 136; Ramet, 2006: 113; Novak, 1970: 50). For the situation in the various occupation zones see Ramet, 2006: 129-142.

<sup>97</sup> Milovan Đilas was one of the closest aides to Tito during World War II and the early years of the second Yugoslavia. He was Tito's special envoy to tell Stalin about Yugoslavia's break-away from the Kremlin in 1948. Đilas later became increasingly critical towards his own Communist party. Turning into a dissident in 1954, he was put on trial and sentenced to prison several times (see obituary in "The New York Times", 21 April 1995).

After some initial joint Chetnik-Partisan action, the irreconcilable ideological-political differences between the two camps lead to an atrocious “civil war” (Pirjevec, 2018: 78; Novak, 1970: 44) following a Chetnik attack on the Partisans headquarter in Užice in western Serbia in early November 1941 (Ramet, 2006: 144). Subsequently, the Partisans became the leading resistance force for broadly three reasons: (i) the Chetnik movement depended on orders from the government-in-exile, whilst the Partisans had a local command; (ii) the Partisan units had been built up rapidly by experienced veterans from the Spanish civil war and by former Yugoslav army officers, and the units were run efficiently; (iii) the Partisans were able to win the support of the Western Allied Powers, notably Britain and the United States (Pirjevec, 2018: 78-89; Calic, 2014: 147-8; Matl, 1954: 115-7; Ramet, 2006: 152).

The atrocities and massacres committed during and immediately after World War II, including ethnic cleansing, cannot be described but as ruthless and enormous. They occurred between the rivalling Partisan and Chetnik forces of the resistance movement, were committed by the German and Italian troops against the resistance movement and the local population<sup>98</sup>, and happened between pro-fascist forces and the resistance movement, not least in Slovenia and with regard to the *Ustaše* in NDH Croatia, a pseudo-independent puppet state on behalf of the German occupiers. The cruelties clearly exceed the scope of this study.<sup>99</sup>

It must be borne in mind, however, that many of the atrocities occurring during World War II in Yugoslavia have led to bilateral relations being historically burdened. When political leaders abused and instrumentalised national(ist) sentiments, they greatly re-surfaced during and immediately after the dissolution of Yugoslavia II. This is particularly evident for the relations between Croatia and Serbia (see IV.5 and IV.5.2)

### IV.3.3 Liberation of Yugoslavia

After Italy’s unconditional surrender to the Allied Powers and the Soviet Union on 8 September 1943, the German army took over the Adriatic Littoral (“Operationszone Adriatisches Küstenland” - OZAK). The Germans on their part had a special interest in the ports of Trieste, Fiume/Rijeka, and Pula. In addition, Hitler issued a direct order to ruthlessly extinguish Communist resistance in Istria (Wörsdörfer, 2004: 429). For a few days, the Partisans had managed to occupy the area of Italian retreat safe for the cities of Trieste, Pula and Rijeka, but had to retreat themselves deep into the forests and mountains by the time the Germans arrived. However, large amounts of weapons and ammunition of the Italian army had fallen into the Partisans’ hands (Novak, 1970: 70-1, 80-1; Calic, 2014: 153-4).<sup>100</sup> By and large, Italian surrender had strengthened Tito’s army all over the place.<sup>101</sup>

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<sup>98</sup> For e.g. the killing of 2.300 Serb civilians by the *Wehrmacht* in October 1941 in Kragujevac as a revenge for Partisan and Chetnik sabotage see Pirjevec (2018: 79-80).

<sup>99</sup> A general survey for Yugoslavia as a whole can be found in Calic (2014: 157-166, 169-70). Ramet touches on the activities of Chetniks and Partisans, the activities of *Ustaše*, and the role of the Catholic Church in Croatia (2006: 114-129), as well as the massive massacres at Bleiburg and Kočevje (160-2). Novak gives an account of the events with particular regard to Slovenia (1970: 50-69). Cresciani provides an insight into the Yugoslav ‘roll-back’, including the *foibe* in Istria, and the events in Zara and Fiume (2004: 6-10). Wörsdörfer delivers an Italo-Yugoslav national-sentiment angle to the Partisan movement (2004: 332-349). For a bilaterally agreed Italian-Slovene account, the report of the joint expert group stands out (Slovene-Italian Report, 2004: 21-24).

<sup>100</sup> Tito’s Partisan army accounted for 300.000 men and women by late 1943. The Germans had to deploy 250.000 troops to fight the growing resistance (Calic, 2014: 153).

<sup>101</sup> Bosnia-Herzegovina with the Partisan headquarters at Bihać remained a Partisan stronghold. Tito’s troops also had a firm grip on Slovenia and Macedonia. Serbia’s underground forces, however, remained in the hands of Mihajlović’s Chetniks (Novak, 1970: 89).

The positive momentum for the Partisans was further advanced by the events on the international diplomatic stage. The Teheran Conference in December 1943 produced an agreement on Yugoslavia between Churchill and Stalin. U.S. President Roosevelt was in the loop, but not a party to the deal. The Partisans were declared the only underground organisation to receive British military support. The Chetniks were asked to join forces with Tito's troops and both parties were ordered to form a coalition to act as a provisional caretaker government<sup>102</sup> (Pirjevec, 2018: 126-31, 140-44; Đilas, 1985: 25-8; Novak, 1970: 89-92).

After a heavy attack of German troops (who were on the retreat from Greece) on the Partisan headquarters in Drvar, Tito was evacuated to the island of Vis in early June 1944 (Pirjevec, 2018: 435)<sup>103</sup>, where he had his new headquarters protected by the British navy<sup>104</sup> and still managed to go on a secret trip to Moscow to see Stalin.<sup>105</sup> By September 1944, Tito had become the sole *de-facto* leader of Yugoslavia, also in full command of the armed forces (Newman, 2015: 259-260; Novak, 1970: 92-93; Matl, 1954: 118).

Partisan and Soviet<sup>106</sup> troops liberated Belgrade on 20 October 1944<sup>107</sup> where Tito's headquarters subsequently moved to. The liberation of Belgrade may also be seen as a major boost for Tito's popularity marking "the final, crowning step toward personal, autocratic power" (Đilas 1985: 12). The Partisan army had further increased by then and with a massive 800.000 troops<sup>108</sup> the liberation of the rest of the country was only a question of time. On 06 April 1945, the Partisans gained control over Sarajevo, and on 09 May 1945, Tito's troops took over Zagreb and Ljubljana. At the end of the day, Yugoslavia was able to do away with the occupation without much help of the allies (Calic, 2014: 172; Pirjevec, 2018: 135-140). Tito went even further moving across the northern border into the Klagenfurt/Celovec area in Austrian Carinthia with the aim of 'bringing home' the Slovenian community there, but had to retreat following Allied pressure (Ramet, 2006: 159, 172; Prunk, 1996: 136).

#### **IV.3.4 Founding of Yugoslavia II**

After the election for the constitution-forming body on 11 November 1945<sup>109</sup>, the Constituent Assembly declared Yugoslavia a republic, and King Petar was banned from the country on the grounds of collaboration with Chetnik forces. On 31 January 1946, the regime adopted a new constitution, the Federal People's Republic of Yugoslavia (FPRY) consisting of a federation of

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<sup>102</sup> In November 1943, the second session of AVNOJ had declared the establishment of a nine-member National Committee of Liberation as the supreme legislative and executive body of a federal Yugoslavia. This body constituted a *de-facto* provisional government (Prunk, 1996: 134-5; Ramet, 2006: 157; Calic, 2014: 154). The coalition agreement the Allies had called for between Tito's AVNOJ and the government-in-exile was signed in June 1944 on the island of Vis (Matl, 1954: 118; Novak, 1970: 92; Prunk, 1996: 134).

<sup>103</sup> For Operation "Rösselsprung" during which Tito and his staff were in the end evacuated to Bari by a Russian plane see Pirjevec (2018: 122-6). The British subsequently flew Tito from Bari to Vis (Pirjevec, 2018: 127).

<sup>104</sup> Remarkably, Tito managed to achieve the retreat of two British battalions who had already landed in Kotor Bay, Montenegro (Matl, 1954: 118).

<sup>105</sup> Russian planes stationed in Bari, Southern Italy, were officially practising incognito nocturnal landings without signalling on Vis. In a top-secret operation coordinated beforehand, Tito together with his dog (sic) managed to board a Russian C-47 on the runway without the Brits noticing and took off to Craiova on 19 September 1944 at 03h00 in the morning. The following day he flew to Moscow (Pirjevec, 2018: 133-4).

<sup>106</sup> In a secret visit to Moscow from Vis (about which the British did not know) Tito had convinced Stalin to send Soviet troops (Ramet, 2006: 158; Novak, 1970: 94).

<sup>107</sup> 15.000 German troops and 3.000 Partisan soldiers lost their lives in that very fierce battle (Calic, 2014: 171).

<sup>108</sup> Vis-à-vis 400.000 German and 150.000 NDH soldiers (Ramet, 2006: 159).

<sup>109</sup> The communist-controlled Popular Front received 81.5 per-cent of the vote (Ramet, 2006: 169).

equal nations, the six Republics Serbia, Croatia, Slovenia, Bosnia-Herzegovina, Macedonia, and Montenegro with Serbia entailing the autonomous provinces of Vojvodina and Kosovo (Ramet, 2006: 169; Jović, 2009: 57; Hondius, 1968: 135-7); see fig. 11 below.

Figure 11: The Socialist Federal Republic of Yugoslavia SFRY (Ramet, 2006: xxv)



It is worth noting that none of the six Republics had existed in this shape before, and that there were now three official languages (Serbo-Croatian, Slovenian, and Macedonian) and many minority languages<sup>110</sup>, three religious denominations (Catholic, Orthodox, and Muslim), and two alphabets (Latin and Cyrillic) in the new Yugoslavia of “brotherhood and unity”<sup>111</sup> (Hondius, 1968: 140; Accetto, 2007: 193). Fundamentally, for Tito and Kardelj, the social revolution and the national question were clearly linked, and the national question was the main point of departure for the new Yugoslavia and the answer to the Great Serbian bourgeoisie Kingdom since 1918. In Tito’s words:

“The [...] national liberation struggle would be nothing but words [...] if they did not have [...] a specifically national meaning for each people individually, if they did not mean, together with the liberation of Yugoslavia, the liberation at the same time, too, of Croats, Slovenes, Serbs, Macedonians [...], Muslims, and the rest; [...] if the national liberation struggle did not contain the substance of effective freedom, equality, and brotherhood for all peoples of Yugoslavia. This is the real essence of the national liberation struggle.” (Tito, 1942: 3; cited in Jović, 2009: 56-7)

The constitution combined elements of direct democracy, notably to replace the parliamentary multi-party system (a crucial point in Kardelj’s concept; see Pirjevec, 2018: 395-6), and local

<sup>110</sup> Albanian, Hungarian, Italian, Slovak, Bulgarian and Romanian (Jončić, 1967: 216).

<sup>111</sup> Wachtel and Bennett hold that “brotherhood and unity” actually is an oxymoron referring to separate and at the least potentially contradictory notions. Whereas “unity” stood for full agreement, “brotherhood” implied some substantial level of difference irrespective of the will for closeness (2009: 17).

rule with the leading role of the Communist Party of Yugoslavia in virtually all areas of life (Calic, 2014: 176; Ramet, 2006: 169; Zellweger, 1954: 126; Jović, 2009: 58-61). The most distinctive feature of the 1946 constitution was the concept of the *unity of power* rejecting the classical *separation of power* familiar to contemporary rule-of-law democracies since Montesquieu times (see Accetto, 2007: 207-8; 228-9), thus transplanting “Soviet rules of operation onto the Yugoslav scene” (Hondius, 1968: 152).

A full assessment of Yugoslavia II (1946-1991) as a polity regrettably is beyond the scope of this study (for the SFRY’s dissolution see IV.5).

Still, it appears fair not to assess the Yugoslav experience merely as “a failed attempt at federalism, but primarily as a unique way of constructing a federal polity” (Accetto, 2007: 196).<sup>112</sup> Neither was Yugoslavia about preventing the various ethnic groups from fighting one another. Sekulić et al have tested the causal link between intolerance and ethnic conflict ahead, during and after the dissolution of Yugoslavia. They have demonstrated that (i) ethnic intolerance in post-WWII-Yugoslavia was low, (ii) that it was even slightly in decline towards the end of the of the SFRY and after the wars of secession, (iii) that outright ethnic conflict amongst individuals was absent, but (iv) elite manipulation<sup>113</sup> was a substantial contributor to a rise in ethnic intolerance (Sekulić et al, 2006; see also Milošević and Touquet, 2018).<sup>114</sup> These findings appear to disconfirm a widespread popular myth that the break-up of Yugoslavia was inevitable anyway because of built-in ethnic conflict.

In summary, the German-Italian invasion of Yugoslavia strengthened Tito’s resistance movement. Profiting from Italian surrender in 1943, the resistance movement increased its military power and subsequently received active British and Soviet recognition and support. These processes put Tito in an allied role and secured him the return of the Istrian territories which had been under Italian rule since 1918. Domestically, the military victory over the fascist occupation, branded the ‘liberation war’, put him in a position to replace the monarchy by a republic. A quasi-federal constitution with communist one-party rule was supposed to secure both the country’s unity and some degree of its constituent nations’ relative autonomy. The role of the inter-republican borders appears to have been mainly administrative-territorial rather than ethnic-political.

#### **IV.4 Free Territory of Trieste (FTT)**

The Trieste crisis deserves particular attention. To start with, it constituted the first larger-scale confrontation between the East and the West around the end of World War II. Second, it was the first piece of Allied governance in a bilateral territorial conflict on the southern fringe of the Yalta line. Third, the Trieste issue involved substantial border changes.

##### **IV.4.1 Liberation of Trieste**

During the last weeks of the war, Tito, in a clever move to secure maximum territorial claims (most importantly the return of the entire Julian Region to Yugoslavia), had his troops move into Trieste and the remaining parts of Istria (Duroselle, 1966: 442; Calic, 2014: 178). By April 1945, the struggle was on between British-American Allied troops and the Yugoslav

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<sup>112</sup> Accetto (2007) provides a profound analysis of the interplay between law and politics in Yugoslavia II.

<sup>113</sup> Meaning persuasion of citizens *by* the political elite.

<sup>114</sup> For a survey on the post-Yugoslav sociologists’ reflection of the SFRY dissolution processes see Flere (2014).

army over who would first occupy the Julian Region. Tito was determined to conquer the territory disputed by Italians and South Slavs since 1870 (Calic, 2014: 178) to put a *fait accompli* before the Allies (Pirjevec, 2018: 156; Novak, 1970: 125; Hildebrandt, 1954: 158).<sup>115</sup>

Between the Yalta Conference in February 1945 (partitioning Europe into a Western and Eastern sphere of interest) and mid-April of that year, Yugoslavia had become a part of the Eastern bloc, not least through the Treaty of Friendship between Tito and Stalin. Churchill and Roosevelt had agreed that the Julian Region needed to be under Allied control to have a clear picture of the advancement of the Eastern bloc (Novak, 1970: 132). The Yugoslav army, coming from the southeast, arrived in the centre of Trieste on 01 May 1945, one day before the British troops entered the town from the west.<sup>116</sup> By mid-May, tensions between the Yugoslav troops and the Anglo-American armed forces had climaxed. The British-American combined chiefs of staff had, in late April, instructed the troops on the ground to occupy the entire Julian Region including Trieste, Rijeka and the Kvarner islands, and to establish an *Allied Military Government* (AMG), whereas Tito's forces would not retreat by a single inch (Novak, 1970: 161-196). However, Yugoslav full 'possession' of Trieste lasted for only forty days. On 12 June, Tito's troops had to retreat from the city after heavy diplomatic pressure from Britain and the U.S.,<sup>117</sup> and the absence of Soviet support. The latter fact Tito would complain about bitterly (Pirjevec, 2018: 157<sup>118</sup>; Wörsdörfer, 2004: 522; Cresciani, 2004: 8).

#### **IV.4.2 Workings of the Free Territory of Trieste (FTT)**

Following the Belgrade agreement of 09 June 1945 between Generals Morgan and Jovanović, the *Free Territory of Trieste* (FTT) was established, consisting of Zone A (Trieste and its suburbs, a tiny strip of hinterland including a link to the new Italian border, and Pula) under direct Allied military administration, and Zone B (the coastal strip south of Trieste including the Slovenian district of Koper, Piran Bay, and the Croatian district of Buje) under Yugoslav military administration (Novak, 1970: 199; Pirjevec, 2018: 157); see fig. 12 overleaf.<sup>119</sup>

The FTT entered into force in September 1947 as a component of the Paris Peace Treaty with Italy.<sup>120</sup> The provisions entailed an FTT governor appointed by the UN Security Council. However, it proved impossible for the Great Powers to agree on a governor. As a result, the FTT as such "only existed on paper" (Rutar, 2010: 249), and what was supposed to be a very short period of temporary military administration lasted for quite a few years (Novak, 1970: 275-280) and was seen as an "interim trusteeship over the area" (CIA Report, 1948: 3).

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<sup>115</sup> The U.S. and Britain had made it clear to Tito that Yugoslavia should, after the end of the war, claim the Julian Region at the peace conference, which would then put a verdict on just demands (Novak, 1970: 130).

<sup>116</sup> The importance of Trieste for Tito may be highlighted by the following facts: The Partisans had proclaimed the annexation of Trieste as early as November 1943 during the second AVNOJ session (Ramet, 2006: 172). Operationally, the Partisans liberated Ljubljana and Zagreb only on 09 May 1945, one week after occupying Trieste (Novak, 1970: 156, 169).

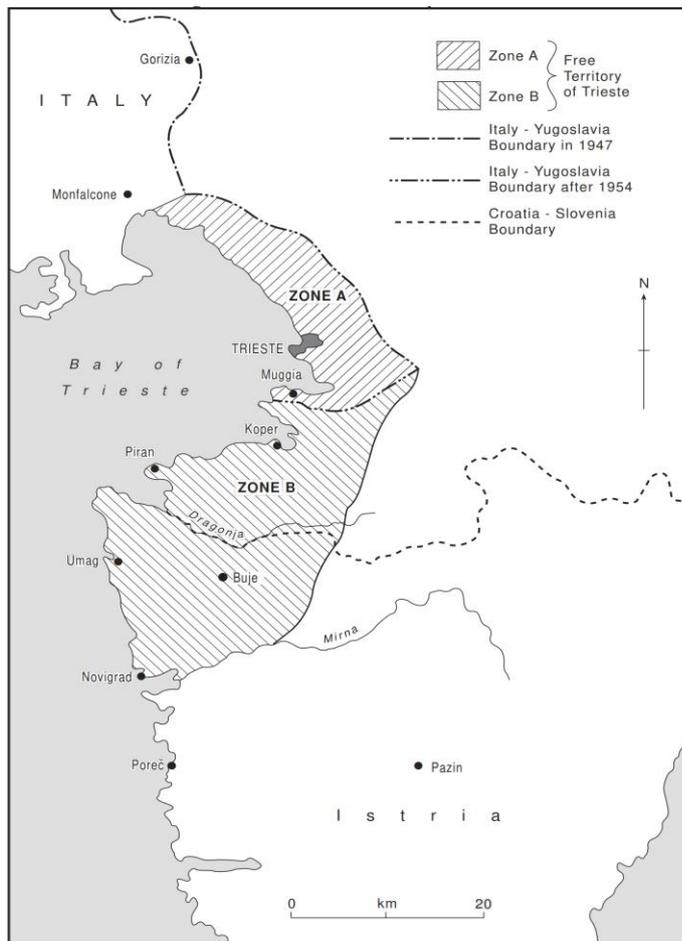
<sup>117</sup> The tough American-British stance may also be related to a feeling of anger towards the Soviet-Yugoslav friendship treaty which had been signed earlier in the year (Capano, 2016: 55; Prunk, 1996: 136).

<sup>118</sup> Stalin was not ready to risk a Third World War over Trieste, and therefore demanded the immediate withdrawal of the Yugoslav troops, although he thought the Yugoslavs did deserve Trieste (Pirjevec, 2018: 157).

<sup>119</sup> The Julian Region as a whole was also divided up into an U.S.-UK Zone A and a Yugoslav Zone B along the so-called Morgan line (Novak, 1975: 5-6; Capano, 2016: 54).

<sup>120</sup> The zones A and B of the Julian Region (*not* of the FTT) expired by the time the area was assigned to Italy and Yugoslavia respectively by the Peace Treaty with Italy in 1947.

Figure 12: The Free Territory of Trieste (Blake and Topalović, 1996: 22)



In March 1948, Britain, France and the U.S. proposed to give the *entire* Zone A to Italy. Yet, this move was fiercely opposed by Yugoslavia and the Soviets. The reasoning behind the Western Allies' move is seen to have been to secure an anti-Communist victory in the upcoming Italian general election, and to prepare for Italian accession to NATO (Capano, 2016: 54; Hildebrandt, 1954: 158; Novak, 1970: 281).

In late June 1948, Tito and the Communist Party of Yugoslavia were expelled from the Cominform (the Moscow-led communist league) for “breaking with the Marxist theory” and for an “unfriendly policy toward the Soviet Union” (Džalto, 2018a: 17). It was not before September 1949, however, that the Soviet Union and its satellite States' governments in East-Central Europe cancelled the Soviet-Yugoslav Treaty of Friendship (Novak, 1970: 299-300, 314-5).<sup>121</sup>

As a result, Yugoslavia received military and financial and foodstuffs support from the West as from 1951 (Hildebrandt, 1954: 169; Pirjevec, 2018: 220), and considerable military support from the U.S., such as two hundred F-84 fighter jets including a training of Yugoslav pilots at their home air bases (Pirjevec, 2018: 216).

The London Memorandum of Understanding of 1954 finally settled the FTT issue assigning Zone A to Italy and Zone B to Yugoslavia.<sup>122</sup> This settlement can be regarded as favourable to Yugoslavia as it was able to acquire most of the territory claimed in the first place, in particular the whole of Istria including Fiume/Rijeka, the Kvarner islands of Cherso/Cres and Lussino/Lošinj, and Dalmatia including Zara/Zadar (Cresciani, 2004: 8; Slovene-Italian Report, 2004: 26). Tito was satisfied with the London Memorandum, although sacrifices in terms of the loss of Trieste had to be made (Novak, 1970: 461; Novak, 1978: 6-8). Yet, Tito secured the port of Koper/Capodistria which Italy had heavily claimed. There were secret

<sup>121</sup> Tito had given a speech full of anger towards the Soviet Union in Ljubljana at the end of May 1945 saying that “we are not going to allow ourselves to become entangled in political spheres of interest [and] we will not be dependent on anyone ever again” (Ramet, 2006: 176).

<sup>122</sup> According to Capano (2016: 55), a secret agreement between the U.S/UK and Tito on the definite partition had been reached as early as 06 October 1953. Pirjevec (2018: 217-8), however, contends that the U.S and the UK took the decision themselves before notifying Tito and the Italian Prime Minister Pella. The Memorandum was in the end signed on 05 October 1954 at the Foreign Office in London following heavy diplomatic activity of the U.S. persuading Tito to accept the partition of the FTT decided by the U.S and Britain. As a reward, Yugoslavia received an additional 450.000 tons of wheat from the U.S. on top of the 400.000 tons already granted plus loans from the International Bank for Reconstruction and Development IBRD (Pirjevec, 2018: 220).

trilateral talks between Yugoslavia, Britain and the U.S between February and September 1954 how to achieve a renouncement of Rome's claims (Pirjevec, 2018: 219-221).

It must be noted that the Slovene notion of the "unjust border" which cuts off the Trieste area and its surroundings with a majority Slovene population has lived on to the present day (interview Alojz Peterle<sup>123</sup>, 15-06-2016; interview Ivo Vajgl<sup>124</sup>, 29-09-2015; see also Slovene-Italian Report, 2004: 26). Conversely, it could be argued that the present-day Slovenian-Italian border has lost its divisive nature since it constitutes an intra-Schengen border with no controls and thus *de-facto* freedom of movement in a truly European cross-border space (interview Tanja Fajon<sup>125</sup>, 22-11-2016).

The return to Yugoslavia of the inter-war Italian territories in Istria, Kvarner and Dalmatia can be seen as the most relevant changes to Yugoslavia's international boundaries after World War II (Radan, 1999: 138). The loss of the Italian territories led to a mass emigration of around 200.000 to 300.000 Italians from the area (Wörsdörfer, 2004: 522-560; Cresciani, 2004: 8-9), mainly because of oppression by the Yugoslav regime, and for fear of eventually living on the wrong side of the Iron Curtain (Slovene-Italian Report, 2004: 30-1).

#### IV.4.3 Osimo Treaty 1975

The 1954 London Memorandum was not a legally binding agreement, notwithstanding its *de-facto* nature (Pirjevec, 2018: 219). It was initialled, not signed (Rutar, 2010: 251)<sup>126</sup>, so neither Italy nor Yugoslavia renounced their claims to what had ceased to be the FTT (Novak, 1970: 460). Yet, it took another 20 years before a final settlement between Yugoslavia and Italy could be agreed on. The Osimo Treaty of 1975 not only put an end to the 'Adriatic Question' between the two countries in delimitating the maritime border in the Gulf of Trieste by means of the equidistance line (Cataldi, 2013: 1). The continental shelf boundary agreement between the two States had been concluded in 1968 (Klemenčič and Topalović, 2009: 313; Blake and Topalović, 1996: 15-17) commencing full delimitation.<sup>127</sup> Osimo also settled the open land-border question resulting from the FTT period discussed above (see IV.4.2).

Trieste had long remained a contentious issue, despite an increasing willingness to phase-out the territorial claims and to look into the benefits of 'Adriatic friendship'. Both the Italian and the Yugoslav governments had come to accept the mutually beneficial effects of a final settlement on geo-political stability and economic cooperation (Capano, 2016: 58-60; Vlašić, 2014). The Osimo agreement, which was applauded by international public opinion, did confirm the return of the FTT zones A to Italy and B to Yugoslavia respectively as for the land border. As for the maritime border in the Upper Adriatic, the delimitation of the territorial waters was carried out in such fashion that larger freight vessels could approach Trieste through Italian waters and Koper through Yugoslav waters (Vukas, 1976: 80).<sup>128</sup>

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<sup>123</sup> Alojz Peterle MEP was Prime Minister of Slovenia in 1991/92, and Foreign Minister in 1993/94 and 2000.

<sup>124</sup> Ivo Vajgl MEP was Foreign Minister of Slovenia in 2004 and Slovenian Ambassador to Germany, Austria, the OSCE, Sweden and the Nordic and Baltic States.

<sup>125</sup> Tanja Fajon MEP is a member of the Civil Liberties and Home Affairs Committee, and was Rapporteur for the EU visa liberalisation for Serbia, Bosnia-Herzegovina, Montenegro, FYROM/Macedonia, Albania, and Kosovo.

<sup>126</sup> Generally, memoranda - as opposed to treaties - are not legally enforceable.

<sup>127</sup> The 1968 agreement between Italy and Yugoslavia was the first-ever continental shelf maritime delimitation treaty in the Adriatic. The boundary runs over 353 nautical miles and reflects the equidistance line (Klemenčič and Topalović, 2009: 313). For an introduction to maritime delimitation terminology see V.I.

<sup>128</sup> The present-day traffic separation scheme of the IMO (International Maritime Organisation) which has been operational since 01 December 2004 has incoming vessels to both Trieste and Koper go through Croatian and

The Osimo accord marked the first international treaty between States incorporating the principles of the preamble of the newly adopted OSCE Helsinki Final Act (Vukas, 1976: 76).<sup>129</sup> Capano (2016: 58) argues that the Italian-Yugoslav border was eventually going to become a bridge rather than a wall between the two countries.

To sum up, the Trieste crisis marked a major territorial conflict between the British-American Allied troops and the Yugoslav army just a few months into the new East-West division of Europe decided on at the Yalta Conference in February 1945. The establishment of the Free Territory of Trieste (FTT) as the result of direct negotiations between the two camps on the ground may be seen as an example of pragmatic ad-hoc partition. The foreseen FTT governor, however, was never appointed because of a lack of agreement between the Great Powers in the UN Security Council. Despite the fact that the FTT was divided up between Italy and Yugoslavia *de facto* in 1954, it took another 20 years to conclude a final bilateral agreement on the common Italo-Yugoslav State border.

#### **IV.5 Dissolution of Yugoslavia**

Much has been written on the fall of Yugoslavia and the political, historical, economic and cultural-societal reasons. Yet, there is no single straightforward way of recapitulating the manifold causal mechanisms that lead to the end of the SFRY<sup>130</sup>, not least because a clear starting point of the country's demise would not be easily identified.<sup>131</sup> As for analyses of the dissolution of Yugoslavia, Bieber (2014: 2) provides a crucial point: Any research runs "the risk of reading history backwards", implying that "the knowledge of the State's eventual failure and dissolution interprets developments and events during Socialist Yugoslavia as evidence of its path towards dissolution". That approach is likely to produce a deterministic view that Yugoslavia as an "artificial" State "was doomed to fail" anyway. Further, the benefit of hindsight tends to prevent the researcher from observing and capturing the "evolution of the ongoing process" and it renders us "less able to grasp the atmosphere and context of the decisions taken at the time" (Bieber et al, 2014: 3).

With regard to the established political historiography of post-WWII-Yugoslavia, it is worth taking a brief look at Wachtel and Bennett's (2009: 13) stock-taking of the broad consensus between scholars. This consensus which, at the popular level, is perhaps not necessarily shared to the same degree in some of the successor States, portrays the demise of Yugoslavia

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Slovenian waters, i.e. the former Yugoslav side of the Osimo delimitation line, and outgoing vessels through Italian waters (Vidas, 2009: 33-4); see also V.1.3.1 and VIII.1.1.1.

<sup>129</sup> The Osimo agreement not only successfully delimited the common State border, but also set foot to considerable economic cooperation in the fields of transport, energy, and the fight against maritime pollution. The agreement even included a zone for local cross-border traffic with freedom of movement for individuals and workers (Italy and Yugoslavia, Agreement on the development of economic co-operation, 1975).

<sup>130</sup> For a recent account of the state of play of the debate in political science quarters see e.g. Bieber et al (2014); on the interplay of law and politics in post-WW-II Yugoslavia see Accetto (2007); a solid historian's account can be found in Calic (2014: 264-344).

<sup>131</sup> The break-up of the SFR Yugoslavia generally tends to be associated with the declarations of independence of Slovenia and Croatia on 25 June 1991. However, the process of disintegration started earlier. Historically, and depending on the scope and type of factors taken into account, a possible starting date for the dismemberment of the SFRY can be seen in Slobodan Milošević's coming to power in Serbia 1987, or in Tito's death in 1980 (Ramet, 2014: 39; Wachtel and Bennett, 2009: 28-9). The effective end of Yugoslavia as a State was there in August 1990 when the League of Communists of Yugoslavia (LCY), the Communist Party, ceased to exist in all Republics, and new political parties had taken shape (Jović, 2009: 361).

as a “multiple organ failure” starting in the late 1980s. Wachtel and Bennet’s reconstruction centres around three domestic areas and their respective long-term problems:

(i) The political arena with the perceived illegitimacy and inefficiency of the central State, and the growing disparities of the competing regional power centres: By the mid-1970s, Yugoslavia had changed from a country of relative unity and socialist co-operation to one where the Yugoslav Republics to a great extent behaved like quasi-independent entities. The decentralizing effect of the 1974 federal constitution of the SFRY had considerably weakened the federal level. The increasing republicanisation coincided with a more self-centred following of interests other than those of the common central State.

(ii) The economic decline in terms of the inability of the Communist system to generate growth and sufficient prosperity for the citizens: Yugoslavia’s economy could only be upheld through international credit and foreign help. Domestically, economic modernisation was increasingly discussed in terms of the ‘non-motivated South’ (Bosnia-Herzegovina, Macedonia, Montenegro) being financially supplied by the ‘hard-working North’ (Croatia and Slovenia) with ‘Belgrade’ being the distribution machine.

(iii) The cultural sphere where the State failed to create a sufficient level of shared identity in terms of a unified multi-national Yugoslavia<sup>132</sup>, and where competing separate national narratives gained ground instead: There was no federal education system after 1948. As a result, crucial issues with regard to history and culture were interpreted and taught in a different way in the respective Republics leading to national narratives, such as victimization (Croatia, Serbia), or exploitation (Slovenia), for example.

On top of the above domestic spheres, two external factors also merit a mention. First, the dissolution of the USSR played its role in so far, as the need for a large Yugoslav State with military power providing security for its citizens was no longer a given. After the rift between Tito and Stalin in 1948, fear of the Soviet Union was considered a crucial unifying factor for a common State. Second, the European Community had enlarged by small States such as Ireland (1973), Greece (1981) or Portugal (1986). This meant, that there were promising prospects in terms of potential prosperity and political security as members of a larger block, even for small countries with a low GDP per capita (Wachtel and Bennet, 2009: 14-28).

There is one crucial aspect, however, which many scholars may have underestimated in their analysis of the dissolution of Yugoslavia. Jović (2009) argues that it is the issue of the *actors* of the political elite, and that one has to reconstruct their ideas, concepts and perceptions. His approach is that the beliefs, intentions and explanations of the actors must be taken seriously. This implies that events need to be analysed *as they happened in their context*, and not with the benefit of hindsight (see also Bieber, 2014: 2). Jović’s main research question is this:

“Why did political actors act as they did? Why did their actions make sense to them? What were their rationales, their motives for action, and their intentions? If we really want to understand the rationale behind the actions of the Yugoslav Communists, we need to take their beliefs seriously. What is relevant here is not whether these actions make sense to us, but whether they made sense to them, to those whose actions we analyse and to the relevant segment of the political body on whose approval the existence and stability of the regime depended. It is not the aim [...] to judge the actions taken by

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<sup>132</sup> "The nations of Yugoslavia [...] have, together with nationalities with which they live, united in a federal republic of free and equal nations and nationalities." (SFRY constitution of 1974, Introductory Part, Basic Principles, I, p. 13)

the Yugoslav elite in either favourable or unfavourable terms, but to explain them by understanding the reasons the actors had for them (Jović, 2009: 34).

Jović argues that Yugoslavia was primarily destroyed from inside, and that the political leaders played the decisive role in the disintegration of the country. His findings include that the ideological consensus of the political elite was originally made up of Kardelj's interpretation of the Marxist concept of self-management - meaning the emancipation from both Stalinist Soviet strong-State Socialism and inter-war Yugoslav unitarism (and thus the application of the concept of the withering away of the State) - and of international non-alignment. Indeed, the Socialist self-management federation consisting of republics as the real power centres<sup>133</sup> and a weak federal level<sup>134</sup>, the status of the economically most advanced socialist State, and the powerful international role of Yugoslavia through the policy of non-alignment - a successful third-way approach in an antagonist Cold War set-up - provided for a notion shared by the leading SFRY actors in the 1970s and most of the 1980s.

That consensus had started to evaporate even before the death of Tito, and left the State (that had indeed already withered away to some degree<sup>135</sup>) so vulnerable that the break-up of the country was unstoppable. As Yugoslavia had based its unity on ideology to a great degree, it was more vulnerable to a collapse of that very identity-creating and -sustaining ideology. With regard to classical arguments explaining the dissolution of the SFRY, Jović (2009: 3-5) demonstrates that many of the arguments, albeit helpful in an *ex-post* analysis of the country's down-fall, appear to offer no single satisfying explanation of developments in their context.

According to Jović (2009: 15-28), looking at the (i) economic argument, the last federal government under market-oriented prime minister Marković who came into power in January 1989 achieved a remarkably sharp decrease of inflation, the convertibility of the dinar, and a substantial increase of industry production. That huge economic progress could not stop the dissolution, however. The (ii) ancient ethnic hatred argument, according to Jović, can be dismissed entirely as ethnic hatred was only constructed by political leaders as the country was already disintegrating, and used in order to replace former class enemies within the country or former enemies from the East or West. The (iii) nationalism argument has insufficient explanatory power, too, because the number of self-declared ethnic Yugoslavs (as opposed to Croats, Serbs, Slovenes, and others) had risen significantly in censuses between 1971 and 1981. In addition, a weak State and high uncertainty were nurturing nationalism towards the very end of the country, but outright nationalism had not been latent from the very beginning of post-World-War-II Yugoslavia. Rather, the federation was indeed able to

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<sup>133</sup> It is useful to note that parliaments in terms of a representative democracy Kardelj saw as the preservation of class power, a product of the bourgeoisie, and therefore unsuitable for the purpose of radically changing reality. The old parliamentary structure was replaced by new so-called delegate assemblies. They were composed of representatives who were made to vote as instructed by their social group. The Communist Party had a leading role, notwithstanding the fact that it was renamed League of Communists of Yugoslavia LCY (Jović, 2009: 76-7).

<sup>134</sup> Despite the exclusive competence of the federal level for foreign policy and defence, the Republics were granted the right to set-up regional territorial defence units (Ramet, 2002: 6). To that end, control over the territorial defence (TO) units proved crucial for Slovenia to fight off the JNA in early July 1991. Despite organized JNA confiscation of weaponry, Slovenia managed to hold on to around 30 per-cent of TO weapons, whereas in Croatia there was no organized resistance towards JNA confiscation, so the Yugoslav army was able to disarm the TOs in Croatia within a few days after the election of Tuđman and his HDZ in April 1990 (Ramet, 2006: 371).

<sup>135</sup> For Kardelj (and Tito), the aim of socialism was not to "create a State-sponsored democracy, but rather to socialize State functions and to promote self-management and self-managing democracy [and once this is achieved] the State apparatus will turn into a specialized public service of the self-managing society" (Kardelj, 1977: 140; quoted in Jović, 2009: 77-8).

accommodate the regional identities as opposed to the inter-war Yugoslavia or the unitarist State after 1918. The (iv) international politics argument, advancing the view that Yugoslavia could not survive the break-down of the bipolar East-West structure, also falls short of a valid explanation. Rather, according to Jović, the collapse of Soviet-style communism was seen as a recognition of the distinct Yugoslav avenue to socialism. As to the West, there was firm support for the unity of the country from both the U.S. and the European Community at the moment of disintegration. Only after the Ten Days War in Slovenia in July 1991 did the EC and the U.S. change their policy.

The following analysis of the dissolution of Yugoslavia is confined to the period *after* the independence declarations of Slovenia and Croatia around (i) the activities of the EC/EU up until 1993, (ii) the role of the post-secession war between Croatia and Serbia<sup>136</sup>, and (iii) the Agreement on Succession Issues between all SFRY successor States in 2001.

### Joint independence of Slovenia and Croatia

It is impossible to skip a very brief sketch of the major political events in 1991. Croatia and Slovenia both declared their independence on 25 June 1991. The timing and the content of the independence proceedings had been secretly agreed on between the new leaders in Ljubljana and Zagreb (interview Ivo Sanader<sup>137</sup>, 19-05-2016; interview Alojz Peterle, 15-06-2016; see also e.g. Ramet, 2006: 392). This deal also included a “defence pact” providing for mutual assistance in case of a military offensive on the part of the Yugoslav Army in either of the two newly independent entities (interview Alojz Peterle, 15-06-2016; interview Ivo Vajgl, 29-09-2015). Politically, the initial point of break-up or melt-down of Yugoslavia may be seen in the event during the League of Communists of Yugoslavia (LCY)’s Congress in January 1990 where the Croatian delegation kind of walked out together with the Slovenian delegation in an act of solidarity (see Ramet, 2014: 42; Wachtel and Bennett, 2009: 35; Pusić, 1997: 97). In fact, after the Slovenian delegation leader Ciril Ribičič had announced the Slovenian walk-out, the head of the Croatian delegation, Ivica Račan, hastened to call for an immediate break-off of the Congress which a majority of the delegates endorsed (Meier, 1995: 246).

It is often overlooked, however, that the actual question put to vote in the referenda in Slovenia (13 December 1990) and Croatia (19 May 1991) was not outright independence cutting all ties to the SFRY. Rather, in the Croatian case, for that matter, the option of an independent Croatia potentially entering into a “federation of sovereign States”<sup>138</sup> with the other SFRY Republics (interview Vesna Pusić<sup>139</sup>, 24-02-2017). Similarly, the referendum question in Slovenia included an option to enter into a confederation of Yugoslav States

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<sup>136</sup> For the wars in Bosnia-Herzegovina (where the death toll amounts to 215.000 people) and Kosovo (12.000 casualties) see Ramet (2006: 414-494; 537-552). Owen (1995) provides a comprehensive personal mediator’s account of the EU/UN peace efforts in Bosnia-Herzegovina. Webb et al (1996) argue that the real-world situation on the ground with an often localized war made mediation efforts an extremely complex affair. For an evaluation of the conflict-reducing effects of UN peace-keeping operations generally see Hegre et al (2015).

<sup>137</sup> Ivo Sanader was Prime Minister of Croatia 2003-2009, Minister for Science and Research in 1992 and Deputy Foreign Minister 1993-2003 involved in bilateral relations with Slovenia.

<sup>138</sup> The full referendum question read “Are you in favour that the Republic of Croatia, as a sovereign and independent State, which guarantees the cultural autonomy and all civil rights of Serbs and members of other nationalities in Croatia, may enter into a federation of sovereign States with the other republics [...]?”; cited in Vukas (2011: 19).

<sup>139</sup> Vesna Pusić MP was Foreign Minister of Croatia 2011-2015, and Chair of the European Integration Committee of the Croatian parliament (Sabor) 2008-2011.

(Wachtel and Bennett, 2009: 38.) Each new State would retain an independent army, but the former Republics would be parties to a defence pact. In economic terms, federal elements such as a common market and even freedom of movement were foreseen (Iglar, 1992: 235-7). The referendum questions may also be seen in the light of the joint Croato-Slovene proposal from October 1990 for a confederation of independent Yugoslav Republics. Jović (2008: 251), however, demonstrates that the confederation proposal was a tactical move and “a genuine attempt to achieve first a *de facto* and then a *de jure* independence without violence“.

Two days after the declaration of independence, on 27 June 1991, the Yugoslav Army (JNA) started to attack or occupy infrastructure installations and border crossings to Austria and Italy (Baker, 2015: 51; Nešovič and Prunk, 1994: 251) in what is often labelled the “Ten Days War” in Slovenia (e.g. Džalto, 2018b: 53). It ended with the withdrawal of the JNA from Slovenia by 07 July (Türk, 1993: 67). There had been a secret understanding between the Slovenian leadership and the Milošević government of Serbia for Slovenia to leave Yugoslavia “without too much resistance from the Serbian side” (Pusić, 1997: 96). Peterle, however, insists that his government was not involved in such talks (interview 15-06-2016). Nonetheless, the agreement, if it existed, may help explain the very short duration of JNA activities in Slovenia. In addition, defence preparations in Slovenia had been carried out at an early stage - unlike in Croatia where the JNA barracks were not placed under siege (Ramet, 2014: 43; Meier, 1995: 267; 273). For the events in Croatia, where a full-blown war broke out in the second half of July 1991, mainly over the areas with a considerable Serbian population in Eastern Slavonia, the Krajina, and Northern Dalmatia, see IV.5.2.

### Role of the European Community

The immediate response of both the EC and the U.S. around the co-ordinated joint declaration of independence of Croatia and Slovenia was to take a cautious approach, not least in the face of the nuclear super-power USSR being in a process of dissolution<sup>140</sup>, and to support Yugoslav unity for the time being (e.g. Hannum, 1993: 59; Rich, 1993: 40).<sup>141</sup> As early as late May 1991, the U.S. State Department had declared that “Yugoslavia’s external or internal borders should not be changed unless by peaceful consensual means”.<sup>142</sup>

In a first mediation initiative on the part of the EC, Slovenia and Croatia agreed on a three-month moratorium on the implementation of their independence declarations at a meeting on Brioni on 07 July 1991, so that they would only take effect as from 08 October 1991 during which time an agreement between all Yugoslav Republics was supposed to be reached. All Yugoslav Republics were present at the Brioni meeting. The foreseen talks, however, never started over the following weeks (Vukas, 2011: 22; Rich, 1993: 39)<sup>143</sup> and the full independence of Croatia and Slovenia was implemented following the expiry of the memorandum on 08 October 1991 (Craven, 1996: 141).

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<sup>140</sup> It was unpredictable by the spring and the summer of 1991 whether the Soviet Union would dissolve peacefully. Yet, the independence of the three Baltic States that had been declared on 21 August 1991 was recognized by Moscow on 04 September. The remaining USSR Republics signed the Declaration of Alma Ata on 21 December 1991 mutually agreeing that the Soviet Union ceased to exist, and subsequently founded the Community of Independent States (CIS) on 26 December 1991 (Rich, 1993: 37-8; 44-47).

<sup>141</sup> On a stop-over visit to Belgrade five days before the declarations of independence on the part of Slovenia and Croatia, U.S. Secretary of State James Baker declared that his country would under no circumstances recognize Croatia and Slovenia (Wachtel and Bennett, 2009: 42).

<sup>142</sup> State Department press release 24 May 1991, quoted in Hannum (1993: 59).

<sup>143</sup> Further provisions entailed a monitoring mission under the CSCE of 30-50 (sic) staff operating in “Slovenia, and possibly Croatia” (Brioni Declaration, Annex II; reprinted in STA News, 08 July 1991).

At a special meeting of the EC Foreign Affairs Council held in Brussels on 27 August 1991, ministers agreed on a joint declaration expressing their determination “not to recognise changes of borders by force” and to set up a “peace conference” and an “arbitration procedure” (EC Bulletin, Vol. 7/8, 24/1991: 115-6) which became known as the *Conference on Peace in Yugoslavia* and the *Arbitration Commission*. Prior to the meeting of 27 August, the Dutch EC Presidency had, in a letter to fellow EC Member States dated 13 July, proposed to look into the possibility of a voluntary redrawing of the internal borders of the Yugoslav Republics to reduce the number of national minorities in the respective Republics. This proposal was, however, rejected by the other eleven Member States on the grounds that ethnic borders were out of date, and that it was technically impossible to re-draw borders without leaving minority ‘pockets’ geographically unconnected (Owen, 1995: 33).<sup>144</sup>

#### **IV.5.1 Badinter Commission**

It is worth quoting the provisions on the arbitration procedure because of their remarkable brevity and the lack of procedural provisions:

“The arbitration procedure in the framework of this peace conference will be established as follows. The relevant authorities will submit their differences to an Arbitration Commission of five members chosen from the Presidents of Constitutional Courts existing in the Community countries. The composition of the Arbitration Commission will be:

- (i) two members appointed unanimously by the Federal Presidency [of the SFRY];
- (ii) three members appointed by the Community and its Member States.

In the absence of an agreement on the members to be appointed by the Federal Presidency, they will be designated by the three members appointed by the Community.

This Arbitration Commission will [decide] within two months.” (EC Bulletin Vol. 7/8, 24/1991: 116)

Every allowance must be made for the unprecedented and emergency circumstances of the EC meeting of 27 August 1991 when hostilities in Croatia were already in full swing. Still, it is worth noting that the above mandate for the Arbitration Commission does not contain any provisions on “relevant authorities” (would the scope of this term include the warring SFRY Republics, the formally still existing SFRY Federal Presidency, or perhaps also the EC?<sup>145</sup>), the type of submissions to the Arbitration Committee, the EC-internal appointment procedure (i.e. the selection of candidates, or the voting procedure), or a reference on the rules of procedure for the Arbitration Commission, to name but a few.

The EC designated the President of the French Constitutional Court, Robert Badinter, the President of the German Federal Constitutional Court, Roman Herzog, and the President of the Italian Constitutional Court, Aldo Corasaniti. As the SFRY Federal Presidency proved unable to unanimously nominate their two candidates, the remaining vacancies were filled according to the above provisions of the declaration by a decision of the other three members of the Arbitration Commission already designated. The further members were the President of

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<sup>144</sup> The EC Presidency letter is reprinted in Owen (1995: 31-3). Member State diplomats probably perceived the letter as too indecisive in both the spirit and the wording, as there was talk of new borders being the result of “a peaceful process [...] based on general agreement”.

<sup>145</sup> The Badinter Commission was in fact called upon by the President of the Conference on Yugoslavia (Opinions 1, and 8-10) and by its later Co-Chairmen respectively (Opinions 11-15), by the Republic of Serbia (Opinions 2 and 3), and the EC Member States (Opinions 4 to 7) (Pellet, 1992: 178; Craven, 1996: 333-4).

the Spanish Constitutional Court, Francisco Tomas y Valiente, and the President of the Belgian *Cours d'Arbitrage*, Irène Petry. Robert Badinter was appointed President and the Commission, hereafter “*Badinter Commission*”, adopted rules of procedure which were not made public (Craven, 1996: 336). Pellet describes the rules of procedure as foreseeing majority voting for the adoption of opinions. In practice, however, the Opinions of the Badinter Commission were adopted by consensus (Pellet, 1992: 332).

#### IV.5.1.2 Opinions of the Badinter Commission

The Arbitration Commission issued 15 Opinions altogether, the first ten Opinions were issued between December 1991 and July 1992. The Commission was reconstituted in January 1993 and delivered a further five Opinions until August 1993 (Craven, 1996: 333-4). All Opinions<sup>146</sup> will be briefly touched on. Those treating most fundamental issues and/or having met a mixed scholarly response will be discussed in somewhat more detail.

##### IV.5.1.2.1 Secession or dissolution? (Opinions 1 & 8)

The first legal question was put to the Committee by the Chairman of the Conference on Yugoslavia, Lord Carrington, on 20 November 1991. He inquired whether (i) the SFRY Republics are in the process of secession (in which case the SFRY would continue to exist), or (ii) the SFRY was in a process of dissolution (in which case all former SFRY republics would become successor entities to the SFRY which would cease to exist).

In Opinion 1 of 11 January 1992, the Committee found that the SFRY no longer met the criteria of a State under international law, because its State organs were virtually powerless due to a lack of participation of the Republics in the federal organs, and due to armed conflict between elements of the federation. As a result, Yugoslavia was in a process of dissolution (I.L.M., 1992: 1494-7).

In Opinion 8 of 04 July 1992, the Committee answered another question from the Conference Chair from 18 May 1992, on whether the dissolution assumed in Opinion 1 could now be regarded as complete. The Committee found that in light of the fact that no federal body had functioned since the issuance of Opinion 1, the FRY (Serbia and Montenegro) was “a new State”, and the former SFRY territory and population were now “entirely under the sovereign authority of the new States”, the dissolution was “now complete and that the SFRY no longer exists” (I.L.M., 1992: 1521-3).

Craven (1996: 366-368) posits that as for the assessment of the facts, Opinion 1 was accurate. However, the assumption that the effective control by a State depended on the system of government was too strict for federal States. What was not acceptable, according to Craven, is that a State ceased to exist simply because of a “lack of [...] participation in government itself” which equalled a notion that federal States were more fragile than unitary States. Subsequent evidence, however, as expressed in Opinion 8, did confirm the dismemberment of the SFRY. Türk (1993: 69), somewhat in contrast, approves of the Commission’s emphasis on effectiveness as “duly recognised” in Opinions 1 and 8. Agreeing with Türk in substance, Pellet (1992: 179) yet attributes “little originality” to the Commission’s findings. Hannum dismisses the concept of dissolution as “*secession* was precisely what was occurring in

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<sup>146</sup> The Opinions are taken from International Legal Materials (I.L.M.) as reproduced primary legal documents.

Yugoslavia” (1993: 62; emphasis added). It is the view of this author, that one may well argue that secession has led to dissolution or dismemberment and that it tends to be difficult to say exactly when one ends and the other one starts.

#### IV.5.1.2.2 Self-determination and internal borders as international ones (Opinions 2 & 3)

On 20 November 1991, the Chairman of the Conference put another two question to the Committee which he had received by the Republic of Serbia. The first one asked whether the Serbian population in Croatia and Bosnia-Herzegovina had the right to self-determination.

The Committee, in its Opinion 2 from 11 January 1992, found that international law at the time did not make reference to all implications of self-determination, but that such self-determination had to avoid changing existing borders at the time of independence (*uti possidetis juris*) unless the States concerned did agree otherwise. Further, all ethnic, religious or language groups within a State had the right to “recognition of their identity” and minority rights for the Serbian population in Bosnia-Herzegovina and Croatia had to be ensured on the part of the State, including the right to choose their nationality (I.L.M., 1992: 1497-9).

The second question by the Republic of Serbia inquired whether “the internal boundaries between Croatia and Serbia and between Bosnia-Herzegovina and Serbia [can] be regarded as frontiers in terms of public international law” (I.L.M., 1992: 1499).

In its Opinion 3 from 11 January 1992, the most far-reaching of the Badinter Opinions, the Committee found that, first, all external frontiers were to be respected following the UN Charter and the Helsinki Final Act. Second, the borders between Croatia and Serbia, and between Bosnia-Herzegovina and Serbia may not be altered unless mutually agreed otherwise. Third and foremost, the former (internal) boundaries were to become international boundaries protected by international law. The Commission invoked the principle of *uti possidetis* stating that this principle “although initially applied in settling decolonisation issues in America and Africa, is today recognised as a general principle”. The Committee referred to a judgement of the International Court of Justice (ICJ) of 1986 in the *Burkina Faso v Republic of Mali* case referring to the *uti possidetis* principle as applicable to independence wherever it occurs (I.L.M., 1992: 1499-1500).

Opinion 3 has received a strong scholarly response. Sorel and Mehdi (1994: 18) approve of the Committee’s finding and assert that “l’*uti possidetis* s’applique donc sur tous les continents et sur tous les espaces et apparait comme le principe incontournable de toute mutation territoriale à l’époque contemporaine”. Pellet (1992: 180) lauds the promotion of *uti possidetis* on the part of the Committee, as the principle ensured the territorial integrity of States, “that great principle of peace, indispensable to international stability”, and Europeans were wise not to dispense it, not least because the principle provided for considerable flexibility for adjustment by mutual agreement.

Craven, whilst approving of *uti possidetis* as such, critiques that the Committee appeared not to have grasped the spirit of the ICJ’s judgement which was indeed confined to issues of decolonisation. In addition, two different processes had been at work in each case, namely (i) the identification of units of statehood, and (ii) the determination of borders “within which those entities are to be confined”. However, the original meaning of *uti possidetis* only applied to the second issue. Yet, the Committee used it for the first purpose and established

the presumptive statehood of entities from the dismemberment of the SFRY denying the autonomous Serbian provinces the benefit of that presumption (Craven, 1996: 388-9).

Radan (1999: 147-151) opposes Opinion 3. He argues that the *uti possidetis* principle was inappropriate mainly since historically Yugoslavia's various internal borders after 1918 were at no point in time foreseen to become international borders, let alone for entities seceding the State.<sup>147</sup> In his view, the post-SFRY "secessionist wars" were in essence wars about borders, and therefore the Badinter Principle did prolong violent conflict. Owen (1995: 34-5) quotes a conversation with Milovan Đilas (a Tito aide who was in charge of designing the boundaries of the post-WW-II-Yugoslav republics) in which Đilas confirmed to him that the inter-Republican boundaries "were never intended to be international boundaries".

#### IV.5.1.2.3 State recognition (Opinions 4-7)

Before turning to the Badinter Opinions on recognition, it is worth recalling a second special meeting of the EC Foreign Ministers on 16 December 1991. Gathering in Brussels, the ministers were facing the delicate task of formulating the requirements for the recognition of no less than 20 States emerging from the former USSR and the former Yugoslavia.

Whilst several pro-Yugoslav observers generally argue that Germany in particular was pressing for early recognition of Croatia and Slovenia (e.g. Chomsky, 2018: 64-6, 201; Džalto, 2018b: 58; Hannum, 1993: 65), some myths or inaccuracies (have) exist(ed) about the 16 December 1991 meeting. Thus, it may be useful to note that there has been no unilateral recognition of any State by any of the EC Member States (e.g. Major<sup>148</sup>, 1995: 533-4). Rather, the EC Foreign Ministers adopted "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union". The Foreign Ministers reached

"[...] a common position on the process of recognition of these new States, which requires:

- (i) respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights;
- (ii) guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE;
- (iii) respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement;
- (iv) acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability;
- (v) Commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes.

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<sup>147</sup> Radan (1999: 137-143) demonstrates that the structure of the internal administrative units of Yugoslavia was "a matter of considerable controversy and change". During the *Oblast* system (1921-29) 33 *oblasti* replaced the much larger units of the Habsburg Empire in order to discourage disunity and separatism in the new Yugoslav State. The *Banovina* system (1929-39) consisted of 9 *banovine* (provinces) completely ignoring historical and cultural borders. The *Sporazum* system (1939-41) introduced a "quasi-federal system". However, it could neither overcome the divergence of interests between the Serbs and the Croats, nor was it applied to the rest of the country anyway. The socialist republic and province system (1946-1991) was largely based on older historical borders from the Austro-Hungarian and Ottoman empires. It was important to note that the post-1946 borders were never subject to any legislative or constitutional acts.

<sup>148</sup> According to John Major, UK Prime Minister from 1992 to 1997, UK Foreign Secretary Douglas Hurd phoned him in the evening of 16 December 1991 informing him that all other 11 Member States were ready to recognise Croatia and Slovenia. After the provisions on minority rights were secured, all ministers did agree.

The Community and its Member States will not recognise entities which are the result of aggression. They would take account of the effects of recognition on neighbouring States [...]" (EC Bulletin Vol. 12, 24/1991: 119).

In a separate "Declaration on Yugoslavia" the EC Foreign Ministers offered *conditional* recognition to all five SFRY successor States by 15 January 1992

"[...] inviting all Yugoslav Republics to state by 23 December [1991] whether:

- (i) they wish to be recognised as independent States;
- (ii) they accept the commitments contained in the above-mentioned Guidelines;
- (iii) they accept the provisions laid down in the draft Convention - especially those in Chapter II on human rights and rights of national or ethnic groups - under Consideration by the Conference on Yugoslavia;
- (iv) they continue to support (a) the efforts of the Secretary General and the Security Council of the United Nations, and (b) the continuation of the Conference on Yugoslavia.

The applications of those Republics which reply positively will be submitted through the Chair of the Conference to the Arbitration Commission for advice before the implementation date [...]" (EC Bulletin Vol. 12, 24/1991: 119-120).

Rich (1993: 43-44) argues that the EC, in view of the increasing need to take action in both the Soviet and the Yugoslav crises, would have to do more than to just stick to traditional criteria for statehood. Adding additional requirements, the process of recognition had become "more difficult". The new method of requiring an application for recognition examined by an arbitral body was unprecedented in recognition practice. Vukas (2011: 30-34) critiques the "long and very complicated process of achieving international recognition" as the EC was only inconsistently respecting the criteria for statehood governed by the doctrine and the practice of international law.

In Opinion 4 from 11 January 1992, the Badinter Committee assessed the request for recognition submitted by *Bosnia-Herzegovina* on 20 December 1991. The verdict was that in view of the diverging development on the ground, in particular the establishment of the "Serbian Republic of Bosnia-Herzegovina", the "will of the peoples of Bosnia-Herzegovina to constitute the Republic of Bosnia-Herzegovina as a sovereign and independent State cannot be held to have been fully established" (I.L.M., 1992: 1503).

In Opinion 5 from the same day on the recognition request of *Croatia* from 19 December 1991 the Committee found that Croatia did fulfil the criteria of the Guidelines save for the country's Constitutional Act which had not fully incorporated the minority rights specifications. The Committee asked the government to supplement the Constitutional Act accordingly.<sup>149</sup> The President of Croatia assured the Committee in a reply on the same day that the provisions would be incorporated into the Constitutional Act (I.L.M., 1992: 1518).

In Opinion 6 also from the same day on the request for recognition by the Republic of *Macedonia* from 20 December 1991 the Committee took the view that Macedonia fulfilled the requirements of the Guidelines. Further, the country "had renounced all territorial claims of any kind" and that therefore "the name 'Macedonia' [could not] imply any territorial claim against another State" (I.L.M., 1992: 1511).

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<sup>149</sup> In a comment from 04 July 1992 on the prior amendment of the Croatian Constitutional Act of 08 May 1992 the Committee found the provisions to be finally satisfying the requirements (I.L.M., 1992: 1505-7).

In Opinion 7 from 11 January 1992 on *Slovenia's* request for recognition from December 1991 the Committee found that the country satisfied the requirements.

The FRY (Serbia and Montenegro) declined the offer of recognition. Serbia claimed that it had acquired internationally recognized statehood as early as at the Berlin Congress 1878. Montenegro replied it acquired independence and sovereignty likewise at the Berlin Congress, and that such international legal personality did not cease to exist (Rich, 1993: 47).

The EC extended recognition to Croatia and Slovenia on 15 January 1992. Bosnia-Herzegovina was recognized on 07 April 1992. Yet, Greece blocked the EC's recognition of Macedonia for some time over the State name (Rich, 1993: 53; Türk, 1993: 69; Mrak, 1998: 9).<sup>150</sup> The country became a member of the UN on 08 April 1993 under its provisional name Former Yugoslav Republic of Macedonia FYROM (Craven, 1996: 377).

#### IV.5.1.2.4 State succession (Opinions 9-15)

In Opinion 9 from 04 July 1992, answering the question from the Chairman of the Conference for Peace in Yugoslavia which he had posed himself, as to the basis and means of settling succession issues between the States emerging from the SFRY, the Committee found that the successor States had to "settle all aspects of the succession by agreement" including SFRY assets and liabilities, and SFRY State property in third countries.<sup>151</sup> Further, none of the SFRY successor States was entitled to claim the membership rights of the SFRY in international organisations (I.L.M., 1992: 1523-5).<sup>152</sup> Opinion 10 issued on the same day answering another question put to it by the Conference's Chair made it clear that the FRY could *not* be considered the sole successor to the SFRY (I.L.M., 1992: 1526).

Opinions 11 to 13 dated 13 July 1993, and 14-15 dated 13 August 1993, submitted by the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia (ICFY)<sup>153</sup>, dealt with a series of questions on (i) the actual dates of secession of the former SFRY Republics, (ii) the type of assets and liabilities to be divided up between the successor States, and on (iii) the legal principles to apply to the division of State property and archives. Further, the question was raised as to (iv) whether war damages were quantifiable in relation to the above division of State property. Subsequently, (v) the relationship between the National Bank of Yugoslavia and the National Banks of the successor States was addressed as to the competence with regard to rights and obligations vis-à-vis State succession. Finally, (vi) the question of protective measures vis-à-vis the free disposal of State property was posed.

The Committee found that

(i) the dates of secession from the SFRY were 08 October 1991 for Croatia and Slovenia, 17 November 1991 for Macedonia/FYROM, 06 March 1992 for Bosnia and Herzegovina, and 27 April 1992 as for the FRY (Serbia and Montenegro; I.L.M., 1993: 1587-9);

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<sup>150</sup> For the implications of the Greece-Macedonia name dispute for EU enlargement, see VIII.2.3.

<sup>151</sup> The subsequent Agreement on Succession Issues was only signed on 29 May 2001; see IV.5.3.

<sup>152</sup> UN Security Council Resolution 757 dated 30 May 1992 had decided *not* to grant the FRY (Serbia and Montenegro) the automatic succession of the SFRY's UN membership (see Mrak, 1998: 10).

<sup>153</sup> The ICFY followed the Conference on Peace in Yugoslavia (convened by means of the EC Foreign Ministers meeting's Declaration on Yugoslavia on 27 August 1991, and subsequently chaired by Lord Carrington, a former UK Foreign Secretary (1979-82) and NATO Secretary General (1984-88); Pellet, 1992: 178). As of 27 August 1992, the ICFY took over as a joint UN-EC venture the Co-Chairs being Lord Owen, a former UK Foreign Secretary 1977-9, and Cyrus Vance, U.S. Foreign Secretary 1977-80. The latter handed over to Thorvald Stoltenberg on 03 May 1993 (Owen, 1995: 1; 20-4; 148).

- (ii) the States concerned were free to conclude agreements on succession issues, but that third countries on whose territories SFRY State property was situated would not be bound by such agreements (I.L.M., 1993: 1589-91);
- (iii) the *overall* outcome of the division of assets and liabilities had to be equitable, but not necessarily the individual issue components;
- (iv) it was possible to set off war damages against assets/liabilities (I.L.M., 1993: 1591-2);
- (v) rights and obligations in relation to the National Bank of Yugoslavia were subject to an agreement to be concluded between the SFRY successor States (I.L.M., 1993: 1595-8); and
- (vi) third countries were entitled to block the free disposal of SFRY State property in accordance with internal law (I.L.M., 1993: 1590-1).

The successor States of Yugoslavia have addressed most, albeit not all of the above issued during the quarrelsome and lengthy process (which is still ongoing) following the Agreement on Succession Issues of 2001 (see IV.5.3).

## IV.5.2 Homeland War in Croatia

The first years of Croatian independence and State-building must be seen as heavily affected by the armed conflict of what is officially known as the Homeland War. As from late July 1991, the Yugoslav Army (JNA), having aligned with the Serbian community in Croatia<sup>154</sup>, managed to occupy almost a third of the country by the end of the year (Lamont, 2015: 73). The move came after the sensitivities of the 580.000 Serbs<sup>155</sup> in Croatia<sup>156</sup> had not been taken into account by the Croatian government, let alone properly reflected in the Croatian constitution (Stojanović<sup>157</sup>, 1995: 345). Zgonjanin (2018: 193-5) holds that Tuđman's refusal to assign the Serbs of an independent Croatia the status of constituent people, and his actual downgrading of the Serbian citizens to a minority by amending the Croatian constitution to that end in December 1990, caused the secessionist move of the Serbs in the Krajina.<sup>158</sup>

There were a few months of bitter fighting where the country suffered tremendous losses and hardship, but experienced a very high level of unity (Pusić, 1997: 102). The town of Vukovar in Eastern Slavonia symbolises the war waged against Croatia by the JNA. Vukovar had been shelled during a “three-months pulverising” (Owen, 1995: 3) before it fell in late November 1991 (Baker, 2015: 51). During the night from 20 to 21 November more than 200 civilians and Croatian soldiers were massacred in Ovčara, a farm outside Vukovar, by Serbian forces. It is widely considered “the largest slaughter of individuals committed during the 1990s war in Croatia” (Banjeglav, 2012: 12-3). Zgonjanin (2018: 50), in his meticulous account of the

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<sup>154</sup> Media reports in Serbia had, as from mid-1988, increasingly claimed that the Serbs in Croatia were threatened by a policy of “assimilation and national subordination” (Pauković, 2012: 186). Slobodan Milošević's 1989 Gazimestan speech at the occasion of the 600<sup>th</sup> anniversary of the 1389 Kosovo battle “became the incarnation of the ethno-nationalism that had been gaining momentum” (Milošević and Touquet, 2018: 386).

<sup>155</sup> The figure is given in Jović (2011: 4) based on the 1991 census.

<sup>156</sup> According to the 1991 census the Serbian minority in Croatia accounted for 12.2 percent of the population at the time (Ramet, 2014: 45; Pusić 1997: 99).

<sup>157</sup> Svetozar Stojanović was an advisor to the first president of the Federal Republic of Yugoslavia (FRY), Dobrica Ćosić, 1992-1993.

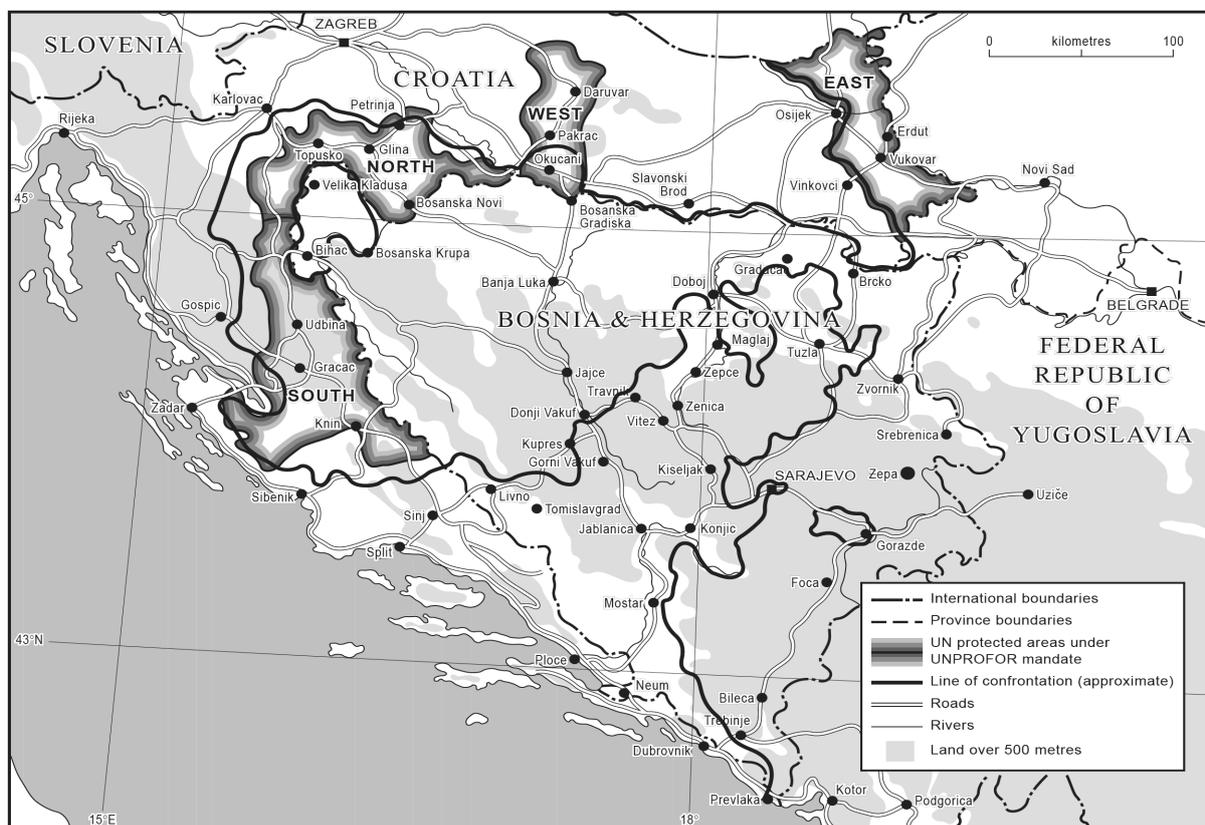
<sup>158</sup> The concept of constituent peoples goes back to the AVNOJ principles of November 1943 where equality and equal opportunities for the constituent peoples of a future federal Yugoslavia after World War II was established (see IV.3.2). That principle also held at the level of the Republics, so that the Serbs were granted the status of the second constituent people in the Yugoslav Republics of Croatia and of Bosnia-Herzegovina.

Ovčara events based on the ICTY archives, speaks of Vukovar as “a disastrous beginning of the handling of war crimes which boded ill for the subsequent years of the war”.<sup>159</sup>

By late 1991, President Tuđman had to realize that winning was not on the cards for the time being, and he accepted a ceasefire and the deployment of an UN peace-keeping force instead (Hague, 1995: 3-4), a situation which proved, diplomatically speaking, “an uneasy truce” (Owen, 1995: 2). The UNPROFOR forces were deployed in the spring of 1992 in the areas where Serbs were the majority or a significant minority. The so-called UN Protected Areas (UNPA) were divided into four sectors (Klemenčić, 1993: 54); see fig. 13 below.

According to the 1991 census, the Serbs constituted the majority in the sectors North and South. The Croats accounted for 35 (North) and 21 (South) percent respectively. In sector West, Serbs and Croats made up roughly equal shares of the population, whereas Croats were the majority in sector East (Klemenčić, 1993: 54).

Figure 13: United Nation Protected Areas in Croatia 1992-1995 (Klemenčić and Schofield, 2001: 27)



After a subsequent, relatively long period of sporadic isolated fighting, and the building up of a Croatian army, the latter launched two major operations 01-03 May 1995 (“Bijesak”/Flash in Western Slavonia) and 04-07 August 1995 (“Oluja”/Storm in the Krajina) to re-gain the occupied territories (Lamont, 2015: 73; Pusić, 1997: 102-3). Despite the military victory, it

<sup>159</sup> The mass grave was only detected in October 1992 by a Western forensic expert (Zgonjanin, 2018: 49). Most of the victims of the atrocities at Ovčara were patients at Vukovar hospital, mainly Croatian soldiers. Three of the JNA officers involved faced a trial before the ICTY. Mile Mrkšić was sentenced to 20 years, Veselin Šljivančanin to five years. Miroslav Radić, however, was cleared of all charges (Banjeglav, 2012: 13-5).

took almost another two-and-a-half years for the full return of Eastern Slavonia into the constitutional-administrative legal order of Croatia to be implemented (Dolenec, 2013: 131). The peaceful re-integration was implemented by a transitional administration (UNTAES) set-up by the UN Security Council which, after two extensions of the timeline, expired only on 15 January 1998.<sup>160</sup> Serb civilians had been killed by the Croatian Army during three months after Operation Storm (August 1995), a fact that was somewhat down-played by the ruling elite after 2001 not least on the grounds that there had been no legal order yet in the respective areas (Banjeglav, 2012: 19-21; Renner and Horelt, 2008: 17-20). The Croatian Helsinki Committee for Human Rights report (2001: 135) accounts for 600 Serb civilian casualties, the Serbian NGO Veritas claims 1078 Serb civilian victims.<sup>161</sup>

### Declaration of the Croatian Parliament October 2000

The Homeland War where around 15.000 (Granić, 2005; cited in Dolenec, 2013: 131; interview Ivo Sanader, 19-05-2016) to 20.000 people (Jović, 2011: 3) lost their lives, amongst them 3.000 civilians (Brkić et al, 1997: 49), has become a vital part of the Croatian ‘self’ as a sovereign and independent nation State. The memory of the war lives on to the present day, not least because there are still more than 1.500 people missing (Jurčević and Urlić, 2002: 234)<sup>162</sup> after more than 2.000 bodies had been found in mass graves.<sup>163</sup> The overall human toll of the dissolution of Yugoslavia is at around 140.000 casualties and four million displaced persons on the territory of the former SFRY (McConnell, 2018:1). The number of Serbs in Croatia has, as a result of the war, decreased from 580.000 (12.2 percent) in the 1991 census to 200.000 (4.5 percent) in the 2001 census. Most of them had become refugees in neighbouring Serbia and Bosnia-Herzegovina (Jović, 2011: 4). A substantial number of land mines from the Homeland War remain to be defused. The process of de-mining was supposed to be completed by March 2019.<sup>164</sup>

As a result, post-1995 Croatia largely sees itself as having (i) emancipated from Yugoslavia, (ii) liberated the territories occupied by the Croatian Serbs (supported by Serbia proper), and (iii) acted in a defensive war against the Serbs’ attacks. These pillars of Croatian national identity are part of the Croatian parliament’s Declaration on the Homeland War adopted on 13 October 2000 (Lamont, 2015: 74; Banjeglav, 2012: 11). The declaration stated that Croatia

“led a just and legitimate, defensive and liberating, and not an aggressive and conquering war [...] in which it defended its territory from greater-Serbian aggression within internationally recognized borders.”

Further to the above narrative, the Declaration provides for a straightforward and defining interpretation of the Homeland War:

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<sup>160</sup> Croatia and the Serb authorities signed an agreement on 12 November 1995 asking the UN Security Council to set up a transitional administration. By the time the agreement was signed, Eastern Slavonia (UNPA Sector East, see figure 13 above) was still under Serbian control (Banjeglav, 2012: 13).

<sup>161</sup> Figure from 2014; see <http://www.veritas.org.rs/srpske-zrtve-rata-i-poraca-na-podrucju-hrvatske-i-bivse-rsk-1990-1998-godine/zrtve-akcije-olujna-na-srpskoj-strani-2014/>.

<sup>162</sup> The figure appears not to have changed. According to the deputy speaker of the Sabor, Milijan Brkić, there are 1.544 missing persons (conference “Missing soldiers and civilians”, European Parliament, 21 March 2017).

<sup>163</sup> Figure given by the Croatian Red Cross representative Branimir Tomić at the above conference.

<sup>164</sup> The commitment stems from Croatia’s ratifying of the UN Anti-Personnel Landmine Convention (APLC); information obtained from the Croatian Centre for De-Mining, 21-04-2017.

“The fundamental values of the Homeland War are unambiguously accepted by the entire Croatian people and all Croatian citizens” (Official Gazette, 2000/102).

The yearly commemorations of the Homeland War in Croatia and Serbia, including the events in Vukovar, have repeatedly led to tensions in the relations between Zagreb and Belgrade since (Banjeglav, 2012: 24-5; author’s field notes 05-08-2018<sup>165</sup>). Moreover, the repercussions of the Homeland War have had a direct impact on the EU’s accession negotiations with Serbia where Croatia submitted reservations vis-à-vis the opening of negotiation chapters in the first half of 2016, not least on the grounds of the war-crime jurisdiction in Serbia (see VIII.2.2).

### Impact of the International Criminal Tribunal for the Former Yugoslavia (ICTY)

When it was founded by the UN Security Council Resolution 827 in 1993<sup>166</sup> (see also Baker, 2015: 98-101), the ICTY was to address what constitute the most atrocious war crimes in Europe since the Second World War. The ICTY was indeed the first international criminal tribunal since the trials of Nuremberg and Tokio (Zgonjanin, 2018: 18). The ICTY sat for almost a quarter of a century, and when it finished on 31 December 2017, a number of essential functions, such as appeal cases, were transferred to the International Residual Mechanism for Criminal Tribunals (MICT).<sup>167</sup> Originally, all trials were supposed to be completed by 2010, and all appeal cases by 2011 (Dragović-Soso and Gordy, 2011: 194).

Orentlicher (2018: 6), in her seminal account of the ICTY’s impact in Serbia and in Bosnia-Herzegovina, highlights a crucial issue in that context: Not only did the ICTY manage to indict and sentence many perpetrators. In addition, a great dividend of the Tribunal’s work was its profound “role in catalysing domestic war crime prosecution, a function no one anticipated when the [Tribunal] was launched”. In fact, domestic war crime prosecution had been scarce in the 1990s, and the capacity of Bosnia-Herzegovina, Croatia, and Serbia for war crime prosecution was only boosted after 2000. The first special prosecutor for war crimes in Serbia was established in 2003, whilst a special war crime chamber started its work in Croatia in 2005, and in Bosnia-Herzegovina in the same year (Dragović-Soso and Gordy, 2011: 198).

With regard to the *impact* of war-time mass atrocities and of war crime tribunals’ work on societies, a quick insight into a few issues from social psychology may be justified here. According to Orentlicher (2018: 226-235), the first issue is the impact of official narratives in terms of *heuristics* and *framing*. Whilst heuristics is about cognitive shortcuts during an assessment of whether the contents of a piece of information is true, i.e. a rule of thumb used by the individual in their reckoning, framing is about the availability of stored information to the individual for their evaluation. The information most readily accessible will prevail. To that end, exposure to communication is central. Politicians tend to strive for that framing effect, for instance by creating a notion of victimisation, a popular course of action not only in Serbia, Bosnia-Herzegovina, or Croatia. Second, *motivated reasoning* and *social identity*: Motivation has a central role in shaping beliefs, and the unconscious part of the processing of information leads to a bias in the actual reasoning. The membership of a social group is crucial for social identity. Members of a group will want to maintain a positive self-image and a positive image of the group. This can lead to denialism if, for instance, a member of the group is said to be involved in mass atrocities. Third, *dissonance*, similarly, is about one’s personal views conflicting with the conduct of another member of the same social group. The

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<sup>165</sup> The 2018 Oluja commemorations were held in Knin including a military parade of the Croatian Airforce.

<sup>166</sup> Resolution 827 is available at <http://unscr.com/en/resolutions/doc/827>.

<sup>167</sup> The MICT also took over functions from the International Criminal Tribunal for Ruanda (ICTR).

result is either the dismissal of official narratives (of victimhood, for example), or it can create denialism if, for instance, family ties are valued paramount and make you believe that your brother or uncle cannot possibly be responsible for wartime atrocities. Lastly, *belief perseverance*. The central argument here is that once you have a belief, any new evidence or arguments coming along will be subject to a confirmation bias. In other words, new pieces of information tend to be interpreted as evidence of your own's established views.

#### IV.5.3 Agreement on Succession Issues (ASI)

After prolonged negotiations lasting almost ten years, Bosnia-Herzegovina, Croatia, the Federal Republic of Yugoslavia (Serbia and Montenegro<sup>168</sup>), Macedonia/FYROM, and Slovenia, “being in sovereign equality the five successor States to the former Socialist Federal Republic of Yugoslavia [...]”(Agreement, 2001: 1)<sup>169</sup> signed the Agreement on Succession Issues (ASI) on 29 June 2001 in Vienna. The Agreement entered into force on 02 June 2004.

With regard to pluri-lateral treaties of State succession, Oeter (1995) distinguishes between (i) a fully consensual solution as in the case of the Czechoslovak Federation, (ii) a peaceful solution with conflicts about the redistribution of assets and liabilities at the break-up of the Soviet Union, and (iii) conflicts on the distribution of liabilities in the case of Yugoslavia.

To be sure, the SFRY's dissolution was non-consensual and not peaceful. Negotiations over succession issues had begun in 1992 (Hasani, 2006: 112)<sup>170</sup>, but the Agreement on Succession Issues would only be concluded many years later. This is mainly due to the FRY taking the view for a long time that only itself constituted the successor State of the SFRY (Dumberry, 2006: 429; Hasani, 2006: 113; Mrak, 1998: 9-10), whereas Bosnia and Herzegovina, Croatia, Macedonia/FYROM, and Slovenia had seceded unconstitutionally. In practice, this meant that Serbia and Montenegro were the sole owner of all State property of the former federation. The FRY only gave up its claim of continued legal personality after Milošević was ousted in October 2000 (Škrk et al, 2015: 214; Stahn, 2002: 379-80; Stanič, 2001: 753). It was only then that the previous conflict on what type of State break-up the SFRY had actually undergone could finally be resolved unanimously amongst the five successor States.

A special negotiator, Sir Arthur Watts, was appointed in 1996 by the High Representative for the civilian implementation of the Dayton Peace Accord (Škrk et al, 2015: 218; Hasani, 2006: 127).<sup>171</sup> Watts' “skilled guidance” (Škrk et al, 2015: 214) is widely seen as a major positive factor for establishing a final settlement (Stanič, 2001: 752).

The Agreement of 2001 consists of two parts. The basic text, an ‘umbrella agreement which is relatively short addresses the major issues of the Yugoslav succession and establishes a Standing Joint Committee (SJC) of representatives of each successor State (Article 4), a dispute resolution mechanism (Article 5), and a reference to the Annexes as an integral part of

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<sup>168</sup> Montenegro became independent in 2006. The agreement with Serbia on the ASI items was that Montenegro receives 5.88 percent of the Serbian assets once the ASI process is completed. In addition, Serbia has rendered some of its gold reserves to Montenegro. Podgorica was also granted observer status for the ASI meetings. The country stopped taking part at a later stage (interview Vladimir Radulović, 20-04-2018).

<sup>169</sup> The FRY further disintegrated after the ASI's conclusion, Montenegro seceding in 2006, and Kosovo seceding in 2008. There are no legal consequences on the remaining parties to the ASI, however, as issues arising from the disintegration of the FRY are a matter solely for the former FRY's three States (see above footnote).

<sup>170</sup> The International Conference on the former Yugoslavia (ICFY) established various Working Groups. One of them was the Working Group on State Succession (Stanič, 2001: 752).

<sup>171</sup> The Dayton Accord had set up the Peace Implementation Council which subsequently charged the High Representative with the issue of State Succession (Hasani, 2006: 112; Stanič, 2001: 752).

the Agreement (Article 6). The Annexes as the second part cover the rights and obligations of the SFRY successor States for implementation within the below issue components (Article 3):

- A: Movable and Immovable Property;
- B: Diplomatic and Consular Properties;
- C: Financial Assets and Liabilities;
- D: Archives;
- E: Pensions;
- F: Other Rights, Interests, and Liabilities;
- G: Private Property and Acquired Rights.

Pursuant to Article 5 of the Agreement, differences over the interpretation or implementation of the Agreement are to be resolved through discussion among the States concerned. If they fail to reach an agreement, they can refer the matter to an independent person of their (unanimous) choice who may deliver a binding decision, or to the steering committee SJC. Further, and with regard to *practical* aspects of implementation, the disputing States can aim at binding expert solution provided they agree on the expert. If they do not agree, the President of the Court of Conciliation and Arbitration within the OSCE shall make the appointment. However, the following issues are not eligible for externalised expert solution: the distribution of BIS Assets, the diplomatic and consular properties already allocated in the Agreement proper, the definition of financial assets from the Agreement proper, and the common heritage part of State archives.

There has been some criticism of the powers of the SJC, the steering body for the implementation of the Agreement, and with regard to the dispute settlement mechanism. Hasani (2006: 127) argues that the non-binding nature of the SGJ's recommendations to the governments is "a serious drawback of this body". Škrk et al (2015: 251-252) critique the insufficient dispute settlement mechanism which was the reason why the most sensitive or complex issues, such as the 'old' foreign currency deposits<sup>172</sup>, or the allocation of tangible military property, remain unresolved to the present day.

On a positive note, the Agreement "closed, once and for all, the problem of State succession to the former Yugoslavia" as it followed the stance of the Badinter Commission (Hasani, 2006: 112). The Agreement clearly stipulated that, in legal terms, the obligations of the predecessor State towards third countries did not simply disappear, but were transferred upon the successor States (Dumberry, 2006: 431).<sup>173</sup> In a more recent study, Dumberry (2015: 30) argues that there is a clear trend of newly independent States continuing, by express or tacit agreement, bilateral treaties entered into by the predecessor State, although the newly independent States are not automatically bound to do so.

A major achievement as for the Agreement's substantive provisions certainly was the crucial role of the international financial organisations in dividing up the outstanding debts and assets (Stahn, 2002: 397).<sup>174</sup>

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<sup>172</sup> For the state of affairs (at the time of writing) on the *Ljubljanska Banka* issue as for the reimbursement of foreign depositors, a highly conflictual and loaded matter not least for Slovenia and Croatia, see V.1.4.

<sup>173</sup> Dumberry (2006) provides a comprehensive discussion of *State succession to international responsibility* looking at (i) the integration of the GDR into the Federal Republic of Germany (FRG) in 1990, (ii) the dissolution of Czechoslovakia 1992, (iii) the dissolution of Yugoslavia 1991-2, and (iv) the break-up of the USSR 1991.

<sup>174</sup> The apportionment of the outstanding SFRY debt to the five successor States was indeed carried out with reference to the International Monetary Fund (IMF) key as follows: Bosnia-Herzegovina 13.2 percent, Croatia

Table 2: State of play implementation of Agreement on Succession Issues<sup>175</sup>

<b>Annex</b>	<b>Settled issues</b>	<b>Open issues</b>	<b>Status</b>
<b>A. <u>Movable and Immovable Property</u></b>	Cultural heritage property	Military property  Works of art	Negotiations yet to start; no prospects as most equipment war-related and worn out  Negotiations ongoing
<b>B. <u>Diplomatic and Consular Property</u></b>	Major property items from Agreement proper (London, Paris, Washington D.C.); +/- 70 % of property from annexed list	Remaining property (+/- 30 percent) e.g. New York, Tokio, Bonn, Berne, Delhi, Moscow, plus OSCE countries, Asia and Africa	Sale ongoing
<b>C. <u>Financial Assets and Liabilities</u></b>	All successor States have settled apportioned SFRY <sup>176</sup> debt with creditors <sup>177</sup> bilaterally; BIS assets apportioned	Old foreign currency deposits; unpaid SFRY contributions to U.N.	Negotiations on currency deposits ongoing at BIS; Slovenia has a compensation scheme in place <sup>178</sup>
<b>D. <u>Archives</u></b>	Joint letter of intent to digitalize common archival heritage	Full access to archives of NBY <sup>179</sup> , defense, and security documents	Digitalization of available documents ongoing
<b>E. <u>Pensions</u></b>	All successor States have concluded bilateral agreements respectively	-	-
<b>F. <u>Other Rights, Interests, and Liabilities</u></b>	-	e.g. State responsibility for unlawful acts	Negotiations ongoing (anything-or-nothing approach)
<b>G. <u>Private Property and Acquired Rights</u></b>	Individual persons' claims	War damages, ownership rights	Individuals' issues to be settled before courts

28.49 percent, Macedonia 5.4 percent, Slovenia 16.39 percent, and FRY (Serbia and Montenegro) 36.52 percent. The IMF key is mirrored in the Appendix to the Agreement.

<sup>175</sup> As of November 2018. Selected and condensed by the author. Mainly based on information provided by the High Representatives on Succession Issues of Croatia and Slovenia.

<sup>176</sup> At the end of 1991, the outstanding SFRY foreign-currency debt was at 15.1 billion Dollar of which 3.14 billion belonged to the Federation, and 5.4 billion to the FRY, i.e. Serbia and Montenegro ("Neue Zürcher Zeitung", 22 September 1992).

<sup>177</sup> International financial institutions (such as the IMF, the World Bank, or the European Bank for Reconstruction and Development), State creditors ("Paris Club"), and private banks ("London Club").

<sup>178</sup> Following the Ališić judgement of the European Court of Human Rights (see VI.1.4).

<sup>179</sup> National Bank of Yugoslavia.

Drenik posits that, politically, the Agreement is a unique treaty beyond other treaties as it reflects the minimum consensus of five successor States after the violent break-up of a country, and that, in a way, the Agreement could be regarded as a “tiny constitution” for the region despite the slow implementation (Drenik, 2013: 96).

It must be noted that the Agreement as such has settled a few of the outstanding issues ad hoc, but that the bulk of work arises through the respective Annexes and the Joint Committees (JCs) established in them. A few main issues have been settled. Progress in other areas, however, has been very slow, and some issues seem to have *de facto* been postponed *sine diem* (interview Ana Polak Petrič, 08-05-2017; interview Andreja Metelko-Zgombić, 01-11-2017; interview Vladimir Radulović, 20-04-2018).

To give an example for the pace of the process: the latest property sale at the time of writing is the New York residence of the former Yugoslav U.N. ambassador of 31 May 2018. The residence had been unoccupied since 1992. Of the revenue of 12.1 million US Dollars Croatia obtained 2.08 m, and Serbia 3.48 m. No information is available as for the other States (Hina news, 03 June 2018). The former SFRY Permanent Mission to the U.N. at Fifth Avenue in New York, rated the most valuable and prestigious property of all, is currently used by Serbia. The sale process altogether has been very slow since 2011. The above chart serves to illustrate the current state of play by the most prominent succession issues (see table 2 above).

In a nutshell, the process of the dissolution of Yugoslavia has apparently had the most immediate conflictual impact on the successor States and their bilateral and plurilateral relations. The independence of Croatia and Slovenia led to the outbreak of an atrocious war over the Serb population in Croatia. The subsequent EC crisis management helped shape a new landscape of successor States, whereas hardly anything could be achieved to stop the warfare on the ground. The process of pluri-lateral negotiations of the SFRY’s succession issues after 2001 has proven loaded to date, as much of it still relates to the violent break-up of the country 26 years ago.

## **Conclusion**

This Chapter has highlighted the processes of political, territorial and violent conflict in the north-eastern Adriatic and in parts of the area of the former Yugoslavia in the time span between the end of the Venetian Empire and the dismemberment of the Socialist Federal Republic of Yugoslavia (SFRY) including its aftermath. For an analysis of the present-day conflicts between SFRY successor States in general, and between Croatia and Slovenia in particular, the following seems particularly relevant:

► Changes in territorial sovereignty in the region in the contemporary international system before 1918 have been frequent and considerable. Since the end of the Venetian Empire, people in the region have had to adapt to Napoleonic, Habsburg, and Italian rule without being able to establish independent entities themselves – except for Serbia and for Montenegro at a relatively late stage after the Berlin Congress of 1878. The founding of Yugoslavia in 1918 - a historic opportunity to shake off foreign rule – did not take place in the most fortunate circumstances at the Paris Peace Conference, where it was difficult for the new State to fight for international recognition at the negotiating table. In addition, it proved

virtually impossible for the new State to secure its territorial claims. Instead, large parts of (present-day) Slovenia and Croatia came under Italian rule during the interwar period. As for the Kingdom of Serbs, Croats and Slovenes, internal conflict over the constitutional nature of the new State could hardly be resolved.

The invasion and partition of Yugoslavia by German and Italian troops during World War II strengthened the Partisan movement and, as a result, laid the foundations of the establishment of a quasi-federal State with communist one-party rule. The violent War of Liberation, in which hundreds of thousands of lives were lost, included a bitter fight over the territories in Istria (over which Yugoslavia finally gained sovereignty, except for Trieste) and led to the first Cold War military zone governed by the Allies, the Free Territory of Trieste, which lasted until 1954. Only in 1975 was the Yugoslav-Italian boundary finally settled through bilateral negotiations and the Italo-Yugoslav Treaty of Osimo.

The second Yugoslavia, despite its leading role in the non-alignment movement in the Cold War world and its status of the most developed socialist country, suffered from the domestic perception that the central State was increasingly illegitimate, from the quasi-independent behaviour of the Republics (which was strengthened by the decentralising 1974 constitution), from temporary economic decline, from increasing domestic conflict over financial resources and, perhaps most decisive, from the Republics growing apart by developing their own separate national narratives about history, culture, and identity following a withering away of the consensus about the ideological core of the Yugoslav project.

► The European Community took on the delicate role of a third-party mediator in the process of the formal dissolution of Yugoslavia in 1991/92. Despite the sobering fact that very little could be done to stop the warfare on the ground, standards were set through an *ad hoc* arbitration body, the Badinter Commission, whose Opinions on crucial issues, such as State succession, State recognition, and the transition of internal borders into international ones were considered binding. Further, the Badinter Opinions have gained considerable weight in international law jurisprudence, since they applied the principle of *uti possidetis* in a post-colonial context and provided for a definition of a State in dissolution, to name but two issues.

Whilst the question of whether the joint EC action has increased or decreased hostilities on the ground will always remain a chicken and egg one, the EC managed to develop and exercise substantial conflict management power on the diplomatic front. This must be seen against the very complex political background of a State being in the process of non-consensual and violent dismemberment or dissolution. Furthermore, the EC had to get to grips with the dissolution of the USSR as a superpower at the same time.

The move by the Slovenian and the Croatian delegations to jointly leave the Communist Party of Yugoslavia's Congress in January 1990 appears to be the beginning of the visible process of the country's dissolution in terms of the end of the workings of the federal institutions. Regardless of the fact that this process proved irreversible, the independence referenda in Croatia and Slovenia did initially foresee confederal elements as opposed to the idea of breaking all ties between the former co-republics. Thus, it is important to bear in mind that a spirit of good-neighbourly co-operation was not completely lost.

► The 'Badinter borders principle', which provides for the recognition of the inter-republican borders as international borders (*uti possidetis*) must be seen as a milestone in terms of post-

colonial State recognition and self-determination under international law. Despite the fact that the Badinter principle has been critiqued for being somewhat random on the historical nature of the internal borders, it provided for some degree of stability. Admittedly, the application of *uti possidetis* also re-opened the potential for national conflict in Yugoslavia, which had been contained somewhat successfully in the early years of the second Yugoslavia, with its five Republics and multi-national approach.

The Homeland War in Croatia (1991-1995) must be seen in this context. Amidst the dissolution of Yugoslavia, it marked the first serious outbreak of violent conflict over territories where a substantial or majority share of an ethnic group were living, i.e. the Serbs in Croatia. What did not matter a lot in Yugoslavia, where the multi-national approach had assigned the inter-republican borders mainly an administrative, at best territorial role, fundamentally changed with the independence of the successor States. Some ethnic groups were *de facto* expatriated from the 'parent' State. During the Homeland War, despite UN peacekeeping as a non-enforcing means of conflict management, the operational control of the escalating or de-escalating aspects of warfare on the ground clearly remained with the parties to the conflict. To this end, the effectiveness of the mediating role of the international community was, for a number of reasons, rather limited.

► The Agreement on Succession Issues concluded by all five successor States in 2001 established the only forum where conflictual issues can be discussed, contained or settled directly among the countries. Whereas the Agreement as such was reached with the assistance of a mediator nominated by the UN, the actual process of *implementation* has since been subject to pluri-lateral and bilateral negotiations. Whilst non-conflictual issues, such as the distribution of the SFRY debt or State pensions, were settled in a pragmatic and timely manner, questions of national interest are far more difficult to resolve. This is all the more the case given that the obligation arising from the treaty, namely to *reach* implementing agreements, is not practically enforceable.

Although the Agreement has been in force for more than 15 years, its implementation naturally very much depends on the good will and faith of all successor States. Many issues representing the left-over 'conflictual heritage' of Yugoslavia continue to remain unresolved or pending. Yet, some of the issues are likely to lead to bilateral conflict in the future, not only in the context of EU enlargement.

## V. Marine spaces and maritime delimitation: the legal issues

This Chapter aims at outlining the issues arising from the legal aspects of territorial and maritime delimitation. The focus is on the delimitation of the Croatian-Slovenian *sea* border. To that end, the ‘lawfare’ between Croatia and Slovenia over maritime zones ahead of the 2008 deadlock at the EU accession stage is a vital prerequisite and collateral foreplay to the later development of the border dispute at the EU stage. That is why this Chapter presenting both the toolbox of maritime law and preceding legal-political developments in the Slovenia-Croatia case needs to precede Chapter VI which has as its major focus on the drafting stage of the Arbitration Agreement where an insight into the maritime law toolbox is indispensable. Coming back to the border, its disputed sections on *land* are relatively tiny strips on what generally is an agreed border following the pre-1991 (administrative-internal) boundary between the former SFRY Republics (see I.1).<sup>180</sup> In contrast, the *sea* border between Croatia and Slovenia is subject to delimitation *de novo*, as is the case between all successor States of Yugoslavia’s coastal waters, as there were no boundaries in the integrated SFRY sea. Piran Bay, for a start, had the status of internal waters.<sup>181</sup> The new task of delimitation at sea following the break-up of the country in 1991 may well be seen as a thorny issue.

It is useful to bear in mind that many of the contemporary territorial conflicts are about space at sea rather than on land. This is all the more relevant if one looks at the size of the overlapping claims most of them triggered by assumed or asserted oil and gas reserves, wind fields, fishing grounds, or, most importantly both in terms of world trade and security and defence, the freedom of navigation. The South China Sea where overlapping claims to the Spratly Islands (to name but one spot) and neighbouring islands involve China, Taiwan, Vietnam, the Philippines, Malaysia, and Brunei, undoubtedly is the most prominent current such example in world affairs (see e.g. Bateman, 2014; Keyuan, 2012; Buga, 2012: 85-6). In 2016, the Tribunal in the *South China Sea* (Philippines/China) arbitration<sup>182</sup> ruled that China had no historic rights in the area, was in violation of the Philippines’ sovereign rights in its exclusive zone by constructing artificial islands, and harmed the fragile ecosystem in the area (PCA Final Award, 2016: 471-7, paras 1202-3). In May 2018, China landed bomber aircraft on its Spratly runways and deployed surface-to-air-missiles on the Paracels for the first time (Asia Maritime Transparency Initiative news, 18 and 24 May 2018). The UK, France and Australia subsequently asserted their rights of passage in the region (The Telegraph news, 03 June 2018), whilst the U.S. Navy has since conducted several freedom-of-navigation operations in the South China Sea (see e.g. Reuters news, 01 October 2018).

The Adriatic Sea, a sub-sea of the Mediterranean, as a semi-enclosed sea previously accounted for three riparian States: Albania, Italy and Yugoslavia. Now there are six of them as the dissolution of the SFRY has led to the establishment of four new littoral States: Croatia, Bosnia-Herzegovina, Montenegro, and Slovenia (Grbec, 2015: 11-12; Blake and Topalović, 1996: 2-3). The Adriatic’s eco-system is particularly vulnerable as its waters are shallow and the exchange or renewal of waters with the Ionian Sea through the relatively narrow Strait of

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<sup>180</sup> Nevertheless, the Croatia-Slovenia land border issue will be addressed in VI.1.2.2, VI.1.4 and VI.3.5.1. For the disputed land border between Croatia and Serbia along the Danube see VIII.2.1.

<sup>181</sup> Piran Bay was closed by a straight baseline in 1965 and is thus a juridical bay (Blake and Topalović, 1996: 12; Klemenčič and Schofield, 1995: 75; see also PCA Final Award, 2017: 272). For straight baselines see V.1.1.1.

<sup>182</sup> The Philippines initiated proceedings against China in January 2013. China, however, refused to take part in the arbitration and to accept the award holding that the Tribunal lacked jurisdiction and that the request for proceedings was inadmissible (PCA Final Award, 2016: 3-5). It must be stressed, however, that non-appearance of one of the parties does not hinder the proceedings and the eventual judgement being binding also on the non-appearing party (see e.g. Tanaka, 2018b: 115).

Otranto is limited (Vidas, 2013: 353; Blake and Topalović, 1996: 4). There is a major oil transportation route to the northern Adriatic ports of Trieste, Venice, Omišalj, and Koper (Vidas, 2006: 358-60). Major container ports are Koper, Trieste, Venezia, Ravenna, and Rijeka (Twrdy and Batista, 2014; Tomašević et al, 2011); see fig. 14 below.

Croatia and Slovenia have, by their independence in 1991, inherited Yugoslavia’s territorial sea border with Italy originally agreed on in 1975 (see I.1 and IV.4.3). However, at the time of writing, only one of the bilateral sea borders between the four SFRY successor States with maritime access has been finally delimited *and* implemented.<sup>183</sup> The bilateral treaty between Croatia and Bosnia-Herzegovina from 1999 has not been ratified yet, however. Implementation of the 2017 Final Award for the Croatian-Slovenian border is pending, and there is a *provisional* agreement between Croatia and Montenegro from 2002 (see VIII.1.2).

Figure 14: Riparian States and main ports in the Adriatic (Vidas, 2006: 357)



To obtain a sufficient grasp of the delimitation issues and processes at stake, the following sections will want to explore (i) the types and definitions of marine spaces under national jurisdiction and beyond, (ii) the rules and principles of maritime delimitation governed by the UN Convention of the Law of the Sea (UNCLOS), and, paying tribute to the crucial role of the jurisprudence of international courts and tribunals, (iii) the development of case law.

<sup>183</sup> The 2017 Final Award on the Croatia-Slovenia border as a binding decision under international law has yet to be implemented (see VI.3.6 and VI.3.7). Croatia, however, objects to this view; see e.g. VI.3.4.2.

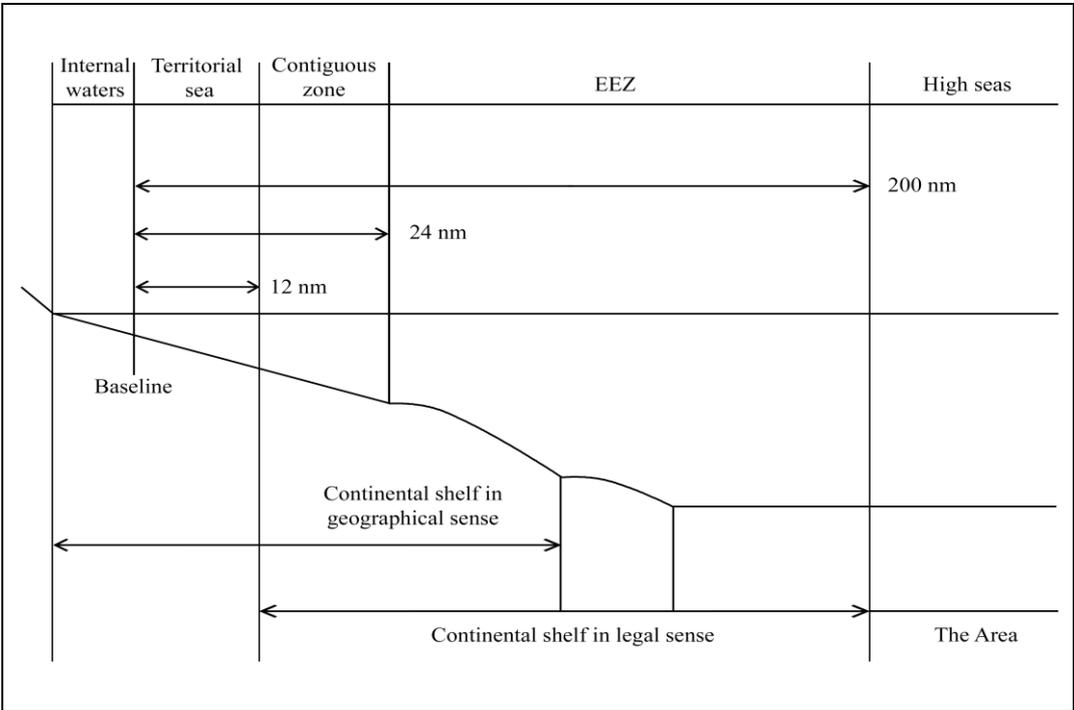
**V.1 Marine spaces**

The following survey of definitions is confined to the marine spaces relevant to the Adriatic. To start with, according to Tanaka (2015: 6-9) a principle distinction must be made between areas of

- (i) *territorial sovereignty* where a State has full jurisdiction, both legislative and enforcement, over all matters and persons on its territory (complete spatial jurisdiction), and those of
- (ii) *sovereign rights* where the State’s jurisdiction is limited to matters defined by international law (limited spatial jurisdiction).

Thus, marine spaces under *complete spatial jurisdiction* include internal waters, and the territorial sea.<sup>184</sup> Marine areas under *limited spatial jurisdiction* include the contiguous zone, the EEZ, and the continental shelf. Fig. 15 below outlines the different marine spaces.

Figure 15: Marine Zones (modelled after Tanaka, 2015: 8)



As Gidel (1981: 40-42) and Churchill and Lowe (1999: 60) have pointed out, there is a continuity of marine areas in the international law of the sea, i.e. the spaces are connected to one another through the ocean worldwide, and at constant sea-level. It follows that rivers and lakes (the Caspian Sea, for example), but also artificial canals (such as Panama Canal or Suez Canal) are considered terrestrial waters and therefore do not fall within the scope of the international law of the sea (Rothwell and Stephens, 2016: 56).

Fundamentally, it may be said that the international law of the sea is about “access to and ownership of the oceans” (Rothwell and Stephens, 2016: 3). There are three principles governing the international law of the sea: (i) the principle of *freedom*, (ii) the principle of

<sup>184</sup> International straits and archipelagic waters are neglected here.

*sovereignty*, and the principle of (iii) *common heritage of mankind* (UNCLOS Preamble<sup>185</sup>; Evans, 2010: 651-3; see also Tanaka, 2015: 38). The principle of freedom historically was about the freedom of navigation for overseas trade for colonial purposes around the beginning of the 17th century (see e.g. Agyebeng, 2006: 376-7).<sup>186</sup> Today, it means the freedom of the various uses of the seas, such as navigation, fishing, overflight, laying pipelines and submarine cables, or the construction of offshore installations/artificial islands. Conversely, the principle of sovereignty aims at advancing the interests of the coastal States.

Historically, the concept of extending national jurisdiction onto offshore spaces goes back to the mid-18th century<sup>187</sup> and mainly served the purposes of security, fisheries, and revenue from customs, a notion already fairly close to the contemporary law of the sea where the distinction between the territorial sea and other areas of national jurisdiction, and the high seas is a result of the dichotomy between the principles of freedom and sovereignty. The principle of the common heritage of mankind, however, was only introduced as late as in April 1982 with the adoption of the United Nations Convention of the Law of the Sea (UNCLOS) entering into force on 16 November 1994. This principle, which one may well consider a purely ethical one, is about safeguarding the interests of all humans on this planet and the generations to come (see Tanaka, 2015: 16-19).

### **V.1.1 Baselines, bays and islands**

The baseline is the starting point of the assignment of maritime spaces. It is the point from which the outer limit of national jurisdiction of the coastal State is measured, thus determining the shape of the coastal front in legal terms. At the same time, the baseline distinguishes the land-bound area of internal waters from the sea-bound space of the territorial sea. It is important to note that, unlike in territorial waters, the right of innocent passage does not apply to internal waters (see also V.1.2). In addition, baselines matter when it comes to delimitating the maritime border between two States with overlapping zones or claims.

#### **V.1.1.1 Normal baselines and straight baselines**

The normal baseline is the low-water line drawn along the coast. It is the basis every maritime claim is related to. Yet, as coastal configurations tend to be rather irregular including fringe islands, there was a need for devising rules to overcome a somewhat impractical set-up of normal baselines. The result was the application of *straight baselines* the main feature of which is the possibility to draw lines joining specific points along the coast to level off innumerable indentations. As a result, straight baselines are drawn across water rather than along the coast (Rothwell and Stephens, 2016: 33-35; 44-5; Tanaka, 2015: 44-51); see fig. 16.

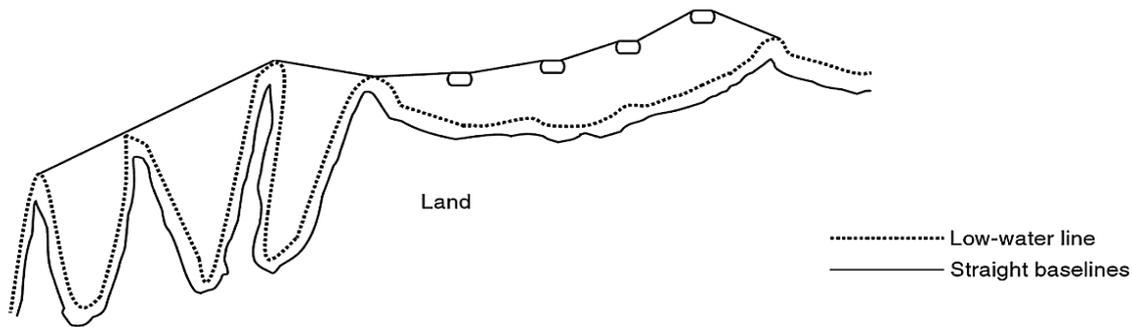
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<sup>185</sup> "Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment."

<sup>186</sup> Reference is to be made here to the works of the Dutch scholar Hugo Grotius. His *Mare Liberum* from 1608 may be considered the nucleus of the freedom-of-the-seas movement and momentum. For an English translation of the Latin original and an introduction to the background of the Dutch East India Company see Feenstra (2009).

<sup>187</sup> Emmerich de Vattel, in his 1758 book *Le droits des gens*, outlines the concept that in coastal waters the same jurisdiction may apply as on land. For an English translation see De Vattel (2003).

Figure 16: Straight baselines and the low-water line (Tanaka, 2015: 47)



Article 7 UNCLOS specifies the conditions for the drawing of baselines in (i) excluding the possibility to draw straight baselines to and from low-tide elevations (unless equipped with a lighthouse or a similar navigational installation), and, (ii) ruling out the drawing of straight baselines in a way that they cut off the territorial waters of another State from the high seas. The latter provision is to deal with exceptional situations where a particularly small territorial unit is embedded in a larger one, or where small islands of one State are very close to the coast of another State. Three such configurations can be found in the Mediterranean. The former configuration applies to Monaco in France, and to the corridor of Bosnia-Herzegovina on the Croatian coast<sup>188</sup>, the latter configuration is represented by the Greek islands along the coast of Turkey (Tanaka, 2015: 52-54; Arnaut, 2014: 165-7; Churchill and Lowe, 1999: 37).

It is important to note that the drawing of baselines is a unilateral act with great diversity in State practice, and that some of the claims clearly appear excessive. Yet, international courts or tribunals will only be able to consider the legitimacy of claims once cases are brought before them (Rothwell and Stephens, 2016: 53). The first-ever judgement on straight baselines was handed down in 1951 when the UK had questioned the legality of the groundbreaking Norwegian straight baselines<sup>189</sup>, and the ICJ endorsed them considering geographic, economic and historic factors (Scovazzi, 2018: 120-2). Judicial bodies have subsequently assessed and modified straight baselines in a number of cases, and it may be said that judicial examination contributes to containing excessive straight baselines (see Tanaka, 2015: 214-5).

#### V.1.1.2 Juridical bays

Bays play a paramount role for coastal States due to their distinctive connection with land and their more intimate character compared to the open coast. Thus, the concept of bays in a legal sense (juridical bay) emerged as early as in the late 19th century, and a special regime applies in the contemporary law of the sea (Tanaka, 2015: 54-5; Evans, 2010: 655-6).

To qualify as a juridical bay, its features must include “a well-marked indentation [...] contain[ing] land-locked waters constitut[ing] 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

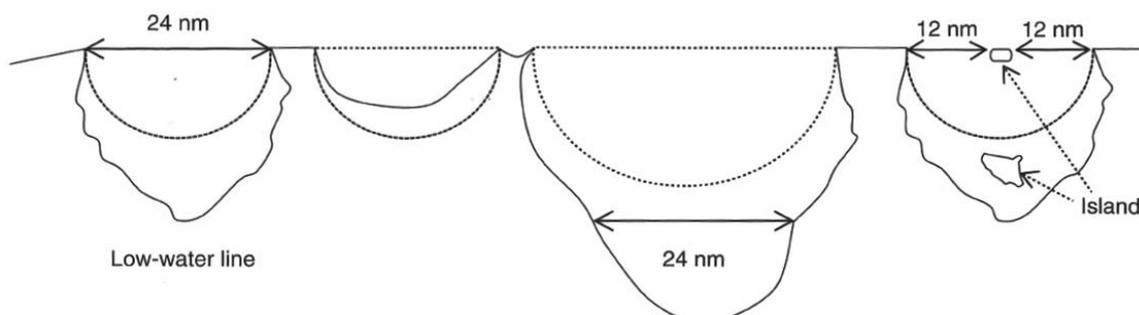
<sup>188</sup> Croatia took over the system of straight baselines from the SFRY. The baseline section between the islands of Korčula and Hvar, however, appears to cut off Bosnia-Herzegovina, a successor State to the SFRY like Croatia, from its access to the high seas; see also V.1.2. The matter is discussed in more detail in VIII.2.5.

<sup>189</sup> The Norwegian straight baseline system established in 1935 was unparalleled incorporating 47 segments covering more than 1.500 kilometres with base points chosen from extreme points on the coast, on islands and rocks out at sea (Scovazzi, 2018: 121; Tanaka, 2015: 48).

than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation” (UNCLOS, Art. 10(2)). Where islands create more than one mouth of the bay, the semi-circle will be drawn along the total length of the lines across the various mouths (UNCLOS, Art. 10(3)). If a bay fulfils the above criteria, and is less than 24 nautical miles (nm) across its natural entrance points, a closing line may be drawn between the two low-water lines at its entrance points. If a bay is larger than 24 nm, a closing line of 24 nm may be drawn inside the bay. The so enclosed waters constitute internal waters (UNCLOS, Arts. 10(4) and 10(5)); see fig. 17 below. It is useful to note that the above provisions hold for bays belonging to a single State, and that pluri-State bays do not fall within the scope of UNCLOS Article 10 (Rothwell and Stephens, 2016: 48-9). However, if the pluri-State status of a former juridical bay is the result of State succession, as is the case with Piran Bay, Croatia and Slovenia being successor States to the SFRY, the status of juridical bay does not change (PCA Final Award, 2017: 272). A similar situation can be found at Prevlaka/Outer Herceg Novi Bay where Croatia and Montenegro are the present-day riparian States (see VIII.1.2).

The concept of a historic bay is not part of UNCLOS, but has developed as a feature of customary international law and State practice (Rothwell and Stephens, 2016: 49-51; Tanaka, 2015: 57-8). A study of the United Nations Secretariat has identified three main requirements for the title to a historic bay: First, a State claiming a historic bay must exercise authority over the area, second, there must be a continuity of authority exercised, and third, there must be no opposition by third States (Study UN Secretariat, 1962: 1-16, paras 80-133). Notably, historic bays can lead to serious conflict. In October 1973, Libya declared the Gulf of Sidra a historic bay drawing a 300 nm [sic] closing line across the Gulf. A considerable number of States, such as the EC Member States, the United States, Australia, and Norway contested the Libyan claim. In August 1981, the U.S. Navy held military manoeuvres in the area. During an armed conflict that emerged, two Libyan fighter planes were shot down. In August 1986, during another U.S. Navy operation, 25 persons were killed (Tanaka, 2015: 60).

Figure 17: Juridical bay with closing line, (failed) semi-circle test, closing line within bay, and closing line with island at bay’s mouth (Tanaka, 2015: 56)



### V.1.1.3 Border bays

Bays which are bordered by more than one State are outside the special regime of Article 10 UNCLOS. With regard to delimitation issues, there are the options of a mutual agreement *sui generis* on the part of the States bordering the bay, or of international court or tribunal decisions. Two different approaches may be distinguished generally: (i) a closing line across the bay and the subsequent apportionment of the internal waters (as is the case in the present

Tribunal decision on Piran Bay; see PCA Final Award 2017: 279, paras 912-913)<sup>190</sup>, and (ii) the application of normal baselines and an apportionment of the respective territorial sea inside the bay. The latter concept considers a closing line and the establishment of *joint* internal waters of more than one State (*condominium*) a contradiction to the exclusive nature of territorial sovereignty (Tanaka, 2015: 60-61).<sup>191</sup>

#### V.1.1.4 Islands

There is a huge amount of island formations in the world, and they are extremely diverse. Still, islands play a crucial part in the delimitation of marine zones since they generate a marine space.<sup>192</sup> UNCLOS provisions stipulate that islands have to be natural formations “surrounded by water”, and “above water at high tide”, i.e. they must constitute an area of land (UNCLOS, Art. 121(1)). Islands not only create a territorial sea, but also an Exclusive Economic Zone (EEZ), and a continental shelf (for EEZ and continental shelf see V.1.4 and V.1.5). However, rocks “which cannot sustain human habitation or economic life of their own” cannot create an EEZ or continental shelf, but only a territorial sea (UNCLOS, Art. 121(3)). This is of considerable relevance as an EEZ/continental shelf claim can extend up to 200 nautical miles and beyond (Tanaka, 2015: 63-68; Buga, 2012: 83-4).

#### V.1.2 **Internal waters**

With the recognition of the system of straight baselines in the second half of the 20th century (for the ICJ landmark decision from 1951 see V.1.1.1), the concept of internal waters became increasingly relevant. Therefore, the area enclosed as internal waters has considerably expanded as most coastal States have interpreted the straight baselines provisions liberally.

The distinctive feature of internal waters is that the coastal State enjoys unlimited sovereignty over these waters including a substantial degree of criminal jurisdiction vis-à-vis foreign vessels, and that there generally is no right to innocent passage, i.e. foreign marine vessels need to ask for clearance before entering internal waters (Evans, 2010: 658). There are, however, two exceptions to that general rule. First, access to ports can be considered open to merchant vessels and is governed by specific consular conventions notwithstanding the fact that coastal States do have the jurisdiction to deny access. To that end, some States fully block access of nuclear-powered ships (New Zealand) or whaling vessels (Australia), for example. Second, where internal waters are newly created, the right to innocent passage is considered ongoing when it already existed previously (Rothwell and Stephens, 2016: 53-59; Tanaka, 2015: 80-2). The latter provision potentially appears to apply in the case of the passage of marine vessels from the territorial waters of Bosnia-Herzegovina through the internal waters

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<sup>190</sup> Tanzania and Mozambique concluded a bilateral agreement in 1988 drawing a closing line over Ruvuma Bay and apportioning the internal waters following the median or equidistance line (Mlimuka, 1994: 399-402).

<sup>191</sup> See also the dissenting opinion of judge Oda in the 1992 *Land, Island and Maritime Frontier Dispute* (Gulf of Fonseca) ICJ judgement stipulating that the Gulf was a historic bay with El Salvador, Honduras and Nicaragua continuing condominium sovereignty (co-ownership) over the Bay save for a three nautical-mile belt of national-sovereignty internal waters along the respective coasts. Judge Oda argued that there was no such thing in international law as joint internal waters, as internal waters exclusively belonged to *one* State, and that a pluri-State bay did not exist either in international law (Dissenting Opinion Judge Oda, Gulf of Fonseca judgement 1992: 745-7, paras 23-26).

<sup>192</sup> The delicate question is, to what extent. Historically, there is a group of island States (such as Fiji, Western Samoa, or Greece) in favour of maximum claims for island-related marine zones. Conversely, other States (such as African States, or Turkey) seek to limit the maritime claims related to islands (Van Overbeek, 1989: 258-61).

of Croatia on their way to the high seas and vice versa (Grbec, 2015: 155-7; 160-2; Arnaut, 2014: 165-7; Vukas, 2008: 187-8; see also VIII.2.5).

### V.1.3 Territorial sea

The territorial sea is under the territorial sovereignty of a coastal State and extends to a maximum of 12 nautical miles measured from the baselines. It may be regarded the most crucial marine space for a coastal State as the territorial sea accounts for the maximum degree of sovereignty and jurisdiction off the coast. Usually, the highest level of marine activity takes place in that area due to its proximity to the coast.

The main features of the territorial sea include the coastal State's sovereignty over the waters, the seabed, its subsoil, and the airspace, and complete legislative and enforcement jurisdiction over all activities unless international law provides otherwise (Tanaka, 2015: 84-6; Rothwell and Stephens, 2016: 60-62; Evans, 2010: 659).

#### V.1.3.1 Innocent passage

The sovereignty of the coastal State over its territorial sea is limited, however, due to the paramount importance of the freedom of navigation (e.g. Evans, 2010: 660; Agyebeng, 2006: 372). Thus, any vessel enjoys the right of innocent passage in the territorial sea of any State (UNCLOS, Art. 17). Yet, passage must be continuous, and stopping other than in ports or at roadsteads is only allowed for reasons of *force majeure*, or distress, or for the purpose of assisting other vessels or persons in distress (UNCLOS, Art. 18). Warships are also supposed to enjoy innocent passage; submarines, however, need to navigate on the surface and show their flag (UNCLOS, Art. 20).

It is useful to note that there is still “considerable controversy” around innocent passage (Evans, 2010: 661), and that several States operate a notification or authorisation policy vis-à-vis warships. In the Adriatic, Croatia, Montenegro, and Albania require prior notification for warships entering the territorial sea.<sup>193</sup> State practice is not uniform on this issue, and a number of States, such as Germany, Italy, The Netherlands and the United Kingdom consider prior notification and authorisation requirements as being in contradiction to the concept of innocent passage. The United States, although not a party to UNCLOS, equally reject restrictions of innocent passage for warships, and so does Russia (Rothwell and Stephens, 2016: 289-92; Tanaka, 2015: 90-1). Generally, it may be suggested that naval powers are in favour of innocent passage for warships, whereas smaller States or States in a sensitive location are against (Evans, 2010: 662).

Nuclear-powered ships and vessels carrying hazardous substances may in practice also be subject to restrictions of innocent passage. Countries such as Bangladesh, China, Egypt, Iran, Malaysia, or Oman require prior authorisation for nuclear-powered ships and vessels with

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<sup>193</sup> Croatia and Montenegro submitted a declaration to that end at the time of ratification, see Declarations and Statements regarding the application of UNCLOS at [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm); Albania has not submitted a declaration, but is operating the notification requirement (see U.S. Department of Defence Freedom of Navigation Report 2016). Other States requiring prior notification for warships include Bangladesh, Denmark, Egypt, Estonia, India, Malta, and South Korea. Prior authorisation is required by States such as Brazil, China, Iran, Pakistan, the Philippines, Poland, the United Arab Emirates, and Vietnam (see Declarations UN website above).

dangerous substances when seeking to enter the territorial sea (Rothwell and Stephens, 2016: 78). Whilst notification may be seen in accordance with UNCLOS, authorisation policies in relation to innocent passage remain contested. To that end, the UN General Assembly pointed out that States should engage in dialogue and confidence-building in collaboration with the International Atomic Energy Agency (IAEA) and the International Maritime Organisation (IMO) in order to address the concerns of small-islands and other States in a spirit of mutual understanding (Tanaka, 2015: 94).

Coastal States have the legislative and enforcement authority over a number of areas with regard to innocent passage, such as the protection of living resources, the prevention of infringements of fisheries laws, the protection of the environment, and the prevention, reduction or control of pollution (UNCLOS, Art. 21). Clearly, vessels undertaking innocent passage are bound to comply with such coastal State legislation. Innocent passage may also be subject to traffic separation schemes, i.e. foreign (and domestic) vessels cannot navigate freely, but must use designated sea-lanes (UNCLOS, Art. 22). Such traffic separation schemes are operational in areas with dense traffic, such as the English Channel, the Strait of Gibraltar, or the Strait of Hormuz, to name but a few, and notably also in the Gulf of Trieste in the Northern Adriatic and the Strait of Otranto in the Southern Adriatic.<sup>194</sup> Lastly, coastal States can exercise criminal jurisdiction vis-à-vis vessels in innocent passage as long as a crime does not concern the internal discipline of a ship, but affects the coastal State's public or territorial sea's order, or in the event of drug-trafficking, for instance (UNCLOS, Art. 27).

The obligations of coastal States as regards innocent passage relate to (i) not hampering passage and not discriminating against any vessel or State, (ii) the publication of any dangers to navigation (UNCLOS, Art. 24), such as sandbanks, low-tide elevations, or rocks, and (iii) the free-of-charge passage through the territorial sea (UNCLOS, Art. 26).

#### **V.1.4 Exclusive Economic Zone (EEZ)**

The EEZ and the Contiguous Zone are marine areas subject to a coastal State's sovereign rights or limited jurisdiction (as opposed to territorial sovereignty or complete jurisdiction in internal waters and the territorial sea; see V.1.2 and V.1.3).

##### **V.1.4.1 Contiguous Zone**

The contiguous zone is an area adjacent to the territorial sea where the coastal State may exercise its authority to prevent or punish infringements of its customs, fiscal, immigration or sanitary laws in place in its territorial sea or on its territory. The maximum breadth of the contiguous zone is 24 nautical miles (UNCLOS, Art. 33).

The contiguous zone may be seen as not a very popular zone. Only some 90 UNCLOS State parties have claimed one, and none of the Adriatic's riparian States, not even Italy which also has considerable territorial maritime jurisdiction in the Ionian, Tyrrhenian and Ligurian Sea.<sup>195</sup>

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<sup>194</sup> Albania, Croatia, Italy, Slovenia, and Serbia and Montenegro concluded an agreement under the International Maritime Organisation (IMO) on designated sea lanes in the Adriatic on 23 March 2003. The IMO's Maritime Safety Committee has subsequently adopted a traffic separation scheme for, *inter alia*, the Gulf of Trieste and the Channel of Otranto (IMO, COLREG.2/Circ.54, Annex III, 28 May 2004).

<sup>195</sup> See UN, Table of Claims to Maritime Jurisdiction, [http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/table\\_summary\\_of\\_claims.pdf](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf).

The reason as for the Adriatic appears obvious since its long and narrow shape leaves not much room for additional maritime zones adjacent to the territorial sea. The prevention or punishment of infringements in fact plays a minor role as most of the passage can be assumed to be lateral rather than high-seas-bound.

#### V.1.4.2 Exclusive Economic Zone

The original idea behind the Exclusive Economic Zone (EEZ), a relatively recent innovation, is to make use of the natural resources of the sea and of the seabed and the subsoil beyond the territorial sea of coastal States in order to boost the economies and raise the standard of living of their peoples. Natural resources would be placed under the coastal States' jurisdiction whilst the freedom of navigation and overflight would be guaranteed. Iceland claimed a small economic zone in the late 1940s, by which time the United States' Truman Proclamation from 1945 was already there generally asserting a claim over economic resources off the coast (Rothwell and Stephens, 2016: 86). The Andean and Central American States were the first ones to claim a 200 nautical miles EEZ in the late 1940s followed by a few African States in the early 1970s (Tanaka, 2015: 127-9). Throughout the 1970s and 1980s, many coastal States around the world claimed an EEZ, so its concept and application can be seen as well-established before UNCLOS entered into force in 1994 (Rothwell and Stephens, 2016: 87).

The seaward limit of the EEZ is at a maximum 200 nautical miles measured from the baseline of the territorial sea, i.e. it extends to a maximum of 188 nautical miles from the outer limit of the territorial sea (UNCLOS, Art. 57). In the EEZ, the coastal State enjoys

- sovereign rights for the exploration and exploitation of living and non-living natural resources of the waters, the seabed and its subsoil, and also for the production of energy from water, current and wind;
- jurisdiction for the establishment and use of artificial islands and installations, marine research, and the protection of the marine environment (UNCLOS, Art. 56).

Notably, (i) the above competencies must be distinguished from territorial sovereignty (as in the territorial sea). However, (ii) the sovereign rights of an EEZ are exclusive, i.e. no other States can exercise them without the consent of the coastal State. Further, (iii) the material scope of the jurisdiction is limited to the above matters, i.e. foreign vessels may not engage in fishing or oil-drilling, for instance, but enjoy complete freedom of navigation, overflight, or the laying of submarine cables or pipelines, major components of the so-called high-seas freedoms (UNCLOS, Art. 58; see also V.1.6). Evans (2010: 674) contends that, in an EEZ, three of the six high-seas freedoms are under the control of the coastal State.

#### V.1.4.3 Situation in the Mediterranean

Whilst claims to an EEZ have become a huge source of contention and conflict over potential oil and gas resources in the seabed and subsoil, in particular in the South China Sea (SCS) where China, Taiwan, the Philippines, and Vietnam face overlapping claims with China's claims being by far the most far-reaching (and most excessive) with its outermost point of the so-called "Nine-Dash Line" at almost 800 nm [sic] from China's coast (see e.g. Kingdon, 2015; Schofield et al, 2014: 2; see also PCA Final Award 2016: 471-7, paras 1202-3), the EEZ has played a relatively minor role in the Mediterranean. More recently, however, EEZs have become politically relevant in the Mediterranean, albeit for environmental and sustainable fishing considerations.

Interestingly, Mediterranean States have for a long time refrained from claiming an EEZ in the actual Mediterranean.<sup>196</sup> The ‘unwritten agreement’ amongst the European riparian States not to claim an EEZ in the Mediterranean only came to an end in 1997 when Spain proclaimed an ‘EEZ light’, followed by a similar ‘EEZ-light’ agreement between France, Italy and Monaco in 1999 covering the marine area between Corsica (France), Liguria (Italy) and Provence (Monaco), and France who claimed a quasi-EEZ in 2004 which became a full EEZ in 2012. It is worth noting that the ‘EEZs light’ focused on the protection of the marine living resources<sup>197</sup>, rather than economic exploitation of natural resources in the seabed or subsoil, or the production of energy (Grbec, 2015: 75-87).

Italy, clearly referring to the French EEZ and the danger that environmentally unsafe vessels not accepted in the French EEZ may navigate through the high seas just off the Italian territorial waters in the Ligurian and Tyrrhenian Sea (Grbec, 2015: 94), adopted its law on Ecological Protection Zones (ZEP) on 08 February 2006 (LOS Bulletin, UN, No. 61/2006: 98). The Italian ZEP in the Ligurian and Tyrrhenian Sea became operational through an implementing decree from 27 October 2011. It must be noted in this context, that Italy has not proclaimed any ZEP for the Adriatic to date.

#### V.1.4.4 Developments in the Adriatic

Croatia declared an Ecological and Fisheries Protection Zone (EFPZ) in October 2003 (LOS Bulletin, UN, No. 53/2004: 68-9; see also Cataldi, 2013: 2). It may be seen as an ‘EEZ light’ as its purpose as set out in Paragraph 1 is the exploitation, conservation and management of marine living resources, marine scientific research, and the protection of the marine environment. Then again, reference is made in Paragraph 2 to the right to proclaim “other elements” in accordance with UNCLOS which renders it a quasi-EEZ. Vidas (2009: 12-13) notes that any reference to “exclusive” was avoided due to pressure from the European Commission to the extent that anything “exclusive” was not in the European spirit for a country that had just filed its application for EU membership. The spatial ambit of the Croatian EFPZ is described in Paragraph 6 as the area up to the continental shelf delimitation line from the 1968 agreement (of Yugoslavia) with Italy (see also V.1.5), and the preliminary delimitation agreement with Serbia and Montenegro (FRY) from 2002 in the South. No delimitation vis-à-vis Slovenia is mentioned. The latter fact appears to be the case simply because no agreement with Slovenia on maritime delimitation had been reached yet.

Slovenia, in a *note verbale* to the Croatian embassy, protested the Croatian decision on the very day of its publication stating that Croatia, by means of unilaterally proclaiming an EFPZ, frustrated “a consensual solution to the issue of the maritime boundary between the two countries and encroached on the area where [...] Slovenia exercises its sovereignty and sovereign rights” (LOS Bulletin, UN, No. 53/2004: 71).

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<sup>196</sup> Spain and France only proclaimed an EEZ along their non-Mediterranean, i.e. North Sea or Atlantic coasts, in 1976 and 1977 respectively, whilst a few northern African States have claimed modest EEZs, albeit without implementing legislation and without affecting the interests of neighbouring States (see Grbec, 2015: 74-5).

<sup>197</sup> It is useful to note that the following fishing rights apply within the framework of the EU Fisheries Policy (CFP): In waters under territorial sovereignty or jurisdiction of the Member States, in principle any fishing vessel from any Member State is allowed to fish within 200 nm (EEZ), except in coastal waters (12 nm) where Member States may decide to restrict the access to other fishing vessels who traditionally fish in those waters. Such restrictions are without prejudice to the existing arrangements as laid down in Annex I of EU Regulation [1380/2013](#) (information obtained from the legal unit of European Commission DG MARE, 18 July 2018).

Italy also protested the Croatian decision, albeit for a different reason. In a note from the Italian Permanent Mission to the UN Secretary General dated 16 April 2004, critiquing a general lack of cooperation on the part of Croatia as for agreeing the limits of new zones of jurisdiction in a narrow sea such as the Adriatic, Italy points out that the Yugoslav-Italian agreement on the continental shelf did not contain superjacent waters, i.e. the water column above the seabed (see also V.1.5). Further, “the 1968 delimitation was agreed in a moment in which the notion of the exclusive economic zone was not well defined in the international law of the sea” (LOS Bulletin, UN, No. 54/2004: 129). In other words, “you cannot use the [1968] continental shelf agreement for a completely different purpose”. Even if Italy were to accept the Croatian EFPZ it would have to be shifted eastward taking into account the Italian straight baselines established after 1968 (interview Giuseppe Cataldi, 18-07-2018).

Vidas (2009: 9) argues that Croatian scientists and experts had for years been presenting alarming findings about depleting fish stocks and a need for more marine environmental protection. Further, as early as during the UNCLOS III conference (1973-82), experts in the Yugoslav delegation<sup>198</sup> had brought these concerns to the attention of the federal Yugoslav government pressing for an introduction of an EEZ, but to no avail. Grbec (2015: 87), conversely, appears to imply that the decision to declare a Croatian EFPZ may have been inspired by the preceding Spanish and French EEZ moves to that end.

After a series of trilateral meetings of Croatia, Italy and Slovenia, at a later stage facilitated by the European Commission, in the first half of 2004, a common understanding was reached on 04 June 2004 in Brussels to the extent that vessels from EU Member States ought to be temporarily exempt from the application of the Croatian EFPZ until an agreement on fisheries was reached (Iborra Martin, 2009: 8; see also Sancin, 2010: 97-8). This exemption of vessels flying the flag of an EU Member State from the application of the Croatian EFPZ is still in operation to date whilst the EFPZ applies to non-EU vessels (interview with senior Croatian civil servant, 25-01-2017), a solution which, whilst not ideal, may just about be regarded as “of a practical nature” (Grbec, 2015: 94).

It must be mentioned in that context, that the exemption for EU vessels - after it was renewed by the Croatian Parliament (Sabor) in 2006 - expired on 01 January 2008, but was re-introduced by the Sabor on 13 March 2008. The move came following a blockade of the opening of the Fisheries chapter in the Croatian accession negotiations by Slovenia since September 2006 (Iborra Martin, 2008: 9), and a threat by the Slovenian Foreign Minister Rupel in December 2007 to potentially block five to six other chapters should Croatia not discontinue the application of its EFPZ to EU vessels. The European Commission also made it clear that this was a matter of urgency in order not to derail Croatia’s EU accession, not least through a visit of Commissioner Rehn to Zagreb (Vidas, 2009: 58-9). However, a secret meeting between Prime Minister Sanader and European Commission President Barroso in Brussels at the beginning of March 2008 may have played a crucial role, too. The agreement was that Croatia would prolong the exemption of EU vessels from the EFPZ until further notice in return for an assurance that Croatia’s accession negotiations could be concluded (on a technical level) by the end of 2009. This date was supposed to feature in the European Commission Progress report for Croatia in November 2008 (Sanader, 2017: 109-11; Martens, 2008: 206-7) which it did (European Commission Progress Report Croatia, 2008: 5).

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<sup>198</sup> Yugoslavia played a solid role during UNCLOS III. When the site for the proposed Tribunal of the Law of the Sea (ITLOS) was voted in 1981, no candidate received an absolute majority in the first ballot. The result in the second ballot was Federal Republic of Germany 78, Yugoslavia 61. The Sea-Bed Authority went to Jamaica (76 votes) ahead of Malta with 66 votes (Oxman, 1982: 14).

Slovenia proclaimed its Ecological Protection Zone and Continental Shelf (EPZCSA) on 22 October 2005. Containing also a reference to the Croatian (Adriatic) EFPZ and the Italian (Ligurian and Tyrrhenian) ZEP, the draft version of the later Slovenian law particularly pointed out the need to protect the marine environment and biodiversity in the vulnerable Northern Adriatic with its narrow and shallow waters (Grbec, 2015: 101-2; see also Cataldi, 2013: 2). The actual law is remarkable in the sense that it starts out by asserting the continental shelf in Paragraph 2 which is to extend “beyond [Slovenia’s] territorial sea”.<sup>199</sup> Only in the following paragraph is the purpose of the ecological protection zone mentioned. Paragraph 4 maps the (provisional) outer limits. The 1968 continental shelf agreement with Italy is referred to as for the limit in the West, and as for the South, i.e. the delimitation with Croatia, the southern limit of the joint fishing zone established in the bilateral SOPS agreement from 1997<sup>200</sup> is stated (LOS Bulletin, UN, No. 60/2005: 56-7). As a result, the Slovenian EPZCSA considerably overlaps with the Croatian EFPZ in the area of the Croatian territorial sea. Croatia, not unexpectedly, in a *note verbale* to the UN Secretary General dated 31 May 2007, critiqued the Slovenian ZEP as “in utter disregard of the International Law of the Sea” protesting “resolutely” as a country with no access to the high seas was not able to claim any continental shelf (LOS Bulletin, No. 64/2007: 40).

### V.1.5 Continental Shelf

The concept of the continental shelf, historically, is attached to the notion of the use of existing or presumed natural resources in the seabed or its subsoil. The Truman proclamation from 1945 can be seen as a prototype assertion in that regard (see also IV.1.4.2). The continental shelf (CS) thus “comprises the seabed and the subsoil of the submarine areas [...] beyond the territorial sea” (UNCLOS, Art. 76(1)). The limit of the CS extends up to 200 nm in a juridical sense. Coastal States may claim a geological CS up to 350 nm, however. The full set of criteria for the various definitions of the CS is beyond the scope of this study<sup>201</sup>. Nevertheless, it must be noted that islands also create a CS, i.e. coastal and island States may enjoy a CS to the same extent, and that submarine elevations can also play a role.

To avoid excessive claims, those exceeding 200 nm are subject to scrutiny and a recommendation by the Commission on the Limits of the Continental Shelf (CLCS) which are considered “final and binding” once a State bases its proclamation on the prior CLCS recommendation (UNCLOS, Art. 76(8)). The CLCS has, as of 08 December 2018, received 88 submissions<sup>202</sup> since it became operational in 2001. CS claims are of enormous economic and political importance as they are quasi-territorial claims and tend to be based on presumed natural resources, such as oil and gas reserves, and potentially also on geostrategic considerations. The CLCS is not entitled to consider a submission from any State subject to a maritime or land dispute, i.e. overlapping claims, unless all States party to the dispute have given their prior consent (CLCS rules of procedure CLCS/40/rev.1, 2009: 22).

The rights of the coastal State over its continental shelf are as follows:

- Exploration and exploitation of the CS’ natural resources;
- The above rights are exclusive, i.e. no other State can consume the natural resources without the agreement of the coastal State (UNCLOS, Art. 77);

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<sup>199</sup> Slovenia has outlined its continental shelf claim in detail only during the arbitral proceedings in 2013/2014. The Tribunal found that Slovenia is *not* entitled to a CS (see PCA Final Award, 2017: 348-354, paras 1085-1103).

<sup>200</sup> For the SOPS fishing zone limits see PCA Final Award (2017: 23, para 79).

<sup>201</sup> For an illustrated discussion of the criteria see Tanaka (2015: 139-42).

<sup>202</sup> For the submissions to the CLCS see [http://www.un.org/depts/los/clcs\\_new/commission\\_submissions.htm](http://www.un.org/depts/los/clcs_new/commission_submissions.htm).

- The water column above the seabed (superjacent waters) and the airspace above are *not* within the scope of the CS; and
- The navigational rights and high-sea freedoms of other States - including fishing (Tanaka, 2015: 149) - must not be interfered with (UNCLOS, Art. 78).

#### V.1.5.1 Relationship between Continental Shelf and EEZ

With the emergence of the EEZ, the CS with a limit of 200 nm can be seen as a well-established fact of customary law (Tanaka, 2015: 139). As a result, 36 percent of the oceans' seabed are under the jurisdiction of coastal or island States (Churchill and Lowe, 1999: 148). The ICJ noted in the *Libya/Malta* case that "there can be a continental shelf where there is no exclusive economic zone, [but] there cannot be an exclusive economic zone without a corresponding continental shelf." (ICJ, 1985: 24, para 34)

As for the substantive regime, (i) the CS, as opposed to the EEZ, exists *ipso facto et ab initio*, i.e. it does not need to be claimed but simply exists geographical circumstances permitting (see also Grbec, 2015: 69), whereas an EEZ must be expressly asserted; (ii) the EEZ is supposed to promote the conservation or management of fisheries, whilst the CS provisions contain no conservation aspect. Rather, its focus is primarily on the exploitation of the non-living resources (Rothwell and Stephens, 2016: 125).

#### V.1.5.2 Situation in the Mediterranean and the Adriatic

The CS has been a field of very modest State activity in the Mediterranean. This is mainly for three reasons: (i) there is no area in the Mediterranean where the coasts of two States would be more than 400 nm apart, i.e. no riparian State to the Mediterranean can extend their jurisdiction up to the maximum provided for by the UNCLOS (such as 200 nm for the EEZ or the CS); (ii) were a coastal State to increase its jurisdiction considerably beyond its territorial sea, the interests of more than one State would be affected due to the general proximity, and there has therefore been some considerable sense of caution (Grbec, 2015: 9); the fact that most of the Mediterranean is fairly deep exceeding 1.000 m has made the exploration of natural resources somewhat theoretical anyway (Grbec, 2015: 68), whilst conservation, environmental, and navigational safety concerns prevail (Vidas, 2009: 6-9).

The jurisdictional continental shelf landscape in the Mediterranean includes agreements between Italy and the former SFRY (Yugoslavia), Albania, Greece, Tunisia and Spain (Grbec, 2015: 71). France has delimited its CR (and territorial sea) with Monaco (Arnaut, 2002: 50). Further, Libya concluded agreements with Tunisia and Malta, Cyprus with Lebanon and Israel, and Albania with Greece (Grbec, 2015: 72).

### V.1.6 **High Seas**

Generally, the high seas comprises any area of the water column or the seabed other than areas under national jurisdiction (e.g. internal waters, territorial sea, EEZ, continental shelf). The *principle of freedom* is a crucial one on the high seas. The high-seas freedoms include

- freedom of navigation;
- freedom of overflight;
- freedom to lay submarine cables and pipelines;

- freedom to construct artificial islands and installations;
- freedom of fishing; and
- freedom of scientific research (UNCLOS, Art. 87(1)).

Yet, the above high-seas freedoms are not unlimited. Rather, they are supposed to be consumed in such a way as to respect “the interests of [all] *other* States in their exercise of the freedom of the high seas” (UNCLOS, Art. 87(2), emphasis added).

The *freedom of navigation* may be seen as iconic since the navigational freedom of a particular vessel as such may not be restricted on the high seas save for fighting piracy and illicit trafficking in drugs (Rothwell and Stephens, 2016: 164-5). The freedom of overflight holds for commercial, government and military aircraft, and would also hold for spacecraft during take-off, re-entry or overflight. With regard to the installations of submarine cables or pipelines, the course of the pipelines is subject to the consent of the coastal State on its continental shelf, whereas on the high seas it is not, as long as the interests of other users are taken into account. Artificial islands and other installations may be constructed and installed, but they must not interfere with sea-lanes or traffic separation schemes, and abandoned structures must be removed. The freedom of fishing is another cardinal freedom. Still, it may be limited through specific preservation conventions for certain parts of the oceans, or through general provisions for the living resources in the UNCLOS (Rothwell and Stephens, 2016: 165-167; Evans, 2010: 665-6).

The second core principle on the high seas is the one of *flag-State jurisdiction*, i.e. the State which has granted the vessel the right to navigate under its flag has exclusive jurisdiction (UNCLOS, Art. 94(1)), so there is by no means a lack of legal order on the high seas. It is established that flag-State jurisdiction relates to both legislative and enforcement jurisdiction regardless of the nationalities of the people on board of a flag-State ship (Tanaka, 2015: 156). It ought to be mentioned that so-called flags of convenience or open registry States (where foreign ship owners have relatively little connection with the flag State with the latter usually providing for zero-taxation and zero-qualification requirements for the ship crews in return for a registration or annual fee) have given rise to grave concern, not least with regard to compliance with safety and navigational rules, and also illegal fishing (Tanaka, 2015: 162).

## **V.2 Maritime delimitation**

Whilst land boundaries tend to be well established and stable, the same cannot be said about maritime boundaries. As a result, the map of the maritime world is far less clear than its terrestrial counterpart, and only half of all potential maritime borders have been delimited (Schofield et al, 2014: 1-2). The task of delimiting maritime zones between States with overlapping claims is highly complex and salient. This very issue has attracted more cases before international courts and tribunals than any other single subject (Evans, 2010: 677).

The difficulties arising with the effort of establishing maritime borders, first, trace back to the need for consensus at the UNCLOS III conference. As a result, some of the UNCLOS provisions on delimitation are ambiguous as they were meant to bridge disagreement between UNCLOS signatories (Shearer, 2014: 52) and are thus subject to different interpretation. Second, the ever-increasing number of maritime claims has created a clear need for delimitation methods applicable to a wide range of delimitation issues (Rothwell and Stephens, 2016: 412).

On a general note, a system for maritime delimitation must be based on the ability to reconcile predictability and flexibility, a classical dilemma in legal affairs altogether, but in particular with maritime delimitation. Further, aspects of both change and continuity may be observed in the practice of international courts and tribunals when interpreting the codified law of the sea (see V.2.2). As Rothwell and Stephens (2016: 412) point out, the need for maritime delimitation generally occurs when

- (i) adjacent States share a boundary that terminates at one point on the coast; and/or
- (ii) opposite States face one another in a maritime space.

Both features apply to the maritime dispute between Croatia and Slovenia. As has become clear from the above distinction, maritime delimitation is not a unilateral act, but must obviously be carried out jointly by the States concerned, as also noted by the ICJ in the *Gulf of Maine* case (ICJ, 1984: 299-300, para 112). In the words of Natalie Klein,

“[t]he high stakes involved in maritime boundary disputes may prevent easy or prompt delimitation of the maritime areas in question. Maritime entitlements are inherently connected to a [S]tate’s sovereignty and that [S]tate’s exercise of rights and duties in respect of diverse ocean activities. As such, the national interests involved in dividing up those entitlements may trigger the most assertive claim possible. These potentially excessive claims to exclusivity may well clash with the claims of other [S]tates to either exclusive or inclusive use of the same ocean space. The disputes that result may prove complex, or even intractable” (Klein, 2018: 117).

## V.2.1 Delimitation provisions of UNCLOS

The provisions on delimitation of marine spaces set out in UNCLOS concern

- delimitation of the territorial sea (UNCLOS, Art. 15);
- delimitation of the EEZ (UNCLOS, Art.74), and
- delimitation of the continental shelf (UNCLOS, Art. 83).

As for the delimitation of the *territorial sea*, Article 15 of UNCLOS provides the following:

“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 to 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 variant therewith” (emphasis added).

With regard to special circumstances, Rothwell and Stephens (2016: 432) opine that “nothing in article 15 suggests that certain features are excluded from consideration or that there is a [fixed] list of special circumstances”, and that special circumstances are “predominantly geographical” (2016: 435). The latter aspect is supported by Tanaka (2015: 225) who posits that “in particular, the configuration of the coast plays an essential role”. Evans (2018: 226) holds that special circumstances were limited in scope, but “at the same time [...] quite loosely described, holding out the prospect of a broad interpretation - such as references to ‘exceptional’ coastal configurations or the ‘presence’ of islands”.

### The role of equity

With regard to the delimitation of the *EEZ* (UNCLOS, Art. 74) and the *continental shelf* (UNCLOS, Art. 83), it must be noted that no reference to a delimitation method is made.

Rather, the above provisions invoke the aim of an “equitable solution”. To that end, a brief illumination of the concept of *equity*, a contentious term amongst scholars and practitioners of the international law of the sea alike, appears useful. Thirlway (2010: 11) has a suitable general definition:

“Equity in many legal systems may play a moderating role in the sense that when the rigorous application of accepted rules of law leads to a result which appears unjust, equity may step in to adjust the outcome.”

It is vital to note, however, that the concept of equity can be used in two ways: (i) *infra legem* (within the law), and (ii) *praeter legem* (outside of the law) or “autonomous equity” (Delabie, 2018: 152) also known as *ex aequo et bono*. The historical trend in the use of equity for the purposes of maritime delimitation in case law can be described as one of “rationalisation” (Delabie, 2018: 154) meaning moving away from extra-legal considerations and to contemplate equity as an aim to achieve a fair and just solution, but by no means as a method of delimitation. In practice, equity *infra legem* tends to be used as an adjustment tool at the level of the second stage of the contemporary three-stage method of delimitation (see V.2.2.3), alongside equity at the level of the general aim to achieve in the process of delimitation (Delabie, 2018: 158-162).

Coming back to the delimitation provisions of UNCLOS, convincing as the concept of equity may appear *prima facie*, the reference to an “equitable solution” renders UNCLOS articles 74 and 83 “substantially less clear than article 15” (Rothwell and Stephens, 2016: 422), “avoids mentioning equidistance, equitable principles, special or relevant circumstances - and is virtually devoid of substantive content” (Evans, 2010: 678). As a matter of fact, the aim of an “equitable solution” in international law may neatly be observed as “highly obscure” (Tanaka, 2015: 201).

Yet, it is useful to note in this context, that the above provisions were a compromise formula reached in the late days of the UNCLOS III conference in August 1981 (leading to the adoption of UNCLOS in September 1982). There was an urgent need to bridge the gap between the supporters of the more rigid “equidistance/special circumstances” approach and the more moderating “equitable principles/relevant circumstances” method (Tanaka, 2015: 200-1; Evans, 2010: 678).<sup>203</sup>

#### V.2.1.1 Dispute settlement

As many UNCLOS provisions are compromise formulae due to the unanimity requirement at the UNCLOS III conference, there naturally is room for differing interpretations. This is why UNCLOS contains in-built procedures for dispute settlement to make sure that parties comply with the Convention (Tanaka, 2015: 417-8). The UNCLOS dispute settlement procedures are remarkable in public international law in the sense that they are comprehensive and compulsory with very few exceptions. Generally, if disputes cannot be successfully settled bilaterally, or if the parties cannot agree on the terms of submission to dispute settlement, one party can invoke compulsory dispute settlement, i.e. bring the matter before an international court or arbitral tribunal (Rothwell and Stephens, 2016: 473).

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<sup>203</sup> The actual compromise proposal had been secretly worked out by Ireland and Spain representing the two adversarial schools of thought (Oxman, 1982: 14-5).

Broadly, both proceedings initiated by one party and submissions by mutual agreement of the parties have constituted State practice. Looking at the more recent cases there appears to be a trend towards proceedings triggered by one party to the dispute (see table 3 in V.2.2.3).

#### V.2.1.1.1 Voluntary dispute settlement

Section 1 of part XV of UNCLOS provides for voluntary dispute settlement emphasising conflict resolution by peaceful means. The parties are encouraged to settle a dispute between them without recourse to the settlement provisions (UNCLOS, Art. 280), or at least to agree on how to proceed with the settlement of the dispute (UNCLOS, Art. 283).

It must be noted in this context, that Croatia and Slovenia have spent the lion share of their joint settlement efforts since 1991 on bilateral negotiations outside the UNCLOS dispute settlement procedures (see VI.). Serdy (2005: 715) argues that States tend to avoid external dispute settlement and prefer bilateral negotiations for two reasons: (i) they find it difficult to hand over the final say in a dispute to a body over which they have no control, and (ii) externalising dispute settlement equals outright failure of State diplomacy. One could add (iii) a potential lack of democratic legitimacy and accountability of the dispute settlement body.

#### V.2.1.1.2 Compulsory dispute settlement

Part XV of UNCLOS contains provisions on “*compulsory* proceedings entailing binding decisions” (Section 2; emphasis added). In fact,

“any dispute [can] be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction [...] (UNCLOS, Art. 286).

Art. 287 (“choice of procedure”) lists the options available in Paragraph 1:

“When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose [...] one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:

- (a) the International Tribunal for the Law of the Sea [ITLOS<sup>204</sup>];
- (b) the International Court of Justice;
- (c) an arbitral tribunal [...];
- (d) a special arbitral tribunal [...].”

To that end, it is useful to note that Croatia (in November 1999) opted for ITLOS<sup>205</sup> and ICJ (in order of preference), and Slovenia (in October 2001) declared its preference for arbitration - safe for delimitation issues.<sup>206</sup> “We believe the UNCLOS provisions do not cover all the specificities to be taken into account in the case of the Slovenia-Croatia delimitation issue. In particular, this issue is not only about maritime delimitation: there are a number of land

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<sup>204</sup> ITLOS was newly created by UNCLOS and became operational in 1996. It took some time to establish itself as an alternative to the ICJ or arbitration. As the first ITLOS President would tell to visitor groups: “The judges would meet once a week for breakfast then going to the letter box together to see whether a case has arrived”.

<sup>205</sup> Prof. Budislav Vukas, a Croatian national, was an ITLOS founding-member judge 1996-2005, <https://www.itlos.org/the-tribunal/members-of-the-tribunal-since-1996/>. In the Croatia-Slovenia arbitration, Vukas served as arbitrator appointed by Croatia until July 2015 (see also PCA Final Award, 2017: 47, para 147).

<sup>206</sup> United Nations, Division for Ocean Affairs and the Law of the Sea, Declarations and statements, [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm).

border sections that are also disputed, including the last land border section right on the coast. And land borders cannot possibly be subject to any arbitration under UNCLOS. Thus, with [our] declaration [...] we simply wanted to avoid any attempt at [a] piece-meal solution of the border issue” (interview senior Slovenian civil servant, 13-06-2017).

## V.2.2 Development of case law

It is an indispensable fact that the existing common or case law on maritime delimitation has been developed by international courts and tribunals. As a result, their jurisprudence has played a dominant role in the field (Rothwell and Stephens, 2016: 422-3; Tanaka, 2015: 201). The following brief survey is to outline several major judgements of international courts and arbitral tribunals with regard to the development of jurisprudence as such and the method of delimitation. An assessment of all decisions is out of place in this study. Whilst every case clearly is an individual affair, it is suggested here that one may still trace stages in the development of case law.

### V.2.2.1 Result-oriented equity approach (1969-1992)

The “result-oriented equity approach” is an analytical concept and is defined as follows:

“This approach allows international courts [and tribunals] to decide, case by case, on the equitable results to be achieved without being bound by any method of maritime delimitation. Thus, the result-oriented equity approach emphasises maximum *flexibility* of the law of maritime delimitation” (Tanaka, 2015: 202; emphasis added).

The first major case in the field of contemporary jurisprudence of maritime delimitation is the 1969 *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) judgement<sup>207</sup> where the Court found that “delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with *equitable principles*” (ICJ, 1969: 47, para 85; emphasis added). Equitable principles were thus established as customary law in maritime delimitation (Rothwell and Stephens, 2016: 425; Tanaka, 2015: 202) creating the result-oriented equity approach.

In the 1977 *Anglo-French Continental Shelf* case<sup>208</sup>, the Tribunal did recognize equitable principles as customary law, but only in taking them into account in applying the method of equidistance/special circumstances (Reports of International Arbitral Awards, vol. XVIII, 1977: 45-6). Equidistance was chosen as a starting point for equity to come in later as a corrective element, so one could speak of the “corrective equity approach” (Tanaka, 2015: 203) here. In the *Gulf of Maine* (Canada/United States) case<sup>209</sup> in 1984, however, the ICJ

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<sup>207</sup> The parties asked the Court to decide on the delimitation of the continental shelf. The Court did not produce a ruling as such as the FRG had not yet ratified the Geneva Convention (a predecessor to UNCLOS), but indicated certain factors for consideration when deciding on the natural prolongation of the land territory under the sea (ICJ, *North Sea Continental Shelf*, Overview of the Case, <http://www.icj-cij.org/en/case/52>).

<sup>208</sup> The Tribunal was asked by the parties to delimit the continental shelf boundary in the English Channel/La Manche west of the Greenwich Meridian Line. The main issues were the effect of the Channel Islands and of the Scilly Isles for the Atlantic region (see Arts. 1 and 2 of the Arbitration Agreement, Reports of International Arbitral Awards, vol. XVIII: 5).

<sup>209</sup> Canada and the U.S. tasked the Court with the delimitation of the continental shelf and fisheries zone in the Gulf with adjacent and opposite coasts. The Court produced a line referring to geographical factors (ICJ, *Gulf of Maine*, Overview of the Case, <http://www.icj-cij.org/en/case/67>).

further substantiated the result-oriented equity approach in noting that “delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area [...], an equitable result” (ICJ, 1984: 300, para 112(2)).

The *Libya/Malta* continental shelf case<sup>210</sup> of 1985 again pronounced the result-oriented equity approach. The ICJ observed that “it is [...] the goal - an equitable result - and not the means used to achieve it, that must be the primary element [in assessing whether a result is equitable]” (ICJ, 1985: 38-9, para 45). Similarly, the Tribunal in the 1992 *St. Pierre and Miquelon* (Canada/France) arbitration<sup>211</sup> noted it was carrying out a delimitation “conformément à des principes équitables, ou à des critères équitables, en tenant compte des toutes circonstances pertinentes, afin de parvenir à un resultat équitable [...] sur la prémisses [que] toute méthode obligatoire est réjetée [...]” (Reports of International Arbitral Awards, vol. XXI, 1992: 282).

#### V.2.2.2 Corrective-equity approach (1993-2009)

The “corrective-equity approach”, the subsequent analytical strand, operates as follows:

“[T]he equidistance method is applied at the first stage of delimitation and, at the second stage, a shift of the equidistance line may be envisaged if relevant circumstances warrant it. Equidistance is the only predictable method for ensuring predictability of results in the sense that once the base points are fixed, the determination line is mathematically determined. The corrective-equity approach thus highlights *predictability* in the law on maritime delimitation.” (Tanaka, 2015: 203; emphasis added)

A landmark case with regard to the full recognition of the corrective-equity approach was the 1993 *Greenland/Jan Mayen* (Denmark/Norway) judgement.<sup>212</sup> The Court noted that “it [...] appears that, both for the continental shelf and for the fisheries zones in this case, it is proper to begin the process of delimitation by a median line provisionally drawn” (ICJ, 1993: 61-2, para 53). Tanaka (2015: 205) posits that the ICJ, for the first time, “incorporated the equidistance method into the domain of customary law”. Churchill (1994: 16-7), however, in this respect, critiques the Court’s lack of supporting evidence or arguments for its proposition of having identified customary law.

The corrective-equity approach was subsequently adopted by the arbitral tribunal in the 1999 *Eritrea/Yemen* (Second Phase) case<sup>213</sup> where a provisional equidistance line was drawn to

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<sup>210</sup> Malta and Libya asked the Court to determine the continental shelf boundary. The opposite coasts of both States are less than 400 nm apart. Although Libya was not party to the Geneva Convention on the Continental Shelf, both parties indicated to the Court that they would respect its provisions and also those of the UNCLOS which had not entered into force yet (ICJ, Continental Shelf, Overview of the Case, <http://www.icj-cij.org/en/case/68>).

<sup>211</sup> Canada and France tasked the Tribunal with delimiting the sea border between Canada and St. Pierre and Miquelon, a French overseas collectivity some 16 nm off the Canadian coast of south-eastern Newfoundland (Reports of International Arbitral Awards, vol. XXI, 1992 : 271-4).

<sup>212</sup> Denmark had instituted proceedings against Norway for the Court to delimit both countries’ fishing zones and continental shelf between the east coast of Greenland and the Norwegian island of Jan Mayen. Both parties had overlapping 200 nm claims for an area comprising some 72.000 square km (ICJ, Maritime Delimitation between Greenland and Jan Mayen, Overview of the Case, <http://www.icj-cij.org/en/case/78>).

<sup>213</sup> Eritrea and Yemen asked the Tribunal to determine the maritime boundaries between the two States. The identification of the respective territorial sovereignty over the islands had constituted the First Phase (Reports of International Arbitral Awards, vol. XXII, 1999: 336-7).

determine the continental shelf and EEZ boundary. The ICJ substantiated the corrective-equity approach as customary law in the 2001 *Qatar/Bahrain* case<sup>214</sup> as for territorial sea issues. In the 2002 *Cameroon/Nigeria* case<sup>215</sup>, the ICJ took on the corrective-equity approach for the delimitation of the continental shelf and the EEZ. The observation of the Court reads:

“The Court has on various occasions made it clear what the applicable criteria, principles and rules of delimitation are when a line covering several zones of coincident jurisdiction is to be determined. They are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an ‘equitable result’” (ICJ, 2002: 441, para 288).

Tanaka (2015: 205) opines that, in view of the deliberate omission of any reference to a delimitation method at the time of drafting UNCLOS Articles 74 and 83, the above quote represents “a creative interpretation of the Court”. Evans (2010: 679) takes the view that “[a]fter 35 years of hesitation, the ICJ finally accepted what it had rejected in the *North Sea* cases, that the equidistance/special circumstances approach reflects customary international law”, and that it was “subsequently confirmed that this is the case [...] for the delimitation of the continental shelf, EEZ [2007 *Guyana/Suriname* case<sup>216</sup>], or when drawing a single delimitation line [2009 *Romania/Ukraine* case<sup>217</sup>]”.

#### V.2.2.3 Three-stage approach (2009-)

The latter 2009 *Romania/Ukraine* case marks the beginning of the most recent phase of maritime delimitation methodology, the so-called “three-stage approach” (e.g. Evans, 2018: 321; Rothwell and Stephens, 2016: 429; Tanaka, 2018a: 304-306; Tanaka, 2015: 206) which, strictly speaking, is a refined corrective-equity approach. According to the ICJ, the method is defined as follows:

“First, the Court will establish a provisional delimitation line, [in the case of adjacent coasts] an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in the particular case [...]. [As for opposite coasts], the provisional delimitation line will consist of a median line between the two coasts [...] The Court will at the next, second stage consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result [...]. Finally, and at a third stage, the Court will verify that the line [provisional, or adjusted according to relevant circumstances], does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio

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<sup>214</sup> Qatar initiated proceedings against Bahrain for the Court to determine territorial sovereignty over an island, sovereign rights over two shoals, and the maritime boundary between the two States (ICJ, Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Overview of the Case, <http://www.icj-cij.org/en/case/87>).

<sup>215</sup> Cameroon instituted proceedings against Nigeria with regard to sovereignty over the Bakassi Peninsula (a part of which was occupied by Nigeria), the delimitation of the joint maritime border, and the terrestrial border at Lake Tschad (ICJ, Land and Maritime Boundary between Cameroon and Nigeria, Overview of the Case, <http://www.icj-cij.org/en/case/94>).

<sup>216</sup> Guyana initiated arbitral proceedings against Suriname concerning the maritime boundary and the alleged disrespect of the maritime territorial sovereignty of Guyana on the part of Suriname (Reports of International Arbitral Awards, vol. XXX, 2007: 12).

<sup>217</sup> Romania instituted proceedings against the Ukraine with regard to the delimitation of a single maritime boundary in the Black Sea including the continental shelf and the EEZ (ICJ, Maritime Delimitation in the Black Sea, Overview of the Case, <http://www.icj-cij.org/en/case/132>).

between the relevant maritime area of each State by reference to the delimitation line” (ICJ, 2009: 44-6, paras 116-122).

In other words, the three stage approach consists of the two stages of the equidistance/relevant circumstances method or corrective-equity approach, plus a third stage of applying a proportionality test (Solomou, 2017: 4; see also Marques Antunes and Becker-Weinberg, 2018: 73-77; Delabie, 2018: 158-164).<sup>218</sup> Generally, the three-stage approach “has been a way for the judiciary to progressively ensure more objectivity” (Delabie, 2018: 158).

It is useful to note in this context, that “the determination of the *relevant area* is crucial for the application of *proportionality*”, so that a court or tribunal will have to determine the relevant area under consideration at the very beginning of a delimitation process (Rothwell and Stephens, 2016: 429; emphasis added). Yet, there generally remains some obscurity of the evaluation criteria for the proportionality between coastal lengths and maritime areas (Tanaka, 2009: 422-4): It can be observed that any objective criteria for the determination of both the relevant coastal length and maritime area have been absent in jurisprudence to date. Further, there are no objective criteria as to what constitutes a *significant* disproportionality between coastal lengths and the maritime areas apportioned. In addition, and strikingly, the (dis)proportionality test employed by the courts and tribunals at the third stage is always met, so that the test as such may be seen as purely formalistic.<sup>219</sup>

On the whole, it may be observed that the disproportionality test is in need of enhancing its objectiveness (Tanaka, 2018a: 316-318). With regard to *relevant coasts/areas* in particular, Oude Elferink demonstrates that whilst generally two case-law approaches may be distinguished: (i) the concept of “seaward extension”, and (ii) the “reference to the delimitation method selected” (2018: 178-9), there are virtually no cases where courts or tribunals would provide any *criteria/explanation* for determining or identifying the relevant coasts/areas (Oude Elferink, 2018: 181-190). As a result, the case law on relevant coasts/areas could “neither be characterized as wholly predictable nor wholly consistent” (Oude Elferink, 2018: 199).

The three-stage approach was subsequently used by ITLOS in the 2012 *Bay of Bengal* (Bangladesh/Myanmar) case<sup>220</sup>, by the ICJ in the 2012 *Nicaragua/Colombia* case<sup>221</sup>, and in the 2014 *Peru/Chile* case<sup>222</sup> (see also Solomou, 2017: 4). The 2017 *Ghana/Côte d’Ivoire* ITLOS case<sup>223</sup> and the 2018 *Costa Rica/Nicaragua* ICJ case<sup>224</sup> constitute the most recent three-stage-approach judgements at the time of writing.

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<sup>218</sup> Lathrop (2018: 221) posits that the construction of the provisional equidistance line as the starting point of the three-stage approach merits particular attention. He observes that the provisional equidistance line must be “a solid foundation from which to consider [...] the effect of coastal irregularities and other features”.

<sup>219</sup> Evans (2018: 233) talks of “the formalism of the three-stage approach” with regard to the role of relevant circumstances at stages two and three of that approach.

<sup>220</sup> Bangladesh instituted proceedings against Myanmar for the Tribunal to delimit the maritime boundary with regard to the territorial sea, the EEZ and the continental shelf (ITLOS, 2012: 9-10, paras 1-4).

<sup>221</sup> Nicaragua filed proceedings against Colombia concerning territorial sovereignty and maritime delimitation mainly around the San Andrés Archipelago (ICJ, Territorial and Maritime Dispute, Overview of the Case, <http://www.icj-cij.org/en/case/124>).

<sup>222</sup> Peru initiated proceedings against Chile seeking the delimitation of the territorial sea and the EEZ (ICJ, Maritime Dispute, Overview of the Case, <http://www.icj-cij.org/en/case/137>).

<sup>223</sup> Ghana and Côte d’Ivoire, at the initiative of Ghana, submitted a joint request to ITLOS to determine their single maritime boundary (territorial sea, EEZ and continental shelf) in the Atlantic (Special Agreement, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.23\\_merits/X001\\_special\\_agreement.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/X001_special_agreement.pdf)).

Table 3: Major maritime delimitation cases (selected; base charts from Rothwell and Stephens, 2016: 424, and Tanaka, 2015: 208; enhanced and updated by this author)

Year	Case	Body	Mode	Boundary	Configuration	Approach
1969	<i>North Sea Continental Shelf</i>	ICJ	A	CS	AC	RE
1977	<i>Anglo-French Continental Shelf</i>	AR	A	CS	AC/OC	RE/CE
1984	<i>Gulf of Maine</i>	ICJ	A	SMB	AC/OC	RE
1985	<i>Libya/Malta</i>	ICJ	A	CS	OC	RE
1992	<i>St Pierre and Miquelon</i>	AR	A	SMB	AC	RE
1993	<i>Greenland/Jan Mayen</i>	ICJ	U	CS/F	OC	CE
1999	<i>Eritrea/Yemen</i>	AR	A	SMB	OC	CE
2001	<i>Qatar/Bahrain</i>	ICJ	U	TS/SMB	AC/OC	CE
2002	<i>Cameroon/Nigeria</i>	ICJ	U	TS/SMB	AC	CE
2007	<i>Guyana/Suriname</i>	AR	U	TS/SMB	AC	CE
2009	<i>Romania/Ukraine</i>	ICJ	U	SMB	AC/OC	3-stage
2012	<i>Bangladesh/Myanmar</i>	ITLOS	U	TS/SMB/CS	AC	3-stage
2012	<i>Nicaragua/Colombia</i>	ICJ	U	TS/SMB	OC	3-stage
2014	<i>Peru/Chile</i>	ICJ	U	TS/SMB	AC	3-stage
2016	<i>Philippines/China***</i>	AR	U	F/EEZ	OC	-
2017	<i>Croatia/Slovenia</i>	AR	A*	IW/TS/J**	AC/OC	2-stage****
2017	<i>Ghana/Côte d'Ivoire</i>	ITLOS	U/A	SMB	AC	3-stage
2018	<i>Costa Rica/Nicaragua</i>	ICJ	U	TS/EEZ/CS	AC	3-stage~

AR: arbitration

A: submission by mutual agreement of the parties

U: proceedings initiated by one party

CS: continental shelf

SMB: single maritime boundary

TS: territorial sea

IW: internal waters

F: fisheries jurisdiction

EEZ: Exclusive Economic Zone

AC: adjacent coast

OC: opposite coast

RE: result-oriented equity approach

CE: corrective-equity approach

\*: induced by Slovenian veto during Croatia's EU accession negotiations; \*\*: junction to high seas

\*\*\*: The Philippines initiated proceedings against China's EEZ excessive claim over almost the entire South China Sea ("Nine-Dash-Line"). China refused to take part in the arbitral proceedings on the grounds that the Tribunal lacked jurisdiction, and did thus not recognize the Award either.

~: 2-stage for the territorial sea (no *relevant areas* were needed for the delimitation purposes)

N.B.: *Nicaragua/Columbia*, *Croatia/Slovenia* and *Costa Rica/Nicaragua* are mixed disputes, i.e. sections of the land border were also determined alongside delimiting the maritime spaces.

\*\*\*\* The Tribunal did not consider coastal lengths as a special circumstance for TS delimitation which appears the reason why no proportionality test was made.

In the 2017 *Croatia/Slovenia* arbitration under particular scrutiny in this study, the Tribunal noted that, as for the delimitation method, the ICJ had developed a well-established jurisprudence with regard to the interpretation of the UNCLOS provisions and quoted the three-stage approach from the *Peru/Chile* case.

<sup>224</sup> Costa Rica instituted proceedings against Nicaragua asking for the delimitation of the single maritime boundary (territorial sea, EEZ, continental shelf) in the Caribbean, Maritime and Land Boundary delimitation, Overview of the Case, <http://www.icj-cij.org/en/case/157>).

The Arbitral Tribunal in *Croatia/Slovenia* carried out the three-stage approach in first drawing a provisional equidistance line as for the territorial sea, then shifting it in favour of Slovenia in view of the differing projections of the relevant coastlines, and lastly, checking for proportionality, however only very modestly as no relevant areas had been identified (see VI.3.5.2.2). The above table 3 illustrates the distinct features of the cases selected above.

## **Conclusion**

This Chapter has outlined the fundamental legal issues relating to the distribution and delimitation of marine spaces in general. Furthermore, it has highlighted the underlying legal-political strands and particular features of the conflict dynamics of the dispute between Croatia and Slovenia over the sea border. Ahead of looking at the genesis of the Arbitration Agreement in the context of Croatia's EU accession negotiations in 2008/2009 (see Chapter VI), it is well worth recalling the following:

► The Convention of the Law of the Sea is a product of an enormous and laborious United Nations treaty conference lasting for nearly ten years (UNCLOS III, 1973-1982). As a quasi-constitution of the oceans, the adoption of UNCLOS was subject to unanimity and followed the package-deal principle. All signatories had to agree on the final text. Thus, many provisions of the Convention were only possible after fine-tuned compromise formulae had been painstakingly carved out. As a result, the agreed texts to some degree represent the lowest common denominator and are therefore subject to different interpretations.

Against this background, UNCLOS' dispute settlement system is remarkable both from the point of view of its integrity and its ability to manage conflict. With the benefit of hindsight, one cannot overestimate the built-in procedures for settling disputes over the interpretation and implementation of UNCLOS for the purpose of preserving the Convention as a whole. A *binding* settlement procedure is another striking feature of UNCLOS. Even where no joint agreement of the parties is feasible on the submission of a dispute, one party can unilaterally initiate proceedings for which the outcome is binding on both parties. This was truly a novelty in international law and the conduct of international relations.

The process of case law developed by international courts and tribunals has refined the delimitation methodology both in technical terms and in terms of predictability. Parties subject to a maritime dispute can nowadays expect a high and structured level of legal reasoning. There is, however, still room for improvement with regard to the transparency of the delimitation method, in particular as far as the (dis)proportionality test in the three-stage approach is concerned. In terms of effectiveness, the parties' level of compliance has, on the whole, been very solid, which highlights the legitimacy and the general effectiveness of the UNCLOS dispute settlement system.

► The dispute between Croatia and Slovenia over the maritime part of the border became an EU issue immediately after Croatia's application for EU membership in 2003. Croatia's proclamation of a *de-facto* economic zone (EFPZ) in the narrow Adriatic later that year triggered a fierce response not only from Slovenia, but also some criticism on the part of Italy, and was largely seen as at odds with the 'European spirit'.

Croatia's EU accession process was facing a particularly rocky road with regard to fisheries. It took some substantial effort from the European Commission acting as a mediator as early as in the spring of 2004 to somewhat defuse the conflict in securing a temporary non-application of the Croatian EFPZ to EU vessels. In late 2006, the actual accession negotiations on the Fisheries Chapter were temporarily blocked by Slovenia in view of the scheduled expiry of the exemption for EU vessels from the EFPZ regime.

► Croatia and Slovenia have been wagging fingers at each other and have 'cultivated' their lawfare (i.e. political offence by legal means) approach through their maritime claims in the Adriatic, which is a pretty narrow playing field for maritime zones. To that end, the Slovenian EPZCSA declaration in 2005 - including an overambitious claim to a continental shelf - may be seen as no less confrontational than the Croatian EFPZ move from 2003.

The respective maritime claims, on paper predominantly of an ecological preservation nature, escalated the conflict level of the unresolved border dispute, whilst virtually no mention of the underlying territorial conflict as such was made. Any move on maritime claims from either side must have been, and indeed was, perceived as lawfare. Such tit-for-tat diplomatic strikes made the bilateral border dispute a sustainable, as it were, and constant line of conflict in the political domain and served to harden the stance of both parties way ahead of the events in 2008/2009.

## **VI. The three development phases of the Croatia-Slovenia border dispute**

The present Chapter is at the heart of the conflict resolution attempts of the Croatian-Slovenian border dispute. The aim is to trace the processes and causal mechanisms of the resolution efforts in the various line-ups with regard to the issues, actors, and the conflict dynamics.

It appears useful to look at the unfolding of both the dispute and its management attempts historically, and to also arrive at a distinction between different phases. Such distinction would be based on considerations of (i) who initiated and/or became involved (ii) at what time in the process, and (iii) whether the conflict resolution effort was of a voluntary or coercive nature.

Whilst time frames sometimes are artificially imposed on developments *ex post*, the present border dispute between Croatia and Slovenia, however, has fairly distinct features which makes indeed such classification a reasonably objective task. For the analytical purposes of this study, the management process of the border dispute is therefore grouped into three stages:

First, the bilateral phase (1992-2007) where both countries were negotiating bilaterally;

Second, Croatia's EU accession negotiations (2008/2009) where the dispute triggered a blockade on the part of Slovenia and subsequently involved third parties in the form of the European Commission and the EU Council Presidency;

Third, the arbitral proceedings (2012-2017) where the resolution of the substantive dispute was externalized to an arbitral tribunal to arrive at a binding judicial settlement. During the follow-up phase (ongoing at the time of writing), in the aftermath of a brief bilateral intermezzo, Slovenia filed an infringement procedure against Croatia before the Court of Justice of the European Union (CJEU) to obtain clarification of the EU law aspects of mandatory implementation of the Final Award.

### **VI.1 The bilateral phase (1992-2007)**

The common State border did not play much of a role around the independence declarations and implementation by Croatia and Slovenia in the summer and autumn of 1991. Yet, there is one early incident worth mentioning: In mid-June 1991, Slovenia began with the construction work for the Slovenian checkpoint of the future Sečovelje-Plovanija border-crossing *south* of the Dragonja (Večernji list, 23 June 1991). Croatia protested the works on 21 June, four days before the joint independence declarations<sup>225</sup>, on the grounds that Slovenia was building the checkpoint on Croatian territory (see e.g. Ministry of Foreign Affairs Croatia press release, 12 May 2006). After a few hours of telephone diplomacy, Slovenia withdrew its workers and started constructing a temporary Sečovelje checkpoint north of the Dragonja next to the Mlini hamlet instead (interview Alojz Peterle, 16-09-2015). The reasoning behind that move was that an open conflict at the Slovenian-Croatian border would have been a pretext for the Yugoslav Army (JNA) to step in (Ministry of Foreign Affairs Slovenia White Paper on the border between Slovenia and Croatia, 2006: 23-24). Ironically, Croatia later completed the works south of the river and made it the Croatian Plovanija checkpoint. Slovenia repeatedly protested Croatia operating that crossing-point south of the river (Ministry of Foreign Affairs Slovenia White Paper, 2006: 26; see also VI.2.2.1 on the Slovenian blockade in October 2008,

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<sup>225</sup> Meier (1995: 311) posits that Tuđman considered the independence declarations merely a declaratory act and was therefore not amused that the Slovenes were actually constructing border-crossing points.

and figure 18 further below), but both checkpoints became permanent ones over time (author's field notes, 24-07-2015).<sup>226</sup>

In the first two years after independence, the border with Slovenia played virtually no role in Croatia since the focus of attention as for territorial issues was on the Homeland War 1991-1995 in the Krajina, northern Dalmatia, and in eastern Slavonia (interview Vesna Pusić, 24-02-2017; interview Ivo Sanader, 19-05-2016; for the Homeland War see V.5.2).

### **VI.1.1 Expert Groups and Joint/Mixed Diplomatic Commission**

A number of joint bodies were set up in 1992 and 1993 on the political and technical level. On 30 July 1993, the Agreement on the Establishment of Joint Bodies for the Establishment and Identification/Demarcation of the State Border was signed which set up the Joint/Mixed Diplomatic Commission on the political level, and the Joint/Mixed Commission for Border Demarcation, Maintenance and Renewal at the technical level, the latter comprising several subsidiary Joint Expert Groups, such as the Group for the Comparison of the Cadastral Boundaries, the Group for Demarcation, or the Group for the Geodetic Basis (interview senior Slovenian civil servant, 17-10-2016; interview senior Croatian civil servant, 11-08-2016; see also PCA Partial Award, 2016: 2, para 9; Sancin, 2010: 96).

A first technical-level bilateral meeting of surveying and mapping experts was held on 26 May 1992 where it was agreed that the definition of the cadastral boundaries would be the starting point for the delimitation of the *land* border. After another meeting on 15 March 1993 where an understanding was reached to identify diverging interpretations of the cadastral border, the final report of the surveying and mapping experts was adopted on 02 June 1994 (Crvtla, 1993: 40; PCA Final Award, 2017: 14-5, paras 51-6). The report, based on 244 sheets of topographic maps at a scale of 1:50.000, noted that

- 77 percent, i.e. approximately 510 km, of the common land border were aligned;
- 10 percent, i.e. approximately 70 km, showed a mismatch of up to 2 cm on the maps;
- 13 percent, i.e. 80 km of the joint border was significantly overlapping (more than 2 cm) in the areas along the Mura and Drava river, at the confluence of the Sotla, Sava, and Bregana rivers, and in the following spots: along the Čabranka river, at Snežnik, in the Topolec area, and along the lower reaches of the Dragonja between the Raven/Sečovlje municipalities on the Slovenian side and the Kaštel municipality on the Croatian side up to the mouth of the river (Joint Report, 1994; cited in PCA Final Award, 2017: 15-6, para 56).

The Expert Group report was fed into the Group for the Comparison of the Cadastral Boundaries (interview senior Slovenian civil servant, 17-10-2016).

The last official Expert Group Report was signed and issued on 20 December 1996 where there was talk of nine percent or 60 km of the land boundary being unaligned in the sense of cadastral district boundaries diverging by more than 50 meters on the ground (PCA Final Award, 2017: 70, para 226). In the Parties' submissions during the arbitration procedure starting in 2012, however, it emerged that Slovenia takes the view that the Report did not screen the cadastral records of the *entire* land border and that the Report was of a mere technical nature, whereas Croatia noted that the disputed areas were addressed and that this had indeed been the task of the Expert Group (PCA Final Award, 2017: 21-2, paras 73-4).

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<sup>226</sup> There are 57 land border crossing points between Slovenia and Croatia today. 32 are for international traffic, 25 are reserved for local traffic and EU citizens (Slovenian Ministry of the Interior, Border Crossings, <http://www.policija.si/eng/index.php/component/content/article/2/96-border-crossing>).

## VI.1.2 First stand-off over Piran Bay and the Dragonja strip 1993/94

An early moment of dissenting views on the *sea* border emerged at a meeting of the joint expert group for establishing and marking the boundary on 16 March 1993 where Piran Bay (and the peak of Sveta Gera/Trdinov Vrh) became an issue. As for the *sea* border to be delimited *de novo*, Slovenia favoured sovereignty over the entire Bay whilst Croatia opted for a partition of the Bay in terms of equal shares by way of the equidistance line (Cvrtila, 1993: 41; see also PCA Final Award, 2017: 71-2, paras 227-30; 76, paras 245-6).

### VI.1.2.1 Piran Bay and the maritime border

The Slovenian view soon became official through a Foreign Affairs Committee resolution of 07 April 1993 stating that, with regard to *Piran Bay*

“[t]he Republic of Slovenia advocated the *maintenance of the integrity of the Bay of Piran under its sovereignty and jurisdiction* and the *exit to the high seas* on the basis of admissible criteria of international law and taking into consideration the specific situation of the Republic of Slovenia.

The Republic of Slovenia holds a view that the Bay of Piran is a case *sui generis* which dictates exclusive regard of the *historic title* and other special circumstances. Slovenia, therefore, resolutely rejects the application of the criterion of the median line, which would - in the case of the Bay of Piran - represent an unjust and impractical solution for the Republic of Slovenia, entirely contrary to the historical and actual state in the Bay of Piran. One should consider the fact that the Republic of Slovenia was executing jurisdiction and power over the Bay of Piran in the former SFRY and that such also was the existing state of affairs at the time of the proclamation of independence of both States [...] on 25 June 1991” (Memorandum on the Bay of Piran, 07 April 1993: 3; emphasis added).

In respect of the maritime border in the territorial sea and *access to the high seas*, the Memorandum states:

“As to the maritime boundary [...] outside the Bay of Piran [...] considering the specific situation, the principle of *equity* - implying also the so-called *special circumstances* [UNCLOS, Art. 15] - also has to be taken into consideration. The Republic of Slovenia undoubtedly meets the requirements for the application of this [provision], since it belongs to the group of the so-called geographically disadvantaged States which, due to their geographic position, cannot declare their exclusive economic zone. The vital question of acquisition of sufficient quantities of national resources for the survival of the Slovene nation is also raised here. Therefore, the Republic of Slovenia is of the opinion that it is necessary, in accordance with the principle of equity and considering the [provision] of special circumstances, to draw the maritime boundary with the Republic of Croatia in such a way as to ensure that the *territorial waters of the Republic of Slovenia would*, at least at a narrow section, *join the high seas* of the Adriatic” (Memorandum on the Bay of Piran, 07 April 1993: 5; emphasis added).

In response to the Slovenian Memorandum, Croatia, in the Sabor resolution from 18 November 1993, insisted that

“[the] *equidistance method* is to be applied in Piran Bay, i.e. each point of the borderline should be equally distant from the Croatian and Slovenian coasts [...]; in the Dragonja river area the borderline runs along the St. Odorik channel by which [the] Dragonja flows into the sea as of 25 June 1991 [...]” (Sabor resolution regarding the Determination of the State Border in Piran Bay and the Dragonja River Area, 18 November 1993: 2; emphasis added).

This marked the fully developed confrontational substantive stance of the two parties on the border issue. Whilst the different positions were officially noted in an Expert Group Report in

December 1996, the political-level Joint/Mixed Diplomatic Commission admitted in March 1997 that the discrepancies along the border could not be overcome by geodetic alignment and that a solution had to be found at the political level. A meeting of the Foreign Affairs ministers in October 1997 in Zagreb brought no results, and the Diplomatic Commission met one last time in July 1998, and subsequently negotiations moved to the political level (Sancin, 2010: 96; see also PCA Final Award, 2017: 21-2).

#### VI.1.2.2 Three Hamlets

The Three Hamlets may be seen as a prototype case of the *land* border territorial dispute between Croatia and Slovenia. In late 1994, by means of a new law on the municipalities and their territory, Slovenia included the three settlements south of the Dragonja (Škudelin/Škodelin, Bužin/Bužini, and Škrilje/Škrile; place names in Croatian/Slovene), the so-called Three Hamlets, a disputed strip of land of around 110 hectares and a length of approximately 6.2 km (PCA Final Award, 2017: 229, para 739) along the lower reaches of the river with overlapping claims, in the municipality of Piran (Pipan, 2008: 341; Klemenčić and Schofield, 1995: 72; Official Gazette Republic of Slovenia, No. 60/1994); see fig. 18 overleaf.

After a fierce rejection by a Declaration of the Croatian parliament (Klemenčić and Schofield, 1995: 72; Official Gazette Republic of Croatia, No. 71/1994) and a request by the Slovenian Constitutional Court, 15 days after the adoption of the original law, Slovenia suspended the application of the new law for the Three Hamlets on the grounds that they were territorially disputed (Pipan, 2008: 342; Klemenčić and Schofield, 1995: 72; Official Gazette Republic of Slovenia, No. 69/1994). In the 06 December 1994 local elections, only citizens resident in Mlini, on the right bank of the Dragonja, participated (Klemenčić and Schofield, 1995: 73).<sup>227</sup>

From a Croatian point of view, the initial Slovenian law may be seen as an attempt to annex territory under *de-facto* control<sup>228</sup> of Croatia. Conversely, a Slovenian viewpoint would underline the Slovenian claim<sup>229</sup> over the Three Hamlets to strengthen its bargaining position in the negotiations with Croatia (Klemenčić and Schofield, 1995: 72; see also Pipan, 2008: 342).

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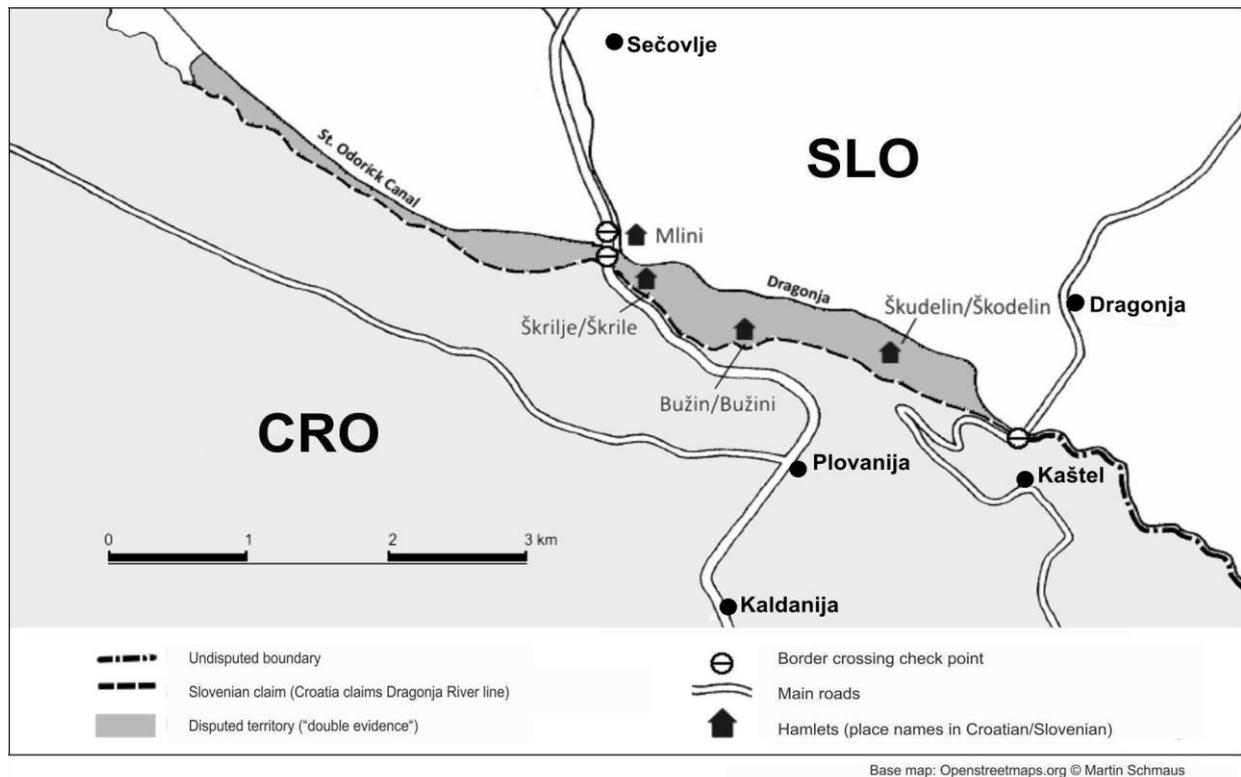
<sup>227</sup> The Three Hamlets are a remarkable case in point in terms of the state of affairs on the ground. In Yugoslav times, the 53 inhabitants of the 17 households (according to the 1991 census; see Klemenčić and Schofield, 1995: 76) were essentially under Croatian administration, had Croatian ID cards, their Yugoslav passports were issued in Croatia, and the people from Škudelin, Bužin, and Škrilje who all have Croatian and Slovenian citizenship today were included in the census and electoral register of Croatia. Yet, during the first years after independence, they were connected to the Slovenian power grid and had Slovenian phone lines. Up until 1984, they had their mail delivered by the Sečovlje post office (subsequently the hamlets inhabitants had to collect their mail at the actual post office in Sečovlje). The Croatian post today delivers to the hamlets, but the inhabitants can still pick up mail across the (factual) border in Sečovlje. Škudelin was connected to the Croatian phone network in 1995, notably with a special local tariff for calls to Slovenia. That tariff, however, expired in 2000 (Pipan, 2008: 342).

<sup>228</sup> Croatia, in essence, refers to an accord from July/August 1955 between the Executive Councils of the (Yugoslav) Republics of Croatia and Slovenia according to which mutual consent emerged as to the Dragonja being the border. Both Parties, according to Croatia, “acknowledged and respected the Dragonja River as a boundary between them up until the critical date [25 June 1991]” (PCA Final Award, 2017: 230-1, paras 742-3).

<sup>229</sup> Slovenia holds that the inhabitants of Mlini and Bužini have refused to be included in the Croatian district of Buje, and that a 1953 survey established the border of the Sečovlje municipality “including three villages on the left bank of the Dragonja” and that the situation was confirmed by the 1964 Act defining the districts and municipalities of the [Yugoslav] Republic of Slovenia (PCA Final Award, 2017: 235-6, para 755).

Figure 18:

Dragonja Strip and the Three Hamlets - situation after 1991



As for the bilateral negotiations in the 1990s, the Joint Diplomatic Commission finished its work after the last unsuccessful meeting in July 1998. In 1999, the parties agreed to attempt third-party mediation seeking the good offices of William Perry, a former U.S. Secretary of Defence. Yet, a joint meeting in Washington on 05 May 1999, and visits to Ljubljana and Zagreb in June 1999 produced no results (interview senior Croatian civil servant, 11-08-2016; interview senior Slovenian civil servant, 17-10-2016; see also PCA Final Award, 2017: 26, para 91). On balance, there was apparently little more common ground shared by the parties other than the mutual respect for the status quo on 25 June 1991 (Sancin, 2010: 96).

### VI.1.3 Agreement on Local Border Traffic and Cooperation (SOPS) 1997

Despite the solidly protracted border conflict as such, Slovenia and Croatia successfully concluded a pragmatic accord on 25 April 1997, the Agreement on Local Border Traffic and Cooperation (SOPS).<sup>230</sup> It entered into force on 05 September 2001.

SOPS is supposed to “improve living conditions of the population in the border areas” along the common border, and to enable “free economic cooperation [...] being aware that the border local communities are the foundations of good cooperation between neighbouring countries” (SOPS, Preamble). The agreement represents a number of practical arrangements for (i) local traffic along the land border, and (ii) a joint fishing zone in the respective territorial seas<sup>231</sup> covering approximately 1200 square kilometres. 1015 square kilometres form part of the Croatian territorial sea, and 169 square kilometres are located in the Slovenian territorial sea (if measured based on the median line in Piran Bay; interview

<sup>230</sup> Agreement between the Republic of Slovenia and the Republic of Croatia on Border Traffic and Cooperation.

<sup>231</sup> North of the line 45° 10' N parallel latitude to the coast of Istria at Cape Grgatov Funtana (SOPS, Art. 1(3)).

Croatian senior civil servant, 25-01-2017). It is worth noting, however, that the joint fishing zone has no implications on the delimitation of the common State border (SOPS, Art. 59).

In the EU context, the joint fishing zone under Article 4 of SOPS has made it into the Fisheries Regulation 1380/2013<sup>232</sup> with regard to the access to the territorial waters of Croatia and Slovenia respectively (points 8 and 10 of Annex I of the Regulation). It is crucial to note, however, that the application of the above provisions of the EU Fisheries Policy is subject to the full implementation of the arbitration award (see VI.3.6.2. and VI.3.7.1).

Whilst some of its provisions have become obsolete with the EU accession of Slovenia (01 May 2004) and Croatia (01 July 2013), SOPS has not expired, not least because the border between Croatia and Slovenia is now a Schengen border. The Permanent Mixed Commission established by SOPS last (at the time of writing) met in Zagreb in December 2016 and agreed on practical measures, such as facilitation of the unhindered movement of the area's population, and repair work on bridges along the land border.

#### **VI.1.4 Initialled Draft Agreement 2001**

What in retrospect turned out the most substantial exercise of bilateral diplomacy before 2009 certainly is the initialled Draft Agreement reached in July 2001. It had been negotiated between the then Prime Ministers Janez Drnovšek (Slovenia) and Ivica Račan (Croatia). The negotiations did not come out of the blue, however. They did build on the previous talks at expert and political level in the 1990s. In addition, the then recent European Commission progress report for Slovenia had mentioned a settlement over the common State border as an outstanding issue (European Commission Progress Report Slovenia, 2000: 75)<sup>233</sup>, and the Croatian side seemed aware that Slovenia was located on the road from Croatia to Europe (Arnaut, 2002: 44). More widely, “a lasting partnership on a common Euro-Atlantic path” was part of Račan's motivation (interview Tonino Picula<sup>234</sup> in telegram.hr, 12-01-2018). In addition, a successful deal on the State border was seen as positively influencing the two separate issues of the joint nuclear power station at Krško (the temporary cut-off from electricity supply to Croatia on the part of Slovenia) and Ljubljanska Banka (the reimbursement of foreign currency depositors) from SFRY times<sup>235</sup> (interview senior Croatian civil servant, 11-08-2016; interview Tonino Picula in telegram.hr, 12-01-2018).<sup>236</sup>

It is important to note from a negotiation point of view that, in early 2001, the two Prime Ministers who knew each other from the late days of the Yugoslav Federal State Presidency decided to push away the foreign ministers – notwithstanding the preparatory efforts

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<sup>232</sup> On the conservation and sustainable exploitation of fish-stocks in terms of preservation measures for demersal and small pelagic species including sardine and anchovy. For the Regulation see <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:354:0022:0061:EN:PDF>

<sup>233</sup> The 2000 European Commission Report on Slovenia can be found at [http://www.esiweb.org/pdf/slovenia\\_EC-Slovenia%20regular%20report-2000\\_en.pdf](http://www.esiweb.org/pdf/slovenia_EC-Slovenia%20regular%20report-2000_en.pdf).

<sup>234</sup> Tonino Picula MEP was Foreign Minister of Croatia 2000-2003.

<sup>235</sup> Many citizens' private foreign-currency deposits were illegally used by the Yugoslav State to cover its demand for foreign-currency reserves. For the SFRY banking system and its need for foreign currency reserves see e.g. Hojnik and Mevel (2016: 10-11).

<sup>236</sup> The financial compensation aspect of the Krško dispute was solved in December 2015 by means of investor-State arbitration, see [Arbitral Award ARB/05/24 HEP vs. Slovenia](#). The Ljubljanska Banka case was to some extent, solved through the [Ališič judgement](#) of the European Court of Human Rights of July 2014 ordering Slovenia to take care of the compensation. The issue of burden-sharing *between* the SFRY successor States, however, is subject to voluntary pluri-lateral negotiations (interview senior Slovenian civil servant, 02-12-2016).

undertaken by them already in 2000 (interview Alojz Peterle, 28-06-2017) - and tackle the matter personally. The conduct of the negotiations was remarkable as the two Prime Ministers were negotiating over the text and the maps face to face and alone in the room with feedbacks to their delegations only every couple of hours (interview senior Slovenian civil servant from the then Slovenian negotiating team, 02-12-2016).<sup>237</sup>

On substance, the Drnovšek-Račan<sup>238</sup> Draft Agreement of 17 July 2001<sup>239</sup> “considering that the two States have no territorial claims towards each other” (Preamble) represents a fully *negotiated* settlement and a solution *sui generis* with a number of striking features:

As for (i) the delimitation at *Piran Bay* and in the *Gulf of Trieste*, the lateral border goes from the outfall of the Dragonja River (St. Odorick’s Canal) to the point (on the former SFRY closing line of the Bay; PCA Final Award, 2017: 272) which is one fourth of the distance between Cape Savudrija (the Croatian entrance to the Bay) and Cape Madona (the Slovenian entrance at Piran). As a result, roughly three quarters of the Bay go to Slovenia and one quarter goes to Croatia (Article 3(1)). Remarkably, the Final Award of the later arbitration procedure took up this very delimitation line inside the Bay on the basis of the fishing management and factual police patrolling during the period up until 25 June 1991 (see VI.3.5.2.1).

From the above point at the mouth of the Bay, the border turns south and runs in an east-west parallel line up to the former Yugoslav-Italian sea border from 1975<sup>240</sup> except for the tiny strip foreseen for the junction to the high seas (Article 3(1)). Article 3 is silent on the nature of the respective waters inside the Bay. However, as the line over the mouth of the bay is not expressly referred to as the closing line, it appears that the status of the waters inside the Bay is considered the respective territorial sea (as opposed to internal waters).<sup>241</sup>

In respect of (ii) *access to the high seas* for Slovenia, a novel approach was agreed on: a “junction” between the territorial sea of Slovenia and the high seas via a high-seas corridor through the Croatian territorial sea (Article 4(1)). The width of the junction is 2.3 nm (Article 4(2); see also PCA Final Award, 2017: 340, para 1060). As a by-product, the corridor created a triangular enclave of Croatian territorial sea maintaining the country’s sea border with Italy (Article 5). It must be noted that no sovereign rights were accorded to either State as for the corridor’s water column under the sea surface, its seabed and its subsoil (Article 4(5)). In terms of the international law of the sea, a corridor between the territorial sea of a State and the high seas historically only emerged twice before (in a pluri-lateral treaty on free passage

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<sup>237</sup> A semi-comparable bilateral line-up, from a purely negotiations-technique point of view, was perhaps the one between Vaclav Klaus and Vladimir Mečiar when they were negotiating the terms of the dissolution/separation of the ČSFR into the Czech Republic and Slovak Republic in the late summer of 1992 (interview Tomáš Prouza, State Secretary in the Foreign Ministry of the Czech Republic in charge of EU affairs 2014-2017, 18-09-2017; interview Eduard Kukan MEP, Foreign Minister of Slovakia 1998-2006, 03-10-2017).

<sup>238</sup> In alphabetical order. In Croatia, the Draft Agreement is usually referred to as Račan-Drnovšek.

<sup>239</sup> English translation by the Slovenian Foreign Ministry of the text initialled by the two heads of the negotiating delegations.

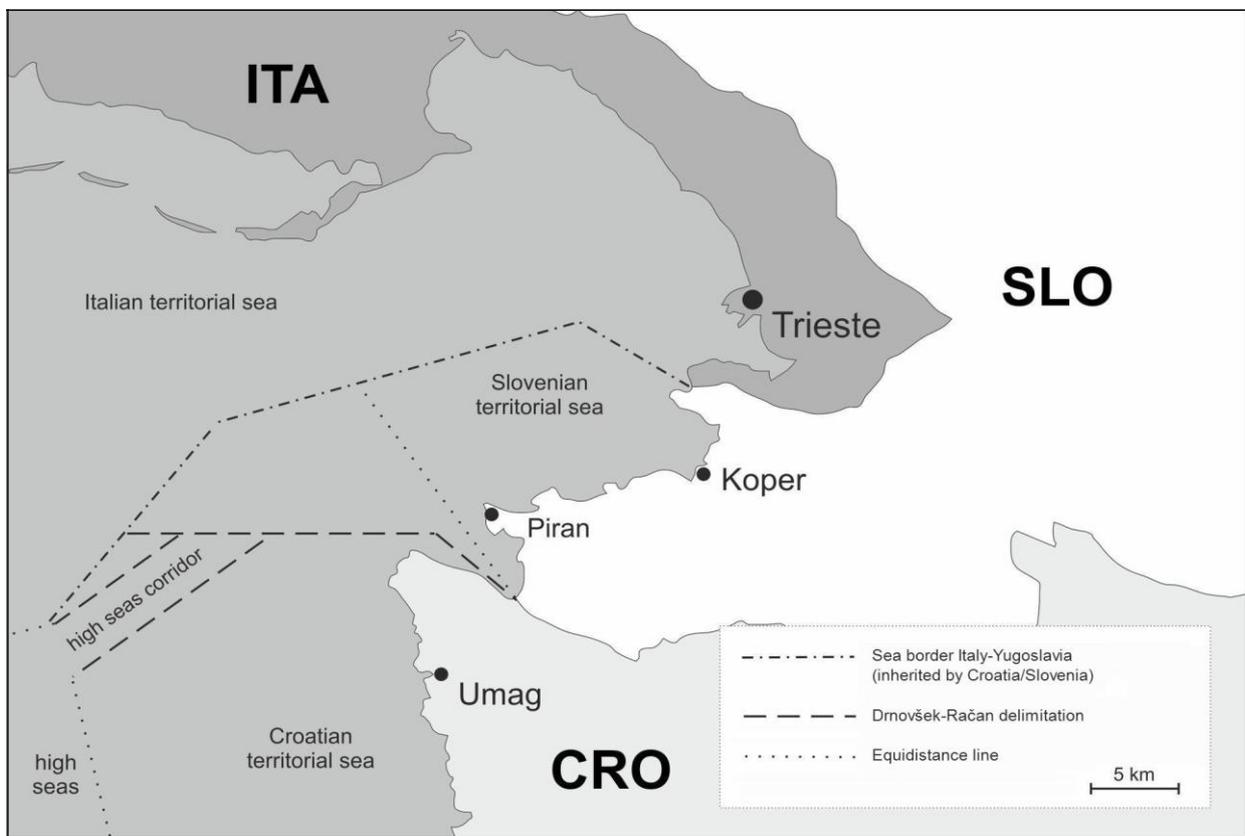
<sup>240</sup> Treaty of Osimo 1975 delimitating the territorial waters of Italy and Yugoslavia. Both Slovenia and Croatia have declared to inherit the respective sea border strip of Yugoslavia. Italy did not object (Cataldi, 2013: 1; Klemenčič and Topalović, 2009: 313-4). For the Osimo Treaty see IV.4.3.

<sup>241</sup> It is important to note that, unlike in the territorial sea, there is no right to innocent passage for foreign vessels in internal waters (see Tanaka, 2015: 78-81; Rothwell and Stephens, 2016: 55-9).

through The Sound/Øresund, one of the Danish straits, in 1857<sup>242</sup>, and in an agreement between France and Monaco in 1984; for the latter see Arnaut, 2002: 50), and a quasi-extraterritorial triangle strip of territorial sea certainly was unheard of at the time and still is today (see fig. 19).

As for (iii) the *land border*, the Three Hamlets south of the Dragonja were finally accorded to Croatia, to name one prominent example.<sup>243</sup> All other disputed spots along the border, such as Trdinov Vrh/Sveta Gera, or the Hotiza-Sveti Martin area along the Mura River, were resolved, too. Annex II of the Draft Agreement contains a verbal description of the border linking 85 points from the tripoint at the border to Hungary to the outfall of the Dragonja into Piran Bay (see Appendix 4a).

Figure 19: Maritime delimitation in Piran Bay and the Gulf of Trieste according to the 2001 Draft Agreement (schematic view)



One peculiarity of the Draft Agreement is worth mentioning from a point of view of its authenticity. In the provisions on both the land border and the sea border reference is made to the verbal description in Annex II prevailing over the maps and coordinates respectively

<sup>242</sup> The pluri-lateral treaty was concluded between Denmark and Austria, Belgium, France, Great Britain, Hanover, the Hanse Towns, Mecklenburg-Schwerin, the Netherlands, Oldenburg, Prussia, and Sweden-Norway. A second bilateral treaty was concluded between Denmark and the United States. Strictly speaking, the provisions only apply to the signatories, but Danish State practice has rendered the provisions a quasi-universal regime (see Bangert, 1997: 105-7).

<sup>243</sup> Trading the Dragonja strip in last-minute to secure the approval of the Croatian delegation has sparked some fierce criticism and opposition in Slovenia (interview Alojz Peterle, 30-11-2015).

(Articles 3(3) and 4(4)). Usually, maps and coordinates take precedent over verbal descriptions in the application of a treaty.

It is vital to note that the initialled Draft Agreement never entered into force. The Foreign Affairs Committee of the Croatian Parliament rejected the text, so it never underwent ratification in the Sabor (PCA Final Award, 2017: 27, para 92; letter from Račan to Drnovšek, 03 September 2002).

In retrospect, several reasons may be identified for the failure of the Drnovšek-Račan Draft Agreement:

(i) The agreement may, on its substantive provisions, have been too innovative, and there were legal doubts as to whether a Croatian triangle enclave disjointed from the rest of the Croatian territorial sea, an unprecedented solution *sui generis*, would be recognized by Italy (Arnaut, 2014: 149; see also Grbec, 2015: 176);

(ii) Virtually the entire Croatian legal expert establishment was against the text, not least because they had all favoured the equidistance line as for the delimitation in the Bay, and had not been consulted ahead of and during the negotiations in the first place. Then again, one can argue that the likelihood of reaching any kind of agreement at all would have been virtually at zero “had there been a greater audience” (interview Vesna Pusić, 24-02-2017);

(iii) Drnovšek, having secured the support of the opposition (mainly Janša’s SDS) on his part, had overestimated the command of domestic support for the deal on the part of Račan (interview senior Slovenian civil servant from the then Slovenian negotiating team, 02-12-2016). Račan had indeed failed to persuade all coalition parties, most notably Budiša’s HSLs (interview Vesna Pusić, 24-02-2017), and the major opposition party HDZ (interview Ivo Sanader, 19-05-2016).<sup>244</sup> It must be noted in this context that the then government comprised no less than six parties, the first-ever coalition government in Croatia after three consecutive HDZ majority governments, and that by summer 2001 Račan’s decision to extradite generals Gotovina and Ademi to the ICTY had provoked the resignation of the HSLs ministers and a subsequent vote of confidence (Dolenec, 2013: 150-1);<sup>245</sup>

(iv) The traumatic experience on Croatia’s other borders with Serbia and Bosnia-Herzegovina between 1991 and 1995, together with the territorial shape of Croatia, had created a solid sensitivity towards territorial issues (interview Dejan Jović, 02-11-2017; see also Klemenčić and Schofield, 1995: 71-2), in particular with regard to the Homeland War (see Koska and Matan, 2017: 129-131; Lamont, 2015: 72-74) during which Croatia lost around 20.000 lives (all told, military and civilian deaths; Jović, 2011: 36). The repercussions of the Homeland War lead to the Sabor Declaration from October 2000 stating that the country “led a just and legitimate, defensive and liberating, and not an aggressive and conquering war [...] in which it defended its territory [...]”, and that therefore “[t]he fundamental values of the Homeland War are unambiguously accepted by the entire Croatian people and all Croatian citizens” (Official Gazette of the Republic of Croatia, No. 102/2000); see also VI.5.2.

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<sup>244</sup> Račan called Sanader on 29 July 2001, 12 days after the initialling of the Draft Agreement, when the HDZ chair was already on summer vacation with his family on Lopud island. The two spoke for three quarters of an hour.

<sup>245</sup> What aggravated to the diversity within the six-party coalition was the fact that HSLs chair Budiša and HSS (Croatian Peasant Party) chair Tomčić were not serving as government ministers which required additional coordination efforts outside the government structures.

In September 2002, Račan sent a passionately gloomy letter to Drnovšek in which he summed up the spirit of the preceding months. It is worth quoting:

“[...] I am certain that you hold that the friendly relations and cooperation between our countries are the strategic interest of both our countries and peoples, and that for democratic forces there cannot be an alternative. However, things are not going in that direction.

Arguments and forces of conflict are gaining momentum on both sides of the joint border and are using open and unsettled issues between our countries, making them bigger and bigger and ever harder to settle. We are facing the risk of unreasonable extension of the problems and conflicts between our countries to our relations where such problems did not previously exist. It would be absurd if today Slovenia and Croatia ‘balkanized’ their relations and State policy, considering that such a way to ‘settle’ problems is losing ground throughout Southeast Europe [...].

As a failed attempt, the initialled Draft Agreement cannot be a basis for settling the problem [...] It was an attempt without legal effects [...]. We can, and therefore we must, reconsider what to do under the circumstances. It appears that, concerning the border, we cannot reach a solution amicably and of our own accord [...]. The most reasonable solution that remains is, therefore, arbitration. I am prepared to talk with you about binding arbitration, after I obtain support from the Croatian Parliament” (letter from Račan to Drnovšek, 03 September 2002).

No efforts to solve the outstanding border issue were made over the next five years.

### **VI.1.5 Bled Agreement 2007**

Only in the summer of 2007 was a new solution attempt made. The Slovenian Prime Minister Janez Janša and his Croatian counterpart Ivo Sanader met in Bled on 26 August and agreed to submit the dispute to the International Court of Justice (ICJ). Janša, on his part, had not consulted anyone prior to his decision to move away from the Draft Agreement of 2001 (which was the result of intensive bilateral negotiations) and refer the matter of dispute to an international court instead (interview senior Slovenian civil servant from the 2001 Slovenian negotiating team, 02-12-2016). Some indeed saw the Bled Agreement as a pragmatic, but forward-looking “back-peddalling exercise” in respect of the bilateral Drnovšek-Račan deal (interview Davor Stier, 23-09-2015).

The Bled Agreement tasked a joint team of legal experts with the drafting of the mandate for the Court. That mandate was supposed to be discussed in both parliaments in a cross-party spirit and ready for submission to the ICJ by the end of 2007 (Office of the Prime Minister of Slovenia’s tape-recording transcript of the Janša statement at the press conference, 26 August 2007: 1). The joint understanding was such that the mandate for the ICJ was also to be *ratified* by both parliaments (interview Ivo Sanader, 02-11-2017). It is worth noting that, unlike Drnovšek-Račan in 2001, there was no link to the other two issues Krško and Ljubljanska Banka. Rather, “the very fact that we have decided to involve a third party in settling the border issue, and to continue to solve other issues bilaterally, shows that we are not dealing with packages” (Janša tape-recording transcript, 26 August 2007: 2).

However, the above timetable proved too ambitious as the *travaux préparatoires* for the mandate for the ICJ turned out to be a rocky road. Drafts were exchanged following a joint meeting of the expert groups in June 2008.<sup>246</sup> Somewhat unexpectedly, the disagreement over

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<sup>246</sup> The initial deadline of December 2007 had proved unattainable. In the context of the entry into force of the Croatian ZERP (see V.1.4.4) in March 2008, Janša and Sanader, in a phone-call in early March, agreed to

which judicial body exactly the dispute was supposed to be submitted to re-surfaced. This is evident from a Slovenian draft of the Special Agreement, the mandate for the judicial body, where there was talk of three options (“International Court of Justice in The Hague/Permanent Court of Arbitration/Ad-hoc Arbitration”) in virtually any of the draft articles (Special Agreement, September 2008). Articles 1 and 2 shall serve as an example here:

“Article 1  
Submission of a dispute

Option 1:

1. The Parties agree to submit the dispute to the *International Court of Justice* in The Hague [...].
2. The Parties agree to submit the dispute to a Chamber of the Court, composed of five judges [...].

Option 2:

The Parties agree to submit the dispute to the *Permanent Court of Arbitration*.

Option 3:

The Parties agree to submit the dispute to *Ad-hoc Arbitration*.

Article 2  
Subject of the Litigation

The Parties authorize the *Court/Permanent Court of Arbitration/Ad-hoc Arbitration* to adjudicate on the substantive elements of the dispute regarding the determination of the lateral boundary between the maritime belts of the two Parties and a more precise delimitation of the land border [...]” (Special Agreement, September 2008; emphasis added).

Conversely, a Croatian draft solely referred to the ICJ (Special Agreement between the government of the Republic of Croatia and the government of the Republic of Slovenia on the submission of the boundary dispute between the two States to the International Court of Justice, September 2008) as becomes clear in the respective first two articles:

“Article I

The parties agree to submit the dispute to the International Court of Justice [...].

Article II

1. The Court is requested to determine, in accordance with the principles and rules of international law (as applicable in the matter between the Parties) [...]” (Special Agreement between the government of the Republic of Croatia and the government of the Republic of Slovenia, September 2008).

There were three meetings altogether, and by early 2009, positions had not changed. Slovenia withdrew its members from the expert groups in March 2009 (interview senior Slovenian civil servant, 17-10-2016; see also PCA Final Award, 2017: 31). Slovenia holds that “the mandates of the negotiating delegations were obviously very different” (interview senior Slovenian civil servant, 17-10-2016). It must not be overlooked in this context, however, that the EU accession negotiations of Croatia had already been heavily infiltrated by the Slovenian

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intensify the work on the mandate and to refrain from provocations in Piran Bay (interview Ivo Sanader, 02-11-2017).

'reservations'<sup>247</sup>, and that the initial European Commission initiative to forge a deal on mediation or arbitration was already in full swing (see VI.2.2). In the same vein, the legal-political dispute over the Croatian Ecological and Fisheries Protection Zone (EFPZ/ZERP) and the Slovenian Ecological Protection Zone and Continental Shelf (EPZCSA) between 2003 and 2008 had seriously added up to the bilateral tensions over the sea border (see V.1.4.4).

The disagreement on substantive issues of the mandate for judicial adjudication is exemplary for the loaded task of negotiating the mandate. The failure of the Bled Agreement is a case in point. As Keohane et al note, the legal norms and requirements as the core issues of a mandate tend to be precisely fixed. Thus, the fiercest kind of bargaining usually ensues over the terms of a prospective settlement by a third-party judicial body (Keohane et al, 2000: 461-2; 470).

## **VI.2            The border conflict during Croatia's EU accession negotiations (2008/09)**

At this point, it is worth looking at the operational design of the workings of the European Union accession negotiations, the bodies involved, its roles, and the relevant procedural steps.

### **VI.2.1        EU accession negotiations**

Generally, any EU enlargement process starts with the application for membership of the potential Candidate Country. The application is assessed by the European Commission which drafts an opinion for the European Council (EU Heads of State and Government). The European Council unanimously takes the decision and, in the case of approval, renders the applicant country the status of *Candidate Country*.<sup>248</sup>

The European Council subsequently adopts a *negotiating framework*. The following stage marks the beginning of the operational accession negotiations starting with the *screening* of the Candidate Country's legislation in each policy field (Chapter) to see whether the Candidate Country is sufficiently in compliance with existing EU *acquis*, i.e. existing EU legislation and international agreements concluded by the EU. It is important to note, that the EU *acquis* is constantly evolving. There are currently 35 negotiating Chapters.<sup>249</sup>

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<sup>247</sup> The Slovenian government took the decision to use the veto as early as June 2008 (see VI.2.2.1).

<sup>248</sup> Croatia applied for EU membership on 21 February 2003. The European Commission recommended Croatia to become a Candidate Country on 01 April 2004, and the European Council approved the candidate status on 01 June 2004. On 01 December 2004, the European Council set the tentative date of 17 March 2005 for the start of the accession negotiations subject to full co-operation of Croatia with the International Criminal Tribunal for the former Yugoslavia (ICTY). The start of the accession negotiations was put on hold by the EU Foreign Ministers on 16 March 2005 (see Council of the EU press release 16 March 2005, [http://europa.eu/rapid/press-release\\_PRES-05-44\\_en.htm?locale=en](http://europa.eu/rapid/press-release_PRES-05-44_en.htm?locale=en)). Nevertheless, they adopted the negotiating framework, and on 20 October 2005, the screening stage of the accession negotiations began. The first negotiating Chapter with Croatia was opened at an Intergovernmental Conference (IGC) on 12 June 2006 (for the stages of Croatia's EU accession process see European Commission website European Neighbourhood Policy and Enlargement Negotiations, Croatia, [https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/croatia\\_en](https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/croatia_en)).

<sup>249</sup> The Chapters are: (1) Free movement of goods, (2) Freedom of movement for workers, (3) Right of establishment and freedom to provide services, (4) Free movement of capital, (5) Public procurement, (6) Company law, (7) Intellectual property law, (8) Competition policy, (9) Financial services, (10) Information society and media, (11) Agriculture and rural development, (12) Food safety, veterinary and phytosanitary policy, (13) Fisheries, (14) Transport policy, (15) Energy, (16) Taxation, (17) Economic and Monetary policy, (18) Statistics, (19) Social policy and employment, (20) Enterprise and industrial policy, (21) Trans-European networks, (22) Regional policy and coordination of structural instruments, (23) Judiciary and fundamental

### VI.2.1.1 Rules governing the accession process

As a general rule, the pace of accession is linked to the pace of goal attainment (mostly meaning reforms) on the part of the Candidate Country.

(i) The fundamental conditions for EU accession are laid down in the so-called Copenhagen Criteria set out in 1993:

- *Political criteria*: stability of institutions guaranteeing democracy, the rule of law, human rights and the respect for and the protection of minorities;
- *Economic criteria*: a functioning market economy and the capacity to cope with competition and market forces;
- *Administrative and institutional capacity* to effectively implement the EU *acquis* and the ability to take on the obligations of EU membership (Presidency Conclusions European Council Copenhagen, 22 June 1993: 13; emphasis added).

(ii) Further, there are more recent additional requirements for the accession negotiations:

- Priority is given to the rule-of-law Chapters 23 (judiciary and fundamental rights) and 24 (justice, freedom and security). These Chapters are to be tackled at an early stage of the accession negotiations (European Commission Enlargement Strategy, 12 October 2011: 23). In addition to the usual opening benchmarks and closing benchmarks to go with every Chapter, there are *interim* benchmarks as a new feature with Chapters 23 and 24. The interim benchmarks are part of the EU Common Position (CP) on a Chapter, drafted by the Commission and discussed and finalised by the Member States by unanimity (see e.g. EU Information Centre Belgrade, 2014: 38);
- No target date for accession is set until the negotiations move close to completion. This marks a new phase as the timetable no longer appears to be a dominant political factor (see e.g. European Commission presentation paper Belgrade, 18 July 2013: 6);
- Regional cooperation and reconciliation in terms of past conflicts play an important role. In the same vein, bilateral issues are expressly to be tackled by the parties “in a good neighbourly spirit and [...] [should] not hold up the accession process” (European Commission Enlargement Strategy, 12 October 2011: 24).

It must be noted that this new Commission strategy, known as the *new approach*, reflects the experience with Croatia’s accession negotiations and may be seen as (i) marking a sea-change in terms of Chapter re-prioritization, and (ii) putting more focus on “monitor[ing] progress with increased attention” (European Commission Enlargement Strategy, 12 October 2011: 23; interview Member State E COELA civil servant, 21-10-2016; interview Member State H COELA civil servant, 07-03-2018). The new approach, more recently and colloquially termed “*fundamentals first*” (e.g. European Commission Enlargement Strategy, 09 November 2016: 2), became operational at the beginning of the EU accession negotiations with Montenegro on

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rights, (24) Justice, freedom and security, (25) Science and research, (26) Education and culture, (27) Environment, (28) Consumer and health protection, (29) Customs union, (30) External relations, (31) Foreign, security and defence policy, (32) Financial control, (33) Financial and budgetary provisions, (34) Institutions, (35) Other issues (for further information see [https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership/chapters-of-the-acquis\\_en](https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership/chapters-of-the-acquis_en)). The *acquis* requirements tend to constitute a serious challenge for Candidate Countries’ administrative capacities (interview Member State B civil servant who worked in COELA in 2009; 08-12-2016). Some Member State, especially those who have experienced EU accession themselves recently, provide assistance to Candidate Countries, as was the case with Slovakia advising Croatia as from 2005 (interview Eduard Kukan, 27-09-2017).

29 June 2012. It has since been applied in the same vein also to the negotiations with Serbia which started on 21 January 2014.<sup>250</sup>

The focus of attention has since been on implementation of the rule-of-law Chapters on the ground, i.e. the so-called *track record*. “We have recently started to focus on the actual output of judicial systems. And that output is indeed quantifiable. In fact, one can look at the ratio between the number of investigations, the number of actual charges resulting from them, and whether the court handed down a judgement.” To that end, expert groups selected by the Commission and composed of practitioners who work alongside their full-time occupation and gather information on the ground. Some of the expert groups’ findings (“case-based peer reviews”) tend to be incorporated into the interim benchmarks proposed by the Commission later on (interview European Commission civil servant, 10-01-2018). Yet, it is the view of this author, that there is a shortcoming with the track-record approach: Quantifiable as one selected item may be, there is no definition of track record in terms of what kind of performance in what areas exactly is going to be measured over what time period.

Miščević and Mrak (2017: 196-7) argue that the new emphasis on Chapters 23 and 24, not least by the introduction of the interim benchmarks, renders these two Chapters “the role of 'controller' of the negotiations“. As a result, Member States increasingly shaped these negotiations by setting benchmarks and deciding whether they “have been met or not“. In fact, this analysis appears to neatly correspond to contemporary State practice in the Council Working Group on Enlargement (COELA). A practitioner’s view is that “interim benchmarks actually tend to be worded in a way that they can never be met” (interview Member State E COELA civil servant, 07-03-2018).

(iii) In its most recent Enlargement Strategy from February 2018, the European Commission crafted some further fine-tuning of the *new approach* introducing a few new features:

- A strong emphasis on the rule of law, in particular the “independence, quality and efficiency of the judicial system”, and the fight against corruption and organised crime (European Commission Enlargement Strategy, 06 February 2018: 4);
- Narrower provisions on bilateral disputes. These are supposed to be “solved as a matter of urgency”. Where this proves impossible on a bilateral level, “parties should submit them *unconditionally to binding, final international arbitration* [sic]” (European Commission Enlargement Strategy, 06 February 2018: 7). Notably, there was a diplomatic battle on the above wording between the Croatian and the Slovenian Commissioner during the late drafting stage. At some stage of the drafting, the International Court of Justice was also mentioned in brackets, and that issue was hotly debated (information obtained from several Commissioner’s Cabinet members in March 2018; draft version of the 2018 Enlargement Strategy from November 2017 this author has seen). The final wording, however, is unusually and unnecessarily fuzzy and confusing, and clearly indicates that it is a compromise formula;<sup>251</sup>
- An indicative EU accession target date 2025 for Serbia and for Montenegro. Whilst the Commission hastens to add that such date “is purely indicative and based on the

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<sup>250</sup> For Montenegro see [https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/montenegro\\_en](https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/montenegro_en); for Serbia see [https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/serbia\\_en](https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/serbia_en).

<sup>251</sup> Arbitration is always “binding” and thus also “final”. Perhaps it was to make up for the deletion of the ICJ in the wording. Then again, why leave out the ICJ as an option in case parties would be willing to agree to submit to the ICJ rather than to an arbitral tribunal?

best-case scenario” (European Commission Enlargement Strategy, 06 February 2018: 7), it is there nevertheless and thus goes against the grain of a purely *merits-based* approach, the Commission’s very mantra from recent years;

- More emphasis on ‘soft’ (“socio-economic”) issues (European Commission Enlargement Strategy, 06 February 2018: 12). To that end, the funds for the “Erasmus+” programme should be “doubled to help even more young citizens of the Western Balkans to study and gain experience in the EU” (European Commission Enlargement Strategy, 06 February 2018: 13). For pre-accession funds generally, the Commission announced a boost in Pre-Accession Assistance for the period close to accession (European Commission Enlargement Strategy, 06 February 2018: 16).

The overall spirit of the 2018 Enlargement Strategy takes up the new emphasis on the Western Balkans highlighted by European Commission President Jean-Claude Juncker in his preceding State of the Union address before the European Parliament in September 2017. It had not gone by unnoticed when the Commission President made the following remark:

“[I]f we want more stability in our neighbourhood, then we must also maintain a credible enlargement perspective for the Western Balkans. It is clear that there will be no further enlargement during the mandate of this Commission [ending 31 October 2019] and this Parliament [end of term beginning of July 2019]. No candidate is ready. But thereafter the European Union will be greater than 27 in number. Accession candidates must give the rule of law, justice and fundamental rights utmost priority in the negotiations.” (State of the Union address, 13 September 2017)

It was not lost on connoisseurs of EU enlargement either, that there was a new *momentum* in the European Commission’s enlargement approach. That new dynamism appears to have been taken up subsequently by the European Commission’s Candidate Country *status* reports (formerly known as *progress* reports) from April 2018. The Commission’s reports actually include the recommendation to start accession negotiations with Albania and Macedonia. Yet, there was an intense debate in the college of Commissioners on 17 April 2018 whether to actually recommend such start (information obtained from several Commissioners’ Cabinet members, 17-04-2018) as the President of France had mentioned a little earlier during his plenary speech in the European Parliament on the morning of the same day, that EU reform had to take precedent over EU enlargement (author’s field notes, 17-04-2018).

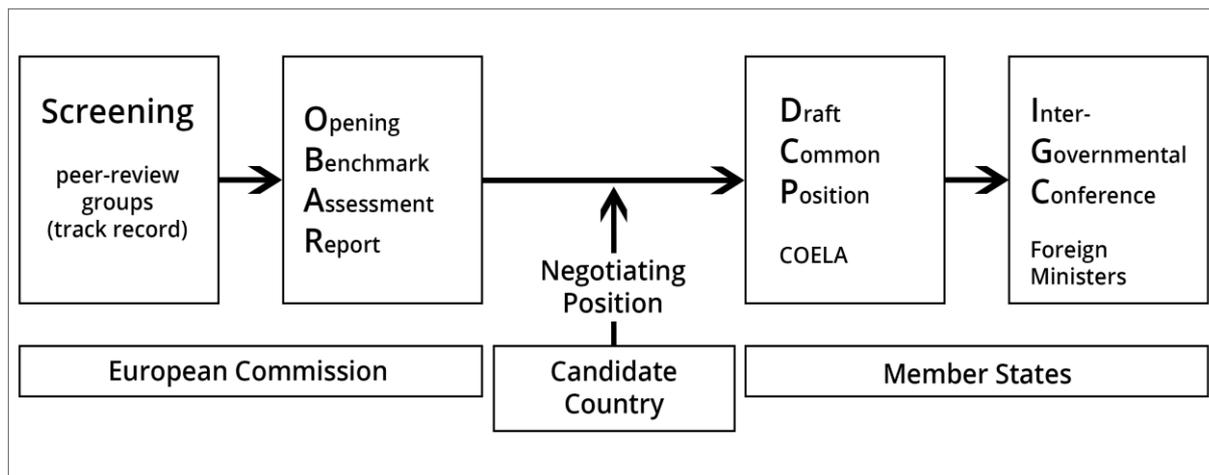
As reservations with regard to EU enlargement on Member State level were, and in fact are, not limited to France, a face-saving solution had to be found. The General Affairs Council (EU foreign ministers) on 26 June 2018 did in principle endorse the positive recommendation from the European Commission. Yet, it postponed the actual beginning of accession negotiations for Albania and Montenegro to June 2019 subject to domestic implementation of reform and subsequent Council approval. In return, the technical screening process carried out by the European Commission, somewhat opaquely termed “necessary preparatory work” in the Council Conclusions, was to start immediately which it did (General Affairs Council Conclusions, 26 June 2018: 16, para 44 [FYR Macedonia]; 19-20, para 54 [Albania]; interview European Commission civil servant DG NEAR, 28-08-2018).

#### VI.2.1.2 Opening and closure of Chapters

The substantive issues are dealt with at the operational level of the accession negotiations, i.e. when the question of opening and/or closing of negotiation Chapters arises. In a nutshell, the process is as follows (fundamentals-first version as operational since 29 June 2012):

- The European Commission, after screening the Candidate Country's existing legislation and practical implementation on the ground, drafts an *Opening Benchmark Assessment Report (OBAR)*. Member States, in the format of the Council Working Group on Enlargement (*COELA*), adopt the OBAR;
- The Council Presidency invites the Candidate Country to submit their negotiating position. The Candidate Country will usually have learnt informally about the date of the upcoming request prior to the Council decision;
- The European Commission subsequently drafts the *EU Draft Common Position (DCP)* which is then negotiated in COELA, i.e. Member States may request changes subject to unanimity. The final *EU Common Position (CP)* is endorsed at the ambassador level (*COREPER*) and then officially adopted at ministerial level (General Affairs Council), the latter usually at the occasion of an *Intergovernmental Conference (IGC)*. The procedure for closing benchmarks follows the same logic (interview with Member State E COELA civil servant, 21-10-2016; interview Member State D COELA civil servant, 15-11-2016; European Commission presentation paper Belgrade, 18-06-2013: 10-11); see fig. 20.

Figure 20: EU accession negotiations: procedure for opening and closure of Chapters 23 and 24 (simplified)



It is useful to note that for rule-of-law issues (Chapters 23 and 24) the Commission operates a biannual non-paper reporting system to inform the Member States on the progress in the field. In addition, the Commission proposes interim benchmarks (including updated ones) for Chapter 23 and 24 matters if they consider it necessary (see e.g. Council of the European Union, DCP on Chapter 24, accession negotiations with Serbia, 05 July 2016: 22-32).

As both the opening and interim benchmarks are proposed by the Commission and are not debated in COELA, it is up to Member States to individually lobby the Commission on the need and potential content of such benchmarks. The Commission's DCP, however, is more or less openly debated and amended inside COELA depending on the style of the Presidency in office (interview Member State E COELA civil servant, 21-10-2016; interview Member State H COELA civil servant, 16-07-2018). Furthermore, it is understood that Member States may turn to one another bilaterally or pluri-laterally to seek for support for their individual points of interest. Thus, it may be said that there is a three-tier opportunity for Member States to influence the EU Common Position vis-à-vis a Candidate Country. The European

Commission, nonetheless, has a strong role as guardian of the *acquis* and accession negotiating executive.

A Candidate Country is also free to lobby its interest with the Commission and the Member States. As a third country, however, the Candidate Country is forced to lobby individually with Member States if such communication is meant to take place at an early stage. Still, there is an official body where Member States and individual Candidate Countries meet: the Stabilisation and Association Council, usually referred to as the SA Council<sup>252</sup>. It is a Council forum for broad debate on equal footing with the Candidate Country about the stage of preparation for EU membership, and usually takes place once a year (interview Member State I COELA civil servant, 12-07-2018; interview Member State E COELA civil servant, 21-10-2016; see e.g. SA Council meeting EU-Montenegro, 25-06-2018<sup>253</sup>).

## VI.2.2 Early efforts to diffuse the conflict

The border dispute with Slovenia was by no means new in the context of Croatia's EU accession process. It had already featured prominently, albeit somewhat in the subtext perhaps, during the introduction and adaptation of the Croatian ecological protection zone in the Adriatic (ZERP) between 2003 and the spring of 2008 (see V.1.4.4). Yet, the border issue only fully impacted the ongoing accession negotiations with Croatia after the Slovenian EU Presidency (which the country held during the first half of 2008) and after the Bled Agreement of August 2007 had begun to run dry due to the re-diverging views on what type of third-party judicial body should be entrusted with the management of the border issue, a dispute that was meant to be overcome by the very Bled Agreement itself in the first place (see VI.1.5).

### VI.2.2.1 Slovenia's reservations

During October 2008, the Slovenian approach of blocking the ongoing EU accession negotiations with Croatia in a number of areas fully materialized (interview Member State B civil servant who was in COELA at the time, 08-12-2016). The actual decision to bring the matter of the prejudging documents on the negotiating table had been taken by the Slovenian government in June 2008 just before the end of the Slovenian EU Council Presidency.<sup>254</sup> The decision was implemented in October of that year, very close to polling day in Slovenia (interview senior Slovenian civil servant, 24-01-2017). The Slovenian 'reservations' concerned eleven negotiating chapters on the grounds that the documents submitted by Croatia "prejudice[d] the definition of the border between Slovenia and Croatia" (Information on prejudices in certain negotiating chapters of accession negotiations for Croatia's

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<sup>252</sup> The Stabilisation and Association Process was launched in 1999 as a tool of support particularly designed for the so-called Western Balkans countries. It contains (i) a bilateral (EU and applicant country) Stabilisation and Association Agreement (SAA) which usually marks the beginning of the EU accession process, (ii) free trade agreements with the EU, (iii) financial assistance, and (iv) the promotion of regional cooperation and good neighbourly relations. For a comprehensive overview of the SAA process see e.g. [https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/sap\\_en](https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/sap_en).

<sup>253</sup> <http://www.consilium.europa.eu/en/meetings/international-ministerial-meetings/2017/06/20/>.

<sup>254</sup> It is established custom and practice on the diplomatic scene in the EU that the rotating Council Presidency refrains from actively advancing matters considered an own national interest. Council Presidencies naturally take on a facilitating role in whatever EU decision-making is due during their Presidency.

membership of the EU, Slovenian non-paper, 18 December 2008: 1; see also PCA Partial Award, 2016: 3).

In fact, the Slovenian veto was grouped into three categories and applied to

- (i) the *opening* of five Chapters (11 Agriculture and rural development; 12 Food safety, veterinary and phytosanitary policy; 16 Taxation; 22 Regional policy and coordination of structural instruments; and 24 Justice, freedom and security);
- (ii) the provisional *closing* of two Chapters (21 Trans-European networks; and 29 Customs union); and, due to “additional substantive reservations”;
- (iii) the *opening* of Chapters 4 (Free movement of capital), 13 (Fisheries), 27 (Environment), and 31 (Foreign, security and defence policy; Slovenian non paper, 18 December 2008: 1).

The reservations in the Slovenian paper outline as follows: In Chapter 4 (Free movement of capital), Slovenia does not accept the total area of land under the Croatian Programme of management of State-owned agricultural land, as had already been protested bilaterally (Slovenian non paper, 18 December 2008: 1-2). As for Chapter 11 (Agriculture and rural development), Slovenia protests the Territories of Counties, Cities and Municipalities Act, a separate Croatian law to the Local and Regional Self-Management Act mentioned in the Croatian negotiating position, for incorporating the Three Hamlets on the left bank of the Dragonja River (Slovenian non paper, 18 December 2008: 2; see also VI.1.2.2 and PCA Final Award, 2017: 240-241, paras 767-770). On Food safety, veterinary and phytosanitary policy (Chapter 12), Ljubljana objected since the Croatian rules on veterinary checks and control of animal products in cross-border trade are related to the Croatian Customs Act containing a reference to the Croatian Maritime Code<sup>255</sup> (Slovenian non-paper, 18 December 2008: 2).

In the Fisheries Chapter (13), Slovenia protests a number of laws and implementing regulations expressly mentioning the Croatian ZERP, the equidistance line in Piran Bay, and the CS boundary with Italy (Slovenian non-paper, 18 December 2008: 2-3; see also V.1.4.4 and V.1.5). With regard to Taxation (Chapter 16), Ljubljana objects to the Croatian Public Roads Act as in its recent implementing Decree the Sečovlje-Plovanija border crossing was not listed as “provisional” (as had been agreed on in a 1994 bilateral act; see also VI.1.2.2) thus predetermining the common State border. In the Trans-European Networks Chapter (21), Slovenia criticises Zagreb’s National Programme for the Development of Railway Infrastructure as it contained maps of the Croatian view of the maritime boundary with Slovenia. As for regional policy and coordination of structural instruments (Chapter 22), Slovenia objects to the Croatian Contingency Plan for Accidental Marine Pollution referring to the maritime border in the annexed map (Slovenian non-paper, 18 December 2008: 3). With regard to Chapter 24 on Justice, freedom and security, analogous to the Croatian Decree in Chapter 16, the Sečovlje-Plovanija border crossing is listed as a permanent installation (Slovenian non-paper, 18 December 2008: 3-4; see also VI.1.2.2).

In relation to Environment (Chapter 27), the Contingency Plan for Accidental Marine Pollution is mentioned and its annexed map (as with Chapter 22). Further, Zagreb’s Decree on air quality in inhabited regions, the National Air Quality Protection and Improvement Plan, and the National Strategy on Water Management, contained several maps with the sea border. Lastly and with regard to Chapter 29 (Customs union), the Customs Act is protested since it

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<sup>255</sup> That Code *inter alia* defines Croatia’s Continental Shelf (CS) claim in the Adriatic which overlaps with Slovenia’s own CS claim (see also V.1.4.4 and V.1.5). It must be noted that the Arbitral Tribunal rejected the Slovenian continental shelf claim altogether (PCA Final Award, 2017: 354, para 1103).

contained a reference to the Croatian CS “den[ying] Slovenia the possibility of [a] continental shelf” (Slovenian non-paper, 18 December 2008: 4; see also V.1.4.4 and V.1.5).

Yet, the Slovenian reservations did not lead to a complete standstill in the Chapters concerned, as the screening of the Croatian legislation by the European Commission continued at expert level, so that the overall delay was marginal. Further, other Chapters were opened or provisionally closed as foreseen. The tactics of Slovenia were widely considered strategically and skilfully allotted, ranging from debates at ministerial level to behind-the-scenes action such as removing points from the agenda of the Council Working Group COELA. Yet, the Slovenian case was “a novelty of a country using its status of Member State to enforce its position vis-à-vis a Candidate Country” (interview European Commission civil servant involved in the accession negotiations with Croatia, 07-01-2016) although it was a purely bilateral issue. As a Member State diplomat put it: “The border dispute between Slovenia and Croatia was deeply political, but it is not a part of the accession process” (interview Member State J civil servant who worked in COELA in 2009, 19-10-2016).

The reaction amongst the EU Member States was predominantly unenthusiastic in the Council Working Group (interview Member State A civil servant, 23-06-2016). Behind the scenes, “a lot of good-will was lost as the Slovenes had played it rather clumsily not putting much effort into explaining the situation. The issue got on the nerves of a large number of Member States despite the fact that the spirit in COELA remained professional and no national position was taken personally” (interview Member State B civil servant, 08-12-2016; both civil servants worked in COELA in 2008/09). There was very little support for the Slovenian position, and, accordingly, the French EU Presidency initially took a firmly critical stance towards Ljubljana’s position (interview European Commission civil servant involved in the accession negotiations with Croatia, 07-01-2016; interview Member State C civil servant who worked in COELA 2008/2009, 27-01-2017). The very few Member States who tacitly supported the Slovenian move saw Ljubljana’s call for access to the high seas somewhat justified in a wider historical context of the north-eastern Adriatic where full maritime access for the area of present-day Slovenia was natural under the pre-1918 Habsburg rule and during post-World-War-II Yugoslavia (interview Karel Schwarzenberg<sup>256</sup>, 26-09-2017).

Croatia considered the Slovenian approach unfair and out of proportion as most of the implementing regulations were not part of the Croatian accession documents. The Slovenian reservations had therefore had to be largely based on additional Slovenian screening of Croatian implementing legislation including legal acts three levels down with regard to the legislation referred to in the original Croatian negotiating position. Furthermore, the Slovenian position was perceived as shared by the other Member States. “There was no outrage, and this appeared to us as a sign of solidarity amongst the members of a club. We felt all this was a manipulation of the Croatian accession negotiation process” (interview member of the then Croatian negotiating team, 30-11-2015). On a lighter note, “Slovenia was not fully supportive of Croatia during our accession negotiations, although they had a great knowledge, expertise, and understanding of Croatia” (interview Vesna Pusić, 24-02-2017).

#### VI.2.2.2 French Presidency proposal

France had taken over the EU Council Presidency from Slovenia on 01 July 2008. In the later stages of its Presidency, France actively pursued defusing the conflict at ambassador level, i.e.

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<sup>256</sup> Karel Schwarzenberg MP was Minister for Foreign and European Affairs of the Czech Republic 2007-2009 (including the period of the Czech EU Council Presidency in the first half of 2009) and 2010-2013.

to work out a solution in trilateral meetings (interview civil servant involved in the trilateral meetings, 27-01-2017; Internal note Ministry of Foreign Affairs Croatia, 2012: 2). The situation proved fairly tense, first of all for the accession negotiations as such as the Slovenian reservations had a “systemic effect” on the preparation of the DCPs (see VI.2.1.2), and secondly “there was a real and open confrontation” between Croatia and Slovenia (interview civil servant involved in the trilateral meetings, 27-01-2017).

The idea of the French diplomacy was to have an exchange of letters between the Council Presidency and Croatia to defuse the prejudging nature of some of the Croatian accession documents towards the common State border. This approach was to address the Slovenian concerns and supposed to remove the blockade. There was a series of trilateral meetings at the French Permanent Representation, the Slovenian Permanent Representation, and the Croatian Mission in Brussels respectively in which drafts were discussed. They culminated in a non-official “Presidency’s proposal” from 15 December 2008 which is worth quoting:

“1. Letter from the Presidency of the EU Council to Croatia:

The Presidency of the EU Council underlines that the purpose of this exchange is to address the question of any border prejudice, by confirming that the accession negotiations between the EU and Croatia will not in any way prejudice the final resolution of the border issue between Slovenia and Croatia and the positions of both sides, in any procedure relating to the resolution of the border issue.

On this basis, the Presidency [...] confirms that no statement made by Croatia in the context of its accession negotiations to the EU, when related to the border between Slovenia and Croatia, may be relied upon by Croatia in any procedure relating to the settlement of the border issue between Slovenia and Croatia in such a way as to imply acceptance or recognition of such statement by any Member State of the EU. In addition, the fact that Slovenia agrees, following its internal procedures, the EU documents and positions which refer to or summarize Croatian documents and positions, related to the border issue between Slovenia and Croatia, cannot be interpreted, in any procedure relating to the settlement of the border issue, as committing Slovenia and its position regarding this issue.

The above applies to all documents and positions either written or submitted orally, including, *inter alia*, maps, negotiating positions, legal acts and other documents in whatever form, produced, presented or referred to by Croatia in the framework of the EU accession negotiations. It also applies to all EU documents and positions which refer to or summarize the above-mentioned Croatian documents and positions [...].

The Presidency [...] notes that Slovenia and Croatia remain committed to the EU principle of good neighbourly relations [and] recalls the position of the EU related to the Croatian Ecological and Fisheries Protection Zone [ZERP] and that, according to the decision of the Croatian Parliament on 13 March 2008, no aspect of this Zone applies to the EU Member States until a common agreement in EU spirit is reached [see V.1.4.4].

[...] The Presidency proposes that this letter and the reply of the Republic of Croatia form an integral part of the accession documents (AD) of the Conference on the Accession to the European Union with Croatia.

2. Reply from Croatia to the Presidency of the EU Council:

With regard to the letter of the Presidency [...] of xx December 2008, I hereby confirm that the government of [...] Croatia fully agrees to the contents of the said letter and acknowledges its principles.

This is on the understanding that the accession negotiations between the EU and Croatia will not in any way have any affect upon the final resolution of the border issue between Slovenia and Croatia and the position of both sides, in any procedure relating to the resolution of the border issue.

Croatia further notes that the second and third paragraph of the above-mentioned letter may not be interpreted, in the context of any procedure relating to the settlement of the border issue between Slovenia and Croatia, as implying on the part of any Member State of the EU any acceptance or rejection of Croatian statements and documents related to the border issue when made, produced or referred to in a context other than the accession negotiations between the EU and Croatia.

Croatia remains committed to resolving any border dispute in conformity with the principle of peaceful settlement of disputes in accordance with the United Nations Charter and in the spirit of good neighbourly relations [and] agrees to your proposal that your letter and this reply form an integral part of the accession documents (AD) of the Conference on the Accession to the European Union with Croatia” (Presidency Proposal, 15 December 2008: 1-2).

The above letter and the positive reply of Croatia were supposed to function “as a disclaimer” and be part of the accession documents. The rationale behind this exercise was that the border dispute was a bilateral issue which was in no way related to the *acquis*, i.e. the substantive pieces of EU legislation touched upon in the actual negotiating Chapters, and that the EU was not going to enter into solving the border problem. Yet, substantial pressure from the Slovenian capital to start the solving of the border dispute was felt in the trilateral meetings, since (i) it was a very sensitive issue for the country anyway, and (ii) polling day in Slovenia was very close (interview civil servant involved in the trilateral meetings, 27-01-2017). The Slovenian side was dissatisfied with the time-pressure as the French Presidency appeared to “rush it through” before the end of their term (31 December 2008). A solution may perhaps have been in the pipeline had more time been allocated to the drafting of the letters (interview senior Slovenian civil servant, 24-01-2017). On a more fundamental note, Croatia should even have had its accession documents modified to meet Slovenia’s concerns (interview senior Slovenian civil servant 17-10-2016). In the end, Slovenia would not accept the Presidency proposal, and it was already becoming apparent that EU Enlargement Commissioner Olli Rehn was aiming at de-contaminating the Croatian accession negotiations from the veto before the end of his own term which was to expire 31 October 2009.

#### VI.2.2.3 Rehn’s Expert Group proposal

As things had developed into a real deadlock, the European Commission started assuming a mediating role in January 2009. Olli Rehn, the then European Commissioner for Enlargement, was determined to “avoid a major new frozen conflict in the Western Balkans” and went on a sentiment-finding mission to Ljubljana and Zagreb on 28 January 2009. He met Prime Minister Borut Pahor and President Danilo Turk in Ljubljana over lunch, and Prime Minister Ivo Sanader and President Stipe Mesić in Zagreb for dinner. Whilst Rehn was facing a mix of rational concern and a very emotional stance towards the other country respectively, there was all but enthusiasm for his idea of mediation (interview Olli Rehn, 09-10-2015; interview Rehn Cabinet member who was with him on that trip, 13-11-2015).<sup>257</sup>

Still, a subsequent first confidential draft dated 26 January 2009 was circulated to the parties outlining the basic elements of a mediation exercise by a “Senior Experts Group” (SEG):

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<sup>257</sup> As for potential mediators, Rehn dropped the names of Martti Arthisaari, Robert Badinter, and Donald Tusk (interview Olli Rehn, 09-10-2015).

- The SEG would be set up to resolve the bilateral border (at sea and at land) based on international law; it would consist of three personalities, one of them chair;
- The Expert Group would, after “consult[ing] the authorities in both countries” issue recommendations that Croatia and Slovenia were supposed to respect;
- The SEG would make its recommendations before the end of 2009;
- No document presented in the accession negotiations with Croatia would “commit any of the negotiating States on the border issue”;
- The Slovenian reservations were supposed to be lifted as soon as the countries made a declaration on mandating the SEG (Basic elements for a joint statement on European facilitation on the border issue between Slovenia and Croatia, European Commission note, 26 January 2009).

The draft declaration as such went through at least three drafting stages between the end of January and mid-March 2009 (Bickl, 2017: 18; see also Draft Declaration, 20 February 2009). A Croatian proposal contained a specific reference to “the work of the two commissions established under the Bled Agreement [2007]” and that the “International Court of Justice was [...] the forum to which the border dispute was to be submitted”. There was also talk of both parties acknowledging “the rights and obligations that derive [...] from the UN Convention on the Law of the Sea”. Further, bilateral negotiations were foreseen “on granting each other concessions with regard to the navigation regime and fisheries, once the border is decided by [...] the International Court of Justice” (Draft Joint Declaration, undated). The last European Commission draft from 10 March 2009 mentioned, for the first time, the date of 25 June 1991 (the day of the declarations of independence of both Slovenia and Croatia) “as the basis for a solution”. Furthermore, the consent of both parliaments was mentioned in the context of both countries respecting the Senior Experts Group’s recommendations (Draft Declaration on the border issue between the Republic of Slovenia and the Republic of Croatia, 10 March 2009).

A first fully-fledged European Commission “Draft Agreement on Arbitration”, albeit still with the Senior Experts Group (sic) as the third-party mediator, surfaced towards the end of March 2009. The Commission neatly describes the approach as “contain[ing] elements from mediation and conciliation” (European Commission, note to the file, 12 March 2009; see also II.1.1 and II.1.3.1.1) highlighting the fact that what the two parties were supposed to enter into was a legally binding international agreement subject to parliamentary ratification (European Commission, Further reflections on a formalized document, fax dated 24 March 2009).

The “Draft Agreement on Arbitration” contained the following core elements:

- Composition and appointing procedure of the Senior Expert Group  
 (“The European Commission will appoint the President [...] on the grounds of his/her experience in international dispute settlement and international reputation within 15 days after signature [...]. The President [...] will appoint two additional members of recognized competence in international dispute settlement and international law [...]. Each side will appoint one member [of the SEG] within 15 days after signature. If either side has not appointed its member within the deadline, [the appointment will be made] by the President of the International Court of Justice.”)
- Task of the Senior Expert Group  
 (“The [SEG] shall use the submissions of the parties for the determination of the legal scope of the maritime and territorial dispute between the parties [and] shall render an award on the dispute.” Further, the SEG was to have “the power to interpret the present Agreement on Arbitration.”)

- **Applicable Law**  
 (“The [SEG] shall apply the principles and rules of international law, in particular the UN-Charter.” In addition, “[n]o document or action undertaken unilaterally by either side after 25 June 1991 shall be accorded legal significance for the tasks of the Senior Expert Group or commit either side on the border dispute.”)
- **Procedure**  
 (“Each side shall prepare a submission to the [SEG] within two months [...]. Each side has the right to comment on the submission of the other side within a fixed deadline [...]. The [SEG] shall seek expert advice and organise oral hearings.”)
- **The award of the Senior Expert Group**  
 (“The [SEG] shall strive to issue its award by the end of 2009 [and] adopt the award by majority of its members. [...] The award [...] shall be binding on the parties and constitute a definitive settlement of the dispute. The Parties shall take all necessary steps to implement the award, including by revising national legislation, as necessary, within six months after the adoption of the award.”)
- **Croatia’s accession negotiations**  
 (“Upon signature of this agreement, [...] Slovenia will lift its reservations as regards opening and closing of negotiation chapters where the obstacle is related to the border dispute. The EU accession negotiations with Croatia will continue according to the negotiating framework.” With regard to accession negotiation documents, “no documents presented in the EU accession negotiations will prejudice the [SEG] [...] or commit either side on the border dispute.”)
- **Ratification**  
 (The Agreement on Arbitration “shall be ratified by either side” according to the respective constitutional provisions; Draft Agreement on Arbitration, 24 March 2009: 1-4)

The above Draft Agreement already contained distinct features of arbitration such as a five-member body including two party-appointed members, provisions on the task of the third-party dispute resolution body and the applicable law, the submission of documents and counter-documents (albeit not referred to as memorials) and oral hearings, and a binding award. Further, the nexus between an arbitration agreement and the lifting of the Slovenian reservations thus unblocking the Croatian accession negotiations was already there, too.

Yet, both Slovenia and Croatia were not fully warming to the idea of the Senior Expert Group mainly because both the task of the Group and the applicable law were not yet sufficiently outlined.<sup>258</sup> As a consequence, the phase for setting up a specific arbitral tribunal began (interview Olli Rehn, 09-10-2015). The Commission had learnt that “a proper judicial procedure was indispensable for the Croats<sup>259</sup>”, whereas taking on board some kind of discretionary powers for the tribunal would be vital for the Slovenes. In the following weeks, the Commission drafted a proposal for an arbitration agreement modelled on established arbitral rules and practice and based on the specific definitions needed for the peculiarities of the Croatia-Slovenia case (interview Frank Hoffmeister, then European Commission Legal Service, 03-06-2016; see also PCA Final Award, 2017: 33, para 107-8).

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<sup>258</sup> Slovenia later expressly suggested that whilst agreeing “to settle this predominantly political dispute through adjudication” it had “consented to the primary proposal by Commissioner Rehn [for] the process of mediation” (Information on the amendments proposed by the Republic of Slovenia, 25 May 2009: 5).

<sup>259</sup> In retrospect, Croatia referred to the Draft SEG Agreement from 24 March 2009 as “political arbitration” as opposed to “judicial settlement” in relation to the final Arbitration Agreement (Croatian Ministry of Foreign Affairs paper, September 2011: 8)

### **VI.2.3 Rehn I**

The first draft proposal for the later Arbitration Agreement, known as “Rehn I”, aiming at establishing and mandating an Arbitral Tribunal, was circulated to the parties on 23 April 2009. The gist of the core issues from the preceding proposal based on the Senior Expert Group (see VI.2.2.3) was retained, whereas the provisions on the task of the Tribunal and the applicable law were revised and defined in greater detail.

To do justice to the evolution of the core provisions of the Arbitration Agreement drafts it is worth quoting the main elements of “Rehn I”:

“[Preamble]

The Government of the Republic of Slovenia and the Republic of Croatia (hereinafter referred to as “the Parties”),

Whereas through numerous attempts the Parties have not resolved their territorial and maritime border dispute in the course of the past years,

Recalling the peaceful means for the settlement of disputes enumerated in Article 33 of the UN-Charter,

Affirming their commitment to a peaceful settlement of disputes, in the spirit of good-neighbourly relations,

Welcoming the facilitation offered by the European Commission,

Have agreed as follows:

[...]

#### Article 2: Composition of the Arbitral Tribunal

(1) Both parties shall appoint by common agreement the President of the Arbitral Tribunal and two members recognized for their competence in international law within fifteen days. In case that they cannot agree within this delay, the President and the two members of the Arbitral Tribunal shall be appointed by the President of the International Court of Justice.

(2) Each side shall appoint a further member of the Arbitral Tribunal within fifteen days after the appointments referred to in paragraph 1 have been finalised. In case that no appointment has been made within this delay, the respective member shall be appointed by the President of the Arbitral Tribunal.

(3) If, whether before or after the proceedings have begun, a vacancy should occur on account of death, incapacity or resignation of a member, it shall be filled in accordance with the procedure prescribed for the original appointment.

#### Article 3: Task of the Arbitral Tribunal

(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; and

(b) the regime for the use of the relevant maritime areas and Slovenia's *contact* to the High Sea [emphasis added].

(2) The Parties shall specify the details of the subject-matter of the dispute within one month after entry into force of this Agreement. If they fail to do so, the Arbitral Tribunal shall use submissions of the parties for the determination of the exact scope of the maritime and territorial disputes and claims between the parties.

(3) The Arbitral Tribunal shall render an award on the dispute.

(4) The Arbitral Award has the power to interpret the present Agreement.

#### Article 4: Applicable Law

(1) The Arbitral Tribunal shall apply

(a) the rules and principles of *international law* for the determination referred to in Article 3 (1) (a) [emphasis added];

(b) international law, *equity* and the principle of *good neighbourly relations* in order to achieve a *fair and just result* for the determination referred to in Article 3 (1) (b) [emphasis added].

#### Article 5: Critical date

No document or action undertaken unilaterally by either side after 25 June 1991 shall be accorded legal significance for the tasks of the Arbitral Tribunal or commit either side on the dispute and cannot, in any way, prejudge the award.

#### Article 6: Procedure

(1) Each side shall submit a memorial to the Arbitral Tribunal within two months after entry into force. Each side has the right to comment on the memorial of the other side within a deadline fixed by the Arbitral Tribunal.

(2) Unless envisaged otherwise, the Arbitral Tribunal shall conduct the proceedings according to the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States.

(3) The Arbitral Tribunal may seek expert advice and organize oral hearings.

[...]

#### Article 7: The award of the Arbitral Tribunal

(1) The Arbitral Tribunal shall strive to issue its award within one year after its establishment. The Arbitral Tribunal adopts the award by majority of its members [...].

(2) The award shall be binding on the Parties and shall constitute a definitive settlement of the dispute.

(3) The Parties shall take all necessary steps to implement the award, including by revising national legislation, as necessary, within six months after the adoption of the award.

#### Article 8: EU accession negotiation documents

No document presented in the EU accession negotiations shall prejudice the Arbitral Tribunal when performing its tasks or commit either side on the dispute.

The above applies to all documents and positions either written or submitted orally, including, *inter alia*, maps, negotiating positions, legal acts and other documents in whatever form, produced, presented or referred to in the framework of the EU accession negotiations. It also applies to all EU documents and positions which refer to or summarize the above-mentioned documents and positions.<sup>260</sup>

#### Article 9: The continuation of the EU accession negotiations according to the negotiating framework

(1) The Republic of Slovenia shall lift its reservations as regards opening and closing of negotiation chapters where the obstacle is related to the dispute.

(2) Both parties shall refrain from any action or statement which might negatively affect the accession negotiations.

[...]

#### Article 11

(1) The present Agreement on Arbitration shall be ratified expeditiously by both sides in accordance with their respective constitutional requirements.

(2) It shall enter into force on the first day of the week following the exchange of diplomatic notes with which the parties express their consent to be bound.

[...]” (Draft Agreement on Dispute Settlement, 24 April 2009: 1-4).

When looking at the revised core provisions of “Rehn I” (and its evolution in the subsequent proposals) with regard to (i) the task of the Tribunal (Article 3) and (ii) the applicable law (Article 4), it is crucial to recall that the difference between *international law* and *equity*, generally, is such that the judicial body possesses substantially wider discretionary powers under equity than if it exclusively applied international law (see V.2.1). This distinction was the *core legal issue of dispute* during the negotiations around the Arbitration Agreement.

The practical implications of the two distinctive legal concepts may be seen as follows: the more leeway there is for the legal deliberations of the Tribunal, the greater the potential for maritime territorial decisions in favour of Slovenia compared to what it could expect under the strict application of international law, the latter obviously favouring Croatia's position. If we look at Articles 3 and 4 of “Rehn I”, it is apparent that both for the delimitation of the waters inside Piran Bay and for the territorial sea border outside the Bay, the provisions of the United Nations Convention on the Law of the Sea (UNCLOS<sup>261</sup>) apply, whereas for the access

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<sup>260</sup> This paragraph is identical with the 3<sup>rd</sup> paragraph of the (draft) “Letter from the Presidency of the EU Council to Croatia”; see VI.2.2.2.

<sup>261</sup> Article 15 of the UNCLOS stipulates that “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

of Slovenia to the high seas and the regime for the use of that access a wider set of legal and extra-legal (*praeter legem*) deliberations is available to the Tribunal.

#### VI.2.3.1 Croatia's response

Croatia approved of “Rehn I” on the understanding that it was presented to the parties on a “take-it-or-leave-it” basis (interview senior Croatian civil servant, 25 January 2017; see also Preamble<sup>262</sup> of the Sabor Decision on the Acceptance of the Draft Agreement on Dispute Settlement [...] between Croatia and Slovenia, 08 May 2009). Zagreb’s view was that it was of paramount importance that the delimitation of the land and maritime border between the two countries as referred to in Article 3(1)(a) was subject to international law exclusively. To that end, the additional equity and good-neighbourly-relations provisions for the regime of the maritime areas and the Slovenian access as in Article 3(1)(b) could, according to the Ministry of Foreign Affairs note, be tolerated, like it or not.

Notably, Croatia’s green light did include the above-mentioned Sabor endorsement of the Draft Agreement signaling cross-party support. “Rehn I” was subsequently hailed by the domestic media as a national victory (internal note Ministry of Foreign Affairs Croatia, 2012: 4) notwithstanding the fact that 3(1)(b) talked of territorial *contact* (sic) for Slovenia.

#### VI.2.3.2 Slovenia's amendments

There was no vote in the Slovenian parliament. Instead, the government decided to send several amendments to “Rehn I” to the European Commission. Its main elements<sup>263</sup> are worth quoting and deserve a brief discussion.

As for Article 3 (Task of the Arbitral Tribunal), Slovenia proposed:

“(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 including Slovenia's territorial contact with the High Seas,<sup>264</sup> and

(b) the regime for the use of the relevant maritime areas and Slovenia's contact to the High Sea.”

In the Slovenian explanatory note, the amendment is labelled “crucial and [...] therefore the most important point” suggesting that if the original wording of “Rehn I” was kept it would deny Slovenia the territorial contact (“the absolute red line”) it had before 25 June 1991, i.e.

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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.” This provision has, through case law, come to be referred to as the equidistance/special circumstances method (Tanaka, 2015: 225-7; Rothwell and Stephens, 2016: 427-36). For a discussion on maritime delimitation, the provisions of UNCLOS, and the development of case law see V.2.

<sup>262</sup> “Taking into account that the proposed texts of the [arbitration] agreement [...] were offered to the Republic of Croatia and the Republic of Slovenia on a take-it-or-leave-it-basis.”

<sup>263</sup> Slovenia also introduced amendments to Article 2 (Composition of the Tribunal) asking to streamline the provisions on the appointment procedure with the PCA Optional Rules, and to Article 6 (Procedure) proposing to insert the possibility for the Tribunal to assist the parties in reaching an amicable bilateral settlement at any stage (Information on the amendments proposed by the Republic of Slovenia, 25 May 2009: 1-2; 5-6).

<sup>264</sup> *NOTA BENE: Track-changes are deliberately used hereafter for illustration purposes.*

in SFRY times.<sup>265</sup> It must be noted in that context, that the access to the high seas, politically and historically, “is a symbol of freedom [for Slovenia] and carries the notion of real independence for the State” (interview senior Slovenian civil servant, 17-10-2016). Further, mere “contact” would carry the meaning of access to the High Seas which all States were entitled to anyway under UNCLOS (Information on the amendments proposed by the Republic of Slovenia, 25 May 2009: 3). The note goes on to cite examples from maritime delimitation case law and treaties in support of the term “territorial contact”<sup>266</sup> and concludes that, on Article 3, the incorporation of “territorial contact” with the High Seas was necessary “to ensure that [Slovenia’s] vital interest is decided upon by the Arbitral Tribunal” (Information on the amendments proposed by the Republic of Slovenia, 25 May 2009: 4).

With regard to Article 4 (Applicable Law) the amendment reads:

“(1) The Arbitral Tribunal shall apply

(a) the rules and principles of international law ~~for the determination referred to in Article 3 (1) (a)~~;

(b) ~~international law~~, equity and the principle of good neighbourly relations, taking into account also vital interests of both Parties and all relevant circumstances, in order to achieve a fair and just result; ~~for the determination referred to in Article 3 (1) (b)~~.

and should therefore decide ex aequo et bono.”

In the explanatory note, the original wording of “Rehn I” in relation to Article 4 (international law for the determination of the *land border*; international law, equity and good-neighbourly relations to achieve a fair and just result for the regime and the *contact to the high seas*) is critiqued for following “the Croatian demand that the border is settled through the strict application of international law” and for the approach that “the resolution of the border issue would [...] be distinguished from the resolution of the issue of [the] Slovenian more liberal regime through, presumably, Croatian territorial waters”. The Tribunal should instead apply “the same principles to the entire dispute” (Information on the amendments proposed by the Republic of Slovenia, 25 May 2009: 4).

The application of the principle *ex aequo et bono* was “crucial due to the very special circumstances of the dissolution of the former SFRY”, and “the true meaning of the *ex aequo et bono* principle is in fact to offer the parties a possibility to widen the margin for decision-making and to give the Arbitral Tribunal a discretionary power to find, *outside* the strict legal prescription, the basis for a satisfactory solution, when it considers that strict law would lead to unjust decisions (*summum ius, summa inuria*)”. It would be clear, however, that *ex aequo et bono* was meant as an add-on tool for the Tribunal “if it finds the law to be either defective or incomplete, [so] that it could base itself on extra-legal consideration[s]” (Information on the amendments proposed by the Republic of Slovenia, 25 May 2009: 5).<sup>267</sup>

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<sup>265</sup> “Slovenia [...] succeeded to the 1968 Agreement between [the] former SFRY and Italy on the Delimitation of the Continental Shelf. Since Slovenia has a continental shelf, it also has territorial contact to the High Seas” (Information on the amendments proposed by the Republic of Slovenia, 25 May 2009: 3). For the Slovenian continental shelf claim see V.1.4.4 and VI.3.5.2.4.

<sup>266</sup> Such as the corridor approaches in the 1992 St. Pierre and Miquelon case (Canada v. France; see V.2.2.1) and the delimitation agreement between Monaco and France (see V.1.1.1).

<sup>267</sup> Bantekas (2015: 49) notes that “equity is only available through party consent and cannot therefore be imposed as default law by the tribunal.”

The Slovenian note goes on to highlight the reference to “vital interests” and “relevant circumstances” as “draw[ing the Tribunal’s] attention to the need to evaluate the effect of the important economic role of the Port of Koper, historic facts, exercise of fishing rights and other circumstances” (Information on the amendments proposed by the Republic of Slovenia, 25 May 2009: 5).

In relation to Article 9 (continuation of the EU accession negotiations according to the negotiating framework) Slovenia proposed the following:

Article 9: The continuation of the EU accession negotiations according to the negotiating framework

“(1) The Republic of Slovenia shall lift its reservations as regards opening and closing of negotiation chapters where the obstacle is related to the dispute after the entry into force of the present Agreement.

~~“(2) Both parties shall refrain from any action or statement which might negatively affect the accession negotiations.”~~

Slovenia argues that since the Agreement would only be legally binding after its ratification by both parliaments and the exchange of diplomatic notes confirming the accomplishment of that task (Article 11(2)), it would only be logical that the provisions of Article 9 could only apply as from the entry into force of the Agreement as a whole. “Consequently, Slovenia can properly protect its vital interests against Croatia’s prejudices only with a valid agreement establishing a mechanism which would start the resolution of the border issue as well as annul the legal effect of the prejudices which were introduced into the EU accession negotiations by the Republic of Croatia”. The deletion of the second paragraph was necessary because it implied that “the parties do not act in good faith”, and that the provision could be interpreted as impeding “to participate constructively during Croatian accession negotiations” (Information on the amendments proposed by the Republic of Slovenia, 25 May 2009: 7-8).

In summary, the Slovenian amendments to “Rehn I” touch on core elements of the Commission draft, such as the task of the tribunal, the applicable law, and the timeline for the lifting of the Slovenian blockade of the Croatian accession negotiations. With regard to the substantive points, the amendments seek to (i) safeguard a *territorial link* between Slovenian territorial waters and the high seas, (ii) enshrine such contact as the country’s vital interest listing the special historic circumstances (*inter alia* the territorial contact Slovenia enjoyed during SFRY times), (iii) considerably widen the scope of the deliberations of the Tribunal by adding the principle of *ex aequo et bono* providing a set of extra-legal considerations (political, historic and economic), and (iv) reserving the right to maintain the reservations vis-à-vis Croatia until the entry into force of the Arbitration Agreement.

#### **VI.2.4 Rehn II**

The European Commission presented a new proposal on 15 June 2009. The changes concern the Preamble, Article 2 (Composition of the Arbitral Tribunal), Article 3 (Task of the Tribunal), Article 4 on the Applicable Law, Article 6 (Procedure), and Article 8 on EU accession negotiation documents, read as follows and are discussed straight after the respective article.

“[Preamble]

The Government of [...] Slovenia and [...] Croatia (hereinafter referred to as “the Parties”),  
Whereas through numerous attempts the parties have not resolved their territorial and maritime border dispute in the course of the past years,

Recalling the peaceful means for the settlement of disputes enumerated in Article 33 of the UN-Charter,

Affirming their commitment to a peaceful settlement of disputes, in the spirit of good neighbourly relations, reflecting their vital interests,

Welcoming the facilitation offered by the European Commission,

Have agreed as follows” (Draft Agreement on Dispute Settlement, 15 June 2009: 1).

This change incorporates “vital interests” as one substantive point of the Slovenian amendment to Article 4, albeit in a new and very different environment. The Commission deliberately inserted “vital interests” in the Preamble to politicise it and render it a joint positive meaning for both Croatia and Slovenia. “It seemed appropriate to insert a ‘diplomatic bow’ of the EU vis-à-vis both parties” (interview Frank Hoffmeister, then European Commission Legal Service, 03-06-2016). This move may be seen as in contrast to the original meaning intended by Slovenia in the context of Article 4.

On a different note, one needs to see a Slovenian leitmotif during the processing of the border dispute in the context of the EU accession negotiations of Croatia: it is the notion of “*quid pro quo*” in the sense that Croatia receives EU membership in return for a link to the high seas for Slovenia. “There is clearly a double dimension here” (interview senior Slovenian civil servant, 17-10-2016; for *quid pro quo* in relation to the arbitration procedure as such see PCA Partial Award, 2016: 28, para 115). The actual Arbitral Tribunal at a later stage noted, in more general terms and, for obvious reasons, without reference to the issue of contact to the high seas, that “a nexus was established between the settlement of the territorial and maritime dispute and the accession of Croatia to the European Union” (PCA Partial Award, 2016: 55, para 220). Croatia, however, has never expressly accepted the notion of *quid pro quo*, but the fact was sinking in during the negotiations over the Arbitration Agreement that the arbitration procedure as such “was the price to pay” for EU membership (interview European Commission civil servant involved in the accession negotiations with Croatia, 07-01-2016).

#### “Article 2: Composition of the Arbitral Tribunal”

(1) Both parties shall appoint by common agreement the President of the Arbitral Tribunal and two members recognized for their competence in international law within fifteen days drawn from a list of candidates established by the President of / by the Member responsible for enlargement of the European Commission. In case that they cannot agree within this delay, the President and the two members of the Arbitral Tribunal shall be appointed by the President of the International Court of Justice from the list.

(2) Each side shall appoint a further member of the Arbitral Tribunal within fifteen days after the appointments referred to in paragraph 1 have been finalised. In case that no appointment has been made within this delay, the respective member shall be appointed by the President of the Arbitral Tribunal.

(3) If, whether before or after the proceedings have begun, a vacancy should occur on account of death, incapacity or resignation of a member, it shall be filled in accordance with the procedure prescribed for the original appointment” (Draft Agreement on Dispute Settlement, 15 June 2009: 1).

The above provision newly inserted by the Commission does not relate to any of the Slovenian amendments. It leaves the pre-selection of candidates for the Tribunal entirely to the Commission. This must be seen as an effort to retain authority for the Commission over the selection process. “This provision limits the autonomy of the parties, and it was plain to see that they may perceive this as a tough move. It is crucial, however, that the Arbitration Agreement was more than a purely legal affair, and that it was something special after all” (interview Frank Hoffmeister, then European Commission Legal Service, 03-06-2016).

“Article 3: Task of the Arbitral Tribunal

(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; and

(b) Slovenia’s *junction* to the High Seas;

(c) the regime for the use of the relevant maritime areas ~~and Slovenia’s contact to the High Sea.~~

[...]” (Draft Agreement on Dispute Settlement, 15 June 2009: 2; emphasis added).

There are two new elements in this core article here. First, the link between Slovenia’s territorial waters and the high seas has become a separate point. This is of relevance for two reasons, (i) since a separate point carries more weight as compared to being included as the second item of another point (as was the case in “Rehn I”), and (ii) inserting an additional point establishes a clear *sequence* which the Tribunal has to follow in determining the border. Second, there is a new term (“*junction*”) for the link between the Slovenian territorial waters and the high seas. Obviously, “*junction*” moves away from the previous term “*contact*” in “Rehn I” in so far as it denounces the physical connection between two marine areas whilst keeping the notion of them being interconnected in a certain way.

“*Junction*” appeared to be the right term to the Commission as “it is sufficiently neutral and unclear” to be acceptable to both sides. This view entails the notion that either side can interpret “*junction*” in a different way, i.e. as a normative term (Slovenia) or rather as a purely factual meaning (Croatia) of some kind of link (interview Frank Hoffmeister, then European Commission Legal Service, 03-06-2016). As to “*junction*”, Slovenia holds that it was taken from the English translation of the 2001 Draft Agreement (see VI.1.4) and submitted to the Commission during the negotiations of the Arbitration Agreement (interview senior Slovenian civil servant, 17-10-2016; see also PCA Final Award, 2017: 342-344, paras 1071-1077).

On balance, one can say with some accuracy that the “Rehn II” version of Article 3, whilst retaining its remarkable spirit of compromise, has shifted somewhat in favour of the Croatian position since the increased weight of the link between the Slovenian territorial waters and the high seas (through making it a separate point) appears to have been over-compensated by replacing “*contact*” (with a clear physical connotation) by the more neutral term “*junction*”.

#### “Article 4: Applicable Law

(1) The Arbitral Tribunal shall apply

(a) the rules and principles of international law for the determination 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 determination referred to in Article 3 (1) (b) and (c)” (Draft Agreement on Dispute Settlement, 15 June 2009: 2).

The second core article now *prima facie* features an additional criterion of flexibility for the legal framework mandating the Tribunal. Point (b) clearly takes on board the second part of the Slovenian amendment to Article 4 of “Rehn I”. One could, however, see the “taking into account [of] all relevant circumstances” as a mere paraphrasing of, rather than a supplement to, the preceding provisions of (b) defining the applicable law for the Tribunal as “international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result” as already implying the “taking into account [of] all relevant circumstances”.

It is useful to look at the underlying approach of the Commission’s wording of Article 3. When drafting the provisions on the applicable law, different legal frameworks (international law, equity<sup>268</sup>) were twinned with more political considerations (good neighbourly relations). “With respect to the first issue [the maritime and land border; Art. 3(1)(a)], the applicable law would be restricted to international law, whereas the two other issues [Slovenia’s junction (Art. 3(1)(b)), and the regime for the maritime areas (Art. 3(1)(c))] are to be decided in line with broader considerations” (European Commission internal note, undated). This approach was to “reflect the EU dimension and its political spirit” and the peculiarities of the bilateral case (interview Frank Hoffmeister, then European Commission Legal Service, 03-06-2016).

#### “Article 6: Procedure

(1) Each side shall submit a memorial to the Arbitral Tribunal within two months after entry into force. Each side has the right to comment on the memorial of the other side within a deadline fixed by the Arbitral Tribunal.

(2) Unless envisaged otherwise, the Arbitral Tribunal shall conduct the proceedings according to the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States.

(3) The Arbitral Tribunal may seek expert advice and organize oral hearings. [...]

(8) The Arbitration Tribunal may at any stage of the procedure with the consent of both parties assist them in reaching a friendly settlement” (Draft Agreement on Dispute Settlement, 15 June 2009: 2-3).

This additional provision reflects the Slovenian amendment to Article 6 stating that, if the parties so wish, the Tribunal stands ready to facilitate a bilateral settlement of the dispute. This enables a bilaterally negotiated agreement ahead of the conclusion of the arbitration procedure, should both parties really wish to go back to that level. The wording of Art. 6(8) does not constitute any bias vis-à-vis any of the parties. Generally, going back into the bilateral mode opens up endless opportunities for any of the parties to delay the negotiations

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<sup>268</sup> For the nature of equity and its role in maritime delimitation see V.2.1.

and/or to finally not sign or ratify a bilateral deal whereas the final award of an arbitral tribunal is considered binding.

#### “Article 8: EU accession negotiation documents

No document presented in the EU accession negotiations unilaterally shall prejudice the Arbitral Tribunal when performing its tasks or commit either side on the dispute.

The above applies to all documents and positions either written or submitted orally, including, *inter alia*, maps, negotiating positions, legal acts and other documents in whatever form, produced, presented or referred to unilaterally in the framework of the EU accession negotiations. It also applies to all EU documents and positions which refer to or summarize the above-mentioned documents and positions” (Draft Agreement on Dispute Settlement, 15 June 2009: 4).

The above insertion can be seen as mere clarification. The Commission made no further changes to the draft arbitration agreement.

Despite of the fact that some of the amendments of the Commission could be seen as in favour of the Croatian position, in particular the new wording “junction” in Article 3(1)(b), but perhaps also the “vital interests” in the Preamble, Zagreb rejected “Rehn II” for reasons of principle. The Sabor had already accepted “Rehn I” which was considered a “grand step forward” as it had moved away from the SEG approach largely based on political criteria to a proper judicial procedure mainly based on international law (internal note Ministry of Foreign Affairs Croatia, 2012: 3-4). “It was impossible for the Croatian Government to ignore the vote in the [...] Sabor and re-open the Pandora box of a new wave of amendments” (internal note Ministry of Foreign Affairs Croatia, 2012: 5).

Zagreb rejected “Rehn II” at short notice ahead of a planned trilateral meeting on “Rehn II” in Brussels (PCA Final Award, 2017: 38, para 118). As a result, the European Commission suspended further discussions on the draft arbitration agreement on 16 June 2009 (European Commission internal note, undated). There are, however, different interpretations as to under what circumstances exactly the negotiations broke down. Slovenia argued that Croatia had informed Slovenia and the Commission that it was not going to continue negotiations facilitated by the Commission, whilst Croatia held that, in view of negative replies to “Rehn II” from both parties, the Commission suspended further efforts (PCA Final Award, 2017: 38, para 118, footnote 240).

### **VI.2.5 Final phase**

The Croatian Prime Minister Ivo Sanader unexpectedly resigned on 01 July 2009, largely on the grounds that he had not managed to lift the Slovenian blockade and that, after all, the EU accession of Croatia had always meant a “life-time project” to him (interview Ivo Sanader, 19-05-2016). Jadranka Kosor became the new Croatian Prime Minister. Bilateral relations appear to have entered a new phase, mainly for two reasons:

First, the working atmosphere between Pahor and Sanader had always been perceived as difficult by both sides (interview Ivo Sanader, 02-11-2017; interview Borut Pahor, 20-06-2017) and there had been a fundamental disagreement between the two prime ministers on the nexus between EU enlargement and the resolution of the bilateral border dispute. Whilst Slovenia insisted on the *quid pro quo* approach. i.e. Croatia receives EU membership in return

for the Slovenian junction to the high seas (interview senior Slovenian civil servant, 17-10-2016), Sanader had always fiercely rejected that package deal. Sanader's position was that the solution of the bilateral border dispute cannot be a precondition for Croatia as it was not one for Slovenia either by the time they joined the EU in the first place (interview Ivo Sanader, 02-11-2017). This clash of positions had become evident at a bilateral meeting at Mokrice Castle on 24 February 2009 when Pahor and Sanader were discussing an early mediation effort by EU Commissioner Rehn (see VI.2.2.3; interview senior Slovenian civil servant, 24-01-2017; internal note Ministry of Foreign Affairs Croatia, 2012: 3).

Second, there appears to have been a mutual sense of having to restore bilateral relations. Both parties felt they were damaging their reputation on the international stage and doing harm to their economies. Croatia was increasingly worried about "losing its European perspective" (internal note Ministry of Foreign Affairs Croatia, 2012: 5), whereas Slovenia "felt awkward with the stalemate" over the border dispute (interview Frank Belfrage, State Secretary in the Foreign Ministry of Sweden in charge of the file at the time, 26-04-2017). What contributed to a renewed spirit of bilateralism was the fact that the Swedish Presidency holding office in the second half of 2009 made it clear that it was now up to Croatia and Slovenia to find a solution (internal note Ministry of Foreign Affairs Croatia, 2012: 5). However, the Swedish Presidency was happy to facilitate not least because it was in favour of EU enlargement anyway (interview Frank Belfrage, 26-04-2017).

#### VI.2.5.1 Unblocking the blockade

In early July 2009, Pahor phoned his counterpart Kosor expressing his readiness to meet soon. During a subsequent exploratory visit of Kosor's advisor to Ljubljana, it became clear that Pahor was worried about a potential escalation of bilateral tensions on the face of the arrest of a Croatian war veteran by the Slovenian police at the Dobava rail border crossing on 11 July 2009. It turned out that the man was going to attempt to assassinate Pahor. The Slovenian Prime Minister assured Kosor's advisor that he had a friendly attitude towards Croatia, whilst Kosor let it be known that she was aiming to build the bilateral relations on mutual respect and a search for a win-win situation rather than continuing the win-lose approach (internal note Ministry of Foreign Affairs Croatia, 2012: 6). Pahor's feeling was that the fact that Kosor was at the head of the Croatian government was a "golden opportunity" to finish the Croatian accession negotiations (interview senior Slovenian civil servant, 24-01-2017).

It is vital to note that the essential point of the new bilateral approach was to aim at a *reversal* of the previous order of tackling the two main issues. Instead of solving the border issue first and subsequently lifting the blockade, the new approach now was to remove the Slovenian reservations by clearing the potentially pre-judging aspects of the Croatian accession documents first to subsequently be able to agree on the terms of the arbitration agreement in a less heated atmosphere. Yet, "the timing and the sequencing proved very sensitive, but there emerged a common understanding that the eventual arbitral award had to be de-coupled from Croatia's accession negotiations, and that all this ought to be beneficially face-saving for both sides" (interview Frank Belfrage, 26-04-2017).

The meeting between Kosor and Pahor took place on 31 July 2009 at Trakošćan Castle. There was a solid tête-à-tête where it became clear that Pahor and Kosor were on good terms. A joint understanding was developing that the issue of the border had to be solved at the prime minister level and that arbitration, whilst it would have been unimaginable to agree on it

bilaterally in 2008, was now the best way forward (interview Borut Pahor, 20-06-2017), and that “we were courageous enough to do it” (interview Jadranka Kosor, 07-06-2016).<sup>269</sup>

At the Trakošćan meeting, the following points were agreed on:

- the Slovenian reservations would be lifted as soon as the Croatian Prime Minister sent a letter to the Swedish Presidency clearing the issue of the allegedly pre-judging Croatian accession documents;
- the letter would be jointly drafted by a “Silent Diplomacy Group”<sup>270</sup>;
- negotiations on the Arbitration Agreement would resume on the basis of “Rehn II” as soon as the Slovenian blockade was lifted;
- Croatia insisted on a statement on the Arbitration Agreement not pre-judging “territorial contact” of Slovenia with the high seas; and
- the Arbitral Tribunal’s award should be rendered *after* Croatia’s accession to the EU (interview senior Slovenian civil servant, 24-01-2017; internal note Ministry of Foreign Affairs Croatia, 2012: 5).

The drafting of the letter was supposed to be finished by the end of August. Against initial expectations, however, it was by no means a walk in the park given the still existing level of suspicion and sensitivities on either side. Yet, the level of personal trust between the negotiators was constantly growing and it was crucial for the Swedish Presidency to feed the notion of “joint ownership” of an agreement on both the letter and the final Arbitration Agreement (interview Frank Belfrage, 26-04-2017).

The basic challenge with the letter was that “we knew that Pahor was committed to the Trakošćan process, but would seek our assurances that Croatia will not walk away from the negotiations [on the Arbitration Agreement] once the blockage was lifted” (internal note Ministry of Foreign Affairs Croatia, 2012: 8). What added to this difficulty of principle caused by the new sequence of tackling the two major issues was that Pahor was also under pressure domestically. Janez Janša, Pahor's predecessor and leader of the main opposition party SDS wanted the border issue to be solved ahead of Croatian EU accession (interview senior Slovenian civil servant, 24-01-2017).

At the end of the day, the Slovenian Prime Minister consented to holding a meeting in Ljubljana on 11 September 2009 where the lifting of the Slovenian reservations and the re-start of the negotiations over the Arbitration Agreement should be made public. Subsequently, representatives of Pahor and Kosor went to see the Swedish Prime Minister Fredrik Reinfeldt in Stockholm to inform him of the upcoming Ljubljana meeting and the announcement of lifting the blockade and the resumption of the work on the arbitration agreement. The texts of both (i) the Kosor letter clarifying the non-prejudging nature of the Croatian accession documents and the continuation of the negotiations on the Arbitration Agreement, and (ii) Reinfeldt’s reply were presented to him including the new timetable of obtaining the arbitral tribunal’s award after Croatia’s accession to the EU. Reinfeldt welcomed the agreement which turned into a major achievement of the Swedish Presidency (internal note Ministry of Foreign Affairs Croatia, 2012: 8).

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<sup>269</sup> Jadranka Kosor did, however, share her predecessor Ivo Sanader’s view to consider it “unfair that the border dispute was not an issue when Slovenia joined the EU” (interview Jadranka Kosor, 07-06-2016).

<sup>270</sup> The Group was composed of State Secretary Iztok Mirošič and foreign policy advisor Marko Makovec for Slovenia, and for the Croatian side of State Secretary Davor Božinović and foreign policy advisor Davor Stier.

The letter was finally sent to Reinfeldt from Pahor's office minutes before the meeting of Pahor and Kosor in Ljubljana on 11 September 2009 which was considered "a major breakthrough" (interview senior Slovenian civil servant, 24-01-2017). The letter is worth quoting:

"[W]ith the aim of addressing Slovenia's reservations on several negotiating chapters, on behalf of the Croatian Government, I would like to declare that no document in our accession negotiations with the European Union can prejudice the final resolution of the border dispute between Croatia and Slovenia. The above applies to all documents and positions either written or submitted orally, including, inter alia, maps, negotiating positions, legal acts and other documents in whatever form, produced, presented or referred to by the Republic of Croatia in the framework of the EU accession negotiations. It also applies to all EU documents and positions which refer to or summarize the above-mentioned documents and positions.<sup>271</sup>

The resolution, or the way of resolution of the border dispute will be pursued through the continuation of the talks between Croatia and Slovenia facilitated by the European Union. It was also agreed that both sides will continue [the] negotiations on [the] border dispute settlement with the understanding either to submit the border dispute to the Arbitral Tribunal or to conclude [a] bilateral agreement on [the] common State border [...]. Both sides also agreed that 25 June 1991 presents the basis for the resolution of the border dispute and that no document or action undertaken unilaterally by either side after that date shall be accorded legal significance for the tasks of any arbitral tribunal, or any other procedure relating to the settlement of the border dispute between Croatia and Slovenia, which will be entitled by Croatia and Slovenia to resolve the border dispute, and cannot, in any way, prejudice the outcome of the process.

Having in mind that we have properly addressed Slovenia's concerns related to the prejudices on the border between Croatia and Slovenia, we kindly invite the Swedish Presidency to convene an Inter-Governmental Conference in order to immediately resume Croatia's accession negotiations with the European Union" (Letter from Kosor to Reinfeldt, 11 September 2009).

The reply of Reinfeldt sent three days later was the following:

"The Swedish Presidency welcomes your letter, which properly addressed Slovenia's reservations on prejudices on the border between Croatia and Slovenia in negotiating chapters.

Having consulted the Republic of Slovenia and with the understanding that the guarantees given by the Republic of Croatia are sufficient for lifting its reservations on the opening and closing of the negotiating chapters related to Slovenia's reservations on prejudices on the border between Croatia and Slovenia, the Swedish Presidency will therefore convene on 2 October 2009 an Inter-Governmental Conference to resume Croatia's accession negotiations with the EU.

The Swedish Presidency takes note that both sides agreed to continue negotiations on the border dispute settlement, under the facilitation of the Presidency of the EU with the understanding either to submit the border dispute to the Arbitral Tribunal or to conclude [a] bilateral agreement on [the] common State border [...]. The continuation of the negotiations between Croatia and Slovenia on the border dispute shall be convened simultaneously with the IGC.

It is understood that both letters present integral part of the accession documents of the IGC on Croatia's accession to the European Union" (Letter from Reinfeldt to Kosor, 15 September 2009).

At the actual Ljubljana meeting on 11 September 2009, Kosor and Pahor managed to sustain their good terms despite the fierce respective domestic opposition to the compromise. They

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<sup>271</sup> The wording on the non-prejudging nature of the documents and positions is very similar to the 3<sup>rd</sup> paragraph of the (draft) "Letter from the Presidency of the EU Council to Croatia" in VI.2.2.2.

announced that the Slovenian reservations would now be officially lifted and that the talks over the Arbitration Agreement would resume.

#### VI.2.5.2 Road to Stockholm

Both issues materialized on 02 October 2009 when the respective negotiating Chapters with Croatia were opened or closed at an Intergovernmental Conference (IGC) in Brussels. On the sidelines of that IGC, a first trilateral meeting of the Croatian and Slovenian delegations with the Swedish foreign minister Carl Bildt plus Commissioner Rehn took place where “Rehn II” was on the table again. Participants did discuss a number of items based on a slightly amended Commission draft from 30 September 2009:

As for Article 2 (Composition of the Arbitral Tribunal), it was debated whether it should be the President of the European Commission or rather the Commissioner for Enlargement who would be in charge of drawing up the list of candidates. No agreement was reached. In the same vein, it was discussed whether the President of the International Court of Justice (ICJ) should be attributed the role of last instance in the appointment procedure, as set out in “Rehn II”. Again, no mutual consent could be reached. However, in relation to Article 6 (Procedure), the parties’ preparation period for the memorials to be submitted to the Tribunal was extended from two to twelve months.<sup>272</sup> With regard to the timelines for the Tribunal (Article 7), the initial angle of the discussion centered around the deadline within which the Tribunal was to issue its award. To that end, the Commission had revised “Rehn II” as follows:

#### “Article 7: The award of the Arbitral Tribunal”

(1) The Arbitral Tribunal shall strive to issue its award expeditiously after due consideration of all relevant facts pertinent to the case ~~within one year after its establishment~~. The Arbitral Tribunal adopts the award by majority of its members [...]” (internal note European Commission, undated).

This point was discussed in more detail at the 02 October 2009 meeting. There was a joint understanding that the aim of Article 7 was for the arbitral award to be delivered *after* the accession of Croatia to the EU. No agreement could be reached, however, on the wording. Croatia favoured “expeditiously” to be replaced by “within three years”, Slovenia would accept a maximum of two years.<sup>273</sup> The issue was referred to a subsequent technical meeting the following week (European Commission internal note, undated). At the end of the day, it proved impossible to meet the ambitions expectations on the part of the Swedish foreign minister to arrive at a mutual consent on the full text of the Arbitration Agreement already during the 02 October meeting (internal note Ministry of Foreign Affairs Croatia, 2012: 9).

As for the main facilitating third party in the final phase of the negotiations over the Arbitration Agreement, it must be noted that the subsequent phase was predominantly conducted on the bilateral level with the Swedish Presidency in a facilitating role.

Both parties considered the Swedish EU Presidency as a remarkably valuable facilitator in that respect. The Swedish diplomacy appeared well aware of the sensitivities of both Slovenia

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<sup>272</sup> It had become evident that the files cannot possibly be prepared within a few weeks. Memorials tend to comprise not only the legal *argumentaire*, but also some detailed documentation of the history of the subject matter including archive material, such as maps or documents many of which had to be translated into English.

<sup>273</sup> One must bear in mind that, in the autumn of 2009, the EU accession date for Croatia was not yet clear. In addition, the expectation at the time was that the Arbitration Agreement was going to be ratified and enter into force swiftly after its signature, i.e. by the end of 2009.

and Croatia and of the challenges ahead, played a very objective role, and was unanimously appreciated by both sides (interview senior Slovenian civil servant, 24-01-2017; interview senior Croatian civil servant, 25-01-2017). So was the effort and the role of Olli Rehn in the preceding months who was perceived as acting with a sense of fairness and tact, and with no secret agenda (interview Borut Pahor, 20-06-2017; interview Ivo Sanader, 19-05-2016).

The European Commission obviously played a less active role after the breakdown of the talks over “Rehn II” (see VI.2.4), but was kept in the loop at all times (e.g. Swedish Ministry for Foreign Affairs fax to Olli Rehn, 25 September 2009; internal e-mail European Commission, 29 October 2009; interview Frank Belfrage, 26-04-2017). As a new feature, Croatia and Slovenia, at the request of Zagreb, introduced the practice of also keeping the U.S. diplomacy in the loop as a neutral witness (interview senior Slovenian civil servant, 24-01-2017; internal note Ministry of Foreign Affairs Croatia, 2012: 10).<sup>274</sup>

As for the remainder of the negotiations, there was a mutual consent to start out from “Rehn II” as the basis (see VI.2.4), but not to touch on the previously hotly disputed Articles 3 (task of the Tribunal) and 4 (applicable law) any more (European Commission internal note, undated), and to finalise the Arbitration Agreement by November (interview senior Slovenian civil servant, 24-01-2017).

There were three outstanding issues to be tackled at a number of meetings taking place in turn in official residences in Croatia and Slovenia:

- (i) the composition of the Arbitral Tribunal (Article 2);
- (ii) the non-prejudging issue of the Slovenian territorial contact; and
- (iii) the timelines for the Tribunal (Article 7).

It turned out that whereas the issue of non-prejudgment could only be resolved by a unilateral declaration<sup>275</sup> by the Sabor at the occasion of the Croatian ratification of the Arbitration Agreement, the two other issues had to be resolved in the text of the Agreement itself.

As for the composition of the Tribunal (Article 2), the question of who in the European Commission would be in charge of drawing up a list of candidates was solved through a compromise. Both the President and the Enlargement Commissioner were entrusted with that task. The President of the International Court of Justice (ICJ) was confirmed the last instance of the appointment procedure to secure qualified judges as members for the Tribunal (internal e-mail European Commission, 29 October 2009).

As regards the timelines, a new approach was chosen to safeguard the aim of delivering the award only *after* the accession of Croatia to the EU. Article 7(1) was left as it read in the most recent Commission draft (“The Arbitral Tribunal shall strive to issue its award *expeditiously* after due consideration of all relevant facts [...]”; emphasis added). Instead, a new provision was inserted into Article 11. Croatia’s initial position was that the Arbitration Agreement should enter into force on the day of Croatia’s EU accession. Slovenia’s initial stance was that

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<sup>274</sup> For the *notes verbales* between the Croatian Ministry of Foreign and European Affairs and the Embassies of the Kingdom of Sweden and the United States of America, the diplomatic cables between the Croatian Ministry of Foreign and European Affairs and the U.S. Embassy in Zagreb, and the diplomatic cables between the U.S. Embassies in Ljubljana and Zagreb to the U.S. State Department see PCA Final Award, 2017: 41, footnote 254.

<sup>275</sup> Croatia initially aimed at including the declaration on the non-predetermining issue of the Slovenian territorial contact in the actual Arbitration Agreement in some form. This was not acceptable to Slovenia, however, as it was regarded as a matter for the domestic Croatian ratification process. The U.S. and Sweden were to witness the unilateral declaration (internal note Ministry of Foreign Affairs Croatia, 2012: 7; European Commission internal note, undated; interview with senior Slovenian civil servant, 24-01-2017).

the Arbitration Agreement should enter into force right after its ratification. The compromise formula agreed on in the end was that all timelines relating to the arbitration procedure would start on the day of signing Croatia's EU Accession Treaty (internal note Ministry of Foreign Affairs Croatia, 2012: 11; interview senior Slovenian civil servant, 24-01-2017).

It must be noted, that the (technical) de-coupling of the Croatian EU accession from the arbitration procedure as such was largely seen as the main "face-saving opportunity" for both parties (interview senior Croatian civil servant, 25-01-2017; interview senior Slovenian civil servant, 24-01-2017; interview Frank Belfrage, 26-04-2017). On the one hand, Slovenia was lifted of the burden of the role of holding Croatian EU accession hostage to the solution of the bilateral border issue, whilst at the same time receiving a binding Arbitration Agreement that incorporated the gist of Slovenia's vital interest in terms of mandating the Tribunal to create some form of link between the Slovenian territorial sea and the high seas. On the other hand, the obstacle for Croatia's EU accession was removed, Croatia's EU membership was quasi-guaranteed, and the Arbitration Agreement provided for a proper judicial procedure where international law and the territorial integrity of Croatia played a strong role.

The concluding agreement was reached on 26 October 2009 at a meeting between Kosor and Pahor in Zagreb (Hoffmeister, 2012: 103). The Arbitration Agreement (see Appendix 2) was signed by the two prime ministers and witnessed by Reinfeldt on 04 November 2009 in Stockholm. It must be noted, however, that regardless of the high level of mutual personal trust within the bilateral Silent Diplomacy Group, the two parties were still somewhat "suspicious of one another" at the political level which manifested in last-minute phone-calls by the foreign ministers to the Swedish Presidency on the morning of 04 November, the day the Arbitration Agreement was to be signed (interview Frank Belfrage, 26-04-2017). Croatia ratified the Arbitration Agreement together with the unilateral Declaration on 20 November 2009<sup>276</sup>, the Slovenian parliament ratified on 19 April 2010 together with a Declaration in disagreement with Croatia's Declaration.<sup>277</sup> After the legislative referendum in Slovenia on 06 June 2010<sup>278</sup>, the Arbitration Agreement entered into force on 29 November 2010. On 25 May 2011, the Agreement was jointly submitted to the Secretary General of the United Nations (PCA Final Award, 2017: 43-6, paras 132-143).

## VI.2.6 Setting up the Arbitral Tribunal

The signature of the Treaty of Accession of Croatia to the EU on 09 December 2011<sup>279</sup> triggered the timelines laid down in Article 11 of the Arbitration Agreement.

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<sup>276</sup> The core element of the declaration reads: "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" (*Note verbale* Ministry of Foreign and European Affairs of Croatia to the Embassy of Slovenia in Zagreb, No. 6257/09, 09 November 2009).

<sup>277</sup> In relation to the above declaration of Croatia, Slovenia insisted that "in accordance with international law the unilateral statement given with respect to the [...] Arbitration Agreement cannot affect its substance and considers the Statement of the Republic of Croatia from 09 November 2009 as unacceptable and without any effect for the arbitral proceedings" (*Note verbale* of the Ministry of Foreign Affairs of Slovenia to the Embassy of Croatia in Ljubljana, No. ZMP 170/09, 21 November 2009).

<sup>278</sup> The result was 51.5 percent in favour and 48.5 percent against with a turnout of 42.7 percent (Electoral Commission of Slovenia, 06 October 2010, see <http://www.dvk-rs.si/index.php/si/arhiv-referendumi/referendum-o-zakonu-o-arbitraznem-sporazumu-6-junij-2010>).

<sup>279</sup> The Croatian accession treaty was signed by the EU Heads of State and Government, by the Croatian President and the Croatian Prime Minister at the European Council in Brussels (European Commission press release 09-12-2011; see [http://europa.eu/rapid/press-release\\_MEMO-11-883\\_de.htm](http://europa.eu/rapid/press-release_MEMO-11-883_de.htm)). The European

The first task to be accomplished was the composition of the Arbitral Tribunal pursuant to Article 2. To that end, the two Foreign Ministers Samuel Žbogar (Slovenia) and Vesna Pusić (Croatia) came to Brussels for a trilateral meeting with the sitting EU Commissioner for Enlargement, Štefan Füle, in early January 2012. The two parties had made their choice as for the composition of the President of the Tribunal and the two further members according to Article 2(1) of the Arbitration Agreement, and submitted - by means of sealed envelopes - the names chosen from a list set up by the European Commission.<sup>280</sup> Croatia and Slovenia happened to agree on Gilbert Guillaume, a former President of the International Court of Justice (ICJ) 2000-2003 and a judge at the Court 1987-2005, as President of the Tribunal, and on Bruno Simma, who was an ICJ judge 2003-2012<sup>281</sup>, as members of the Arbitral Tribunal (interview senior Croatian civil servant, 25-01-2017; interview senior Slovenian civil servant, 24-01-2017; interview European Commission civil servant, 05-07-2017).

Yet, there appeared to be some disagreement, however, as to the way forward in relation to identifying the remaining Tribunal member alongside President Guillaume and Simma. Commissioner Füle insisted on coming forward with a proposal, whilst Foreign Minister Pusić clearly favoured a bilateral agreement with her Slovenian counterpart Žbogar. Both ministers agreed to meet shortly, to bring along their lists, and to agree on the third tribunal member. The meeting which took place in Otočec, Slovenia, a little later in January 2012, was described as very constructive and positive by both sides. After a brief discussion both ministers agreed on Vaughan Lowe, who is a Professor Emeritus of Public International Law, as the third member of the arbitral tribunal (interview Vesna Pusić, 24-02-2017; interview senior Slovenian civil servant 24-01-2017; see also PCA Final Award, 2017: 47, para 146).

Both governments subsequently nominated one party-appointed arbitrator each according to Article 2(2) of the Arbitration Agreement. Slovenia appointed Jernej Sekolec, an independent arbitrator of Slovene nationality, on 26 January 2012; Croatia appointed Budislav Vukas, Member of the International Tribunal of the Law of the Sea (ITLOS) 1996-2005 and a Croat national, on 31 January 2012 (see also PCA Final Award, 2017: 47, para 147).

### **VI.3 Arbitral proceedings before the Permanent Court of Arbitration**

At this moment, it is worth briefly recalling a few basic general features of arbitration and the origins of the Permanent Court of Arbitration (PCA).

#### **VI.3.1 Features of arbitration**

Arbitration can be seen as the most mature means of dispute settlement and it dates back to 1794 when the United Kingdom and the United States, by means of the Jay Treaty, first formed panels of national experts appointed by the two States. The aim was to resolve a

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Parliament had consented on 01 December 2011: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0538+0+DOC+XML+V0//EN&language=EN>.

<sup>280</sup> Olli Rehn had previously provided a list of eight names in a letter to both foreign ministers on 11 June 2009. The list contained Marie Gotton Jacobson (Sweden), Georg Nolte (Germany), Sir Michael Wood (UK), Einar Fife (Norway), Johan Gerrit Lammers (Netherlands), Erik Franckx (Belgium), Robert Badinter (France), and Nicolas Michel of Switzerland (speaking note European Commission civil servant for a meeting in the European Parliament, 10 November 2009). The European Commission consulted the ICJ when drawing up the list (interview European Commission civil servant, 05-07-2017).

<sup>281</sup> For current and former members of the ICJ see <http://www.icj-cij.org/en/all-members>.

number of outstanding disputes between the two countries with regard to the border with Canada and claims of U.S. and UK citizens (Indlekofer, 2013: 24-7; Bantekas, 2015: 1-4).

Generally, arbitration tends to be used for subject matters that are of a legal nature, but need to be solved through a binding decision by a third-party judicial body, in this case an arbitral tribunal. The political aim often is to settle a dispute in order to improve or restore bilateral relations (Merrills, 2014: 4; 2010: 568)<sup>282</sup>, notwithstanding the fact that there are considerably more cases that are resolved by bilateral negotiations and diplomacy than through litigation by international courts or tribunals (Scott, 2014: 24).

One distinctive feature of arbitration is that the parties define the mandate of the arbitral tribunal, i.e. the questions the parties want the tribunal to answer, and the criteria to be used to arrive at the final verdict. Thus, the mandate for the judicial body establishes both the scope of the arbitrators' jurisdiction and the applicable law (Tanaka, 2018b: 116-118; Merrills, 2014: 4-5). It is vital to note that the parties can require that the arbitral tribunal apply specific rules on wider considerations other than international law (Tanaka, 2018b: 106). Scope and applicable law are one aspect of the parties exercising control over the process of arbitration.

Another feature of control over the process is that the parties nominate the arbitrators. This is usually done in two ways. First, the parties jointly agree on several members of the tribunal. Second, each party nominates one party-appointed arbitrator. It is of fundamental importance that, in so proceeding, the subject matter in question is considered to be going to be dealt with by a tribunal that commands the parties' trust (Tanaka, 2018b: 106; Mourre, 2010; Merrills, 2010: 568). It has become standard practice in State-to-State arbitration to have a Tribunal composed of three arbitrators and two party-appointed arbitrators, although also three- or seven-member tribunals have recently been in operation.<sup>283</sup>

Fundamentally, arbitration plays a solid role in the dispute resolution toolbox of the United Nations Convention on the Law of the Sea (UNCLOS; see V.2.1.1).<sup>284</sup>

Yet, State-to-State arbitration does have its limitations. Negotiations in the diplomatic field account for a maximum degree of control over the process by the parties, whereas once the process of setting up an arbitral tribunal is over, so is direct control by the parties. A further weakness is that regardless of the task of arbitration to produce a binding settlement of a case, and unlike in commercial arbitration where the recognition and enforcement of foreign

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<sup>282</sup> For territorial issues in particular, Brilmayer and Faure (2014: 195-6) posit three basic assumptions: (i) the uniqueness of territory (territory has a strong emotional component as people care about their homeland, and once territory is lost the grievance can last for several generations), (ii) judicial dispute settlement as a maximization strategy (if diplomacy is difficult and war is not on the cards, the acquisition of territory through third-party adjudication may be a viable alternative), (iii) avoidance of jurisdiction (territorial disputes are zero-sum by nature, so if one State can expect to gain, the other State will try to avoid adjudication).

<sup>283</sup> Inter-State cases recently administered by or ongoing at the PCA at the time of writing include six five-member tribunals (Ukraine v. Russia, Italy v. India, Croatia v. Slovenia, Mauritius v. United Kingdom, Netherlands v. Russia, and Bangladesh v. India), two three-member tribunals (Malta v. São Tomé and Príncipe, Ecuador v. United States), and one seven-member tribunals (Pakistan v. India); see <https://pca-cpa.org/en/cases/>.

<sup>284</sup> Inter-State-arbitration must be distinguished from investor-State (or mixed) arbitration between a State and an individual or a company, and, closely related, commercial arbitration between individual corporations. There are innumerable examples in the world of politics and business. For a contemporary and comprehensive survey see Moses (2017).

arbitral awards is considered truly global (Bantekas, 2015: 223-7)<sup>285</sup>, enforcement in State-to-State arbitration cannot be guaranteed (Merrills, 2010: 569)<sup>286</sup>. In a world of sovereign States, arbitration must rely “for its effectiveness on responsible behaviour from the parties“ (Merrills, 2014: 7).

The Permanent Court of Arbitration (PCA) is the oldest existing dispute settlement body in the world. It was established in 1899 following the Hague Peace Conference the same year which had adopted a Convention for the Peaceful Settlement of International Disputes. The Convention created the PCA which subsequently enjoyed a first ‘Golden Age’ until the creation of the Permanent Court of International Justice (PCIJ), the judicial institution of the League of Nations, in 1922 (Indlekofer, 2013: 42-69), and precursor to the International Court of Justice (ICJ) founded in 1945. Several reforms were carried out in the 1990s to render the PCA more attractive. The adoption of a number of optional rules and guidelines facilitated the use of arbitration (Tanaka, 2018b: 109) and rendered arbitration a popular means of contemporary judicial dispute settlement.

### **VI.3.2 Written memorials 2013 and hearing 2014**

Following the appointment of the members of the arbitral tribunal at the end of January 2012, the Tribunal held a first procedural meeting with the Parties on 13 April 2012. After a brief discussion of the procedural framework, the Arbitral Tribunal endorsed a proposal from the Parties for the following calendar for the pleadings: The Parties' first written memorials would be simultaneously submitted on 11 February 2013, and the Parties' counter-memorials were going to be submitted simultaneously on 11 November 2013. A hearing was scheduled for the spring of 2014 (PCA press release 13 April 2012; see also Article 6(1) of the Arbitration Agreement), and the Tribunal reserved the period from 26 May to 13 June 2014 for a hearing (PCA Final Award, 2017: 48, para 153).

It must be noted that, pursuant to Article 6(5) of the Arbitration Agreement, the proceedings of the arbitration were confidential, so none of the submissions by the Parties are in the public domain except for the maps both Parties submitted for the purposes of the determination of the land border.<sup>287</sup> Therefore, any insight into the actual proceedings is somewhat limited to the official communication by the PCA and the Parties, and to pieces of information provided to the author by the Parties. In addition, some of the contents of the Parties’ submissions is disclosed *ex post* by “The Parties’ Legal Arguments” in the Partial Award (PCA Partial Award, 2016: 20-36, paras 87-140) and from “The Parties’ Positions”/”Croatia’s Position”/Slovenia’s Position” throughout large parts of the Final Award (see PCA Final Award, 2017: 69-359).

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<sup>285</sup> Recognition and enforcement of awards in commercial arbitration are governed by the 1958 New York Convention which has been ratified by 157 States (as of 30 September 2018). For the Convention see [http://www.uncitral.org/uncitral/de/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/de/uncitral_texts/arbitration/NYConvention.html).

<sup>286</sup> Judgements of the International Court of Justice (ICJ), however, may be enforced by the UN Security Council (Scott, 2014: 28). Yet, such enforcement decision requires unanimity amongst its permanent members.

<sup>287</sup> Slovenia submitted a document of 46 maps (numbered from the tri-point with Hungary to Piran Bay) as a part of the requests of the Slovenian memorial from 11 February 2013. Croatia submitted a document of 45 maps (numbered from Piran Bay to the tri-point with Hungary) as a part of the requests of the Croatian counter-memorial from 11 November 2013. Both documents are accessible on <https://pca-cpa.org/en/cases/3/>.

### VI.3.2.1 Written Memorials and Counter-Memorials

In the submissions of a judicial procedure, each of the Parties usually starts out with its so-called Requests where they state what they wish the Tribunal to adjudge and declare. In the following, the Requests of Croatia and Slovenia shall be summarized as for the *maritime* border. The *land* border requests will be neglected here as the corresponding maps were made public by the Tribunal with the consent of the Parties (see footnote 287).

#### VI.3.2.1.1 Croatia's Requests

With regard to maritime delimitation, Croatia, in its Memorial and Counter-Memorial, requested the Tribunal to adjudge and declare that

- (i) the delimitation in the Bay and of the territorial sea outside the Bay followed a simplified equidistance line starting from the mouth of the Dragonja (St. Odoric's Canal) to the sea border with Italy;
- (ii) the "Junction to the High Seas" under Article 3(1)(b) of the Arbitration Agreement did "not imply or allow any territorial contact between Slovenia and the High Seas";
- (iii) pursuant to Article 3(1)(b) and (c) the Junction and the regime for the relevant maritime areas "shall be, *mutatis mutandis*, [...] the regime of innocent passage through international straits, as [...] in Article 45 [UNCLOS], and subject to the [...] IMO traffic separation scheme<sup>288</sup> [...]" (PCA Final Award, 2017: 60, para 210).

#### VI.3.2.1.2 Slovenia's Requests

As for the maritime border, Slovenia requested the Tribunal to adjudge and declare that

- (i) the Bay "has the status of Slovenian internal waters and is closed by a straight baseline connecting the most prominent points on the coasts of the Madona and Savudrija promontories";
- (ii) with regard to the territorial sea boundary, the border runs from Cape Savudrija in a west-southwest direction up to a point three miles from the Treaty of Osimo line and then, in a three-mile-distance parallel to the Osimo line further south west to a point 12 nautical miles off the Croatian coast south of Poreč [sic];
- (iii) Slovenia's Junction to the high seas goes from the southern limits of its territorial sea to the Osimo line between Italy and the former SFRY;
- (iv) the regime for the use of the relevant maritime areas enables Slovenian fishermen to "enjoy their historical fishing rights in Croatia's territorial waters, which are also guaranteed by [Croatia's EU Accession Treaty] and the 1997 [SOPS] Agreement [...]"; the corridor between Slovenia's territorial sea and the high seas constitutes high seas "within which Slovenia possesses sovereign rights over the continental shelf (sea bed and sub-soil)" (PCA Final Award, 2017: 65-6, para 216).

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<sup>288</sup> A Traffic Separation Scheme (TSS) in the Northern Adriatic which was confirmed by the International Maritime Organisation (IMO) on 28 May 2004 has been in force since 01 December 2004. The TSS regulates navigation for maritime vessels to and from the ports of Trieste and Monfalcone (Italy) and Koper (Slovenia). There are designated sea-lanes crossing the respective territorial sea of Croatia, Italy and Slovenia. The separation scheme originates from a trilateral Memorandum of Understanding concluded by Croatia, Italy and Slovenia on 19 October 2000. See IMO Report of the Maritime Safety Committee on its Seventy-Eight Session, MSC 78/26 of 28 May 2004, cited in Grbec (2015: 227) and Vidas (2009: 33).

Corresponding to (i) above, one Slovenian *land* border request needs to be mentioned here, namely the one running along the Croatian shores of Piran Bay, as Slovenia claims the Bay in its entirety. As a result, the land border, according to the Slovenian request, after reaching the Bay, “follows the coast of the Savudrija peninsula to the most prominent point of the Savudrija promontory [...]” (PCA Final Award 2017: 63, para 214).

#### VI.3.2.2 Hearing 2014

The hearing took place from 02 to 13 June 2014 at the PCA in The Hague, the Netherlands, where the Tribunal members put questions to the Parties to which they replied orally; certain technical questions were answered in writing. The Tribunal issued a summary of the Parties’ positions by means of a press release on 17 June 2014 the contents of which was consented by the Parties (PCA Final Award, 2017: 50-2, paras 171-3).

##### VI.3.2.2.1 Croatia’s position

The Deputy Prime Minister and Minister of Foreign Affairs, Vesna Pusić, started off her country’s pleadings by expressing the government’s confidence in the arbitral proceedings and the importance the country and its people attached to the procedure (PCA press release, 17 June 2014: 1).

As for the applicable law, Croatia put an emphasis on Articles 3(1) and 4 of the Arbitration Agreement stressing that both the maritime and land border had to be determined first strictly applying the rules and principles of international law. Only after that boundary had so been determined could the Tribunal turn to items (b) and (c) of Article 3 regarding Slovenia’s “junction to the high seas” and the “regime for the use of the relevant maritime areas”. The determination of the two latter issues involved two further elements, equity and the principle of good-neighbourly relations. Croatia stressed that the two elements were to serve as a supplement to international law, not as a means to act in opposition to it. With regard to the *land* boundary, on the day of the critical date mentioned in the Arbitration Agreement, 25 June 1991, the republican boundary became the new international border between Croatia and Slovenia following the principle of *uti possidetis juris*. In practical terms, that meant that the outer limits of the respective cadastral units would define the border. To that end, Croatia urged Slovenia to give up the military post at Croatian Sveta Gera and to allow for unhindered travel between Sveti Martin na Muri and Murišće (PCA press release, 17 June 2014: 2).

As for maritime delimitation in particular, Croatia insisted that Article 15 of UNCLOS was the relevant rule of international law. It followed that the sea boundary, starting at the mouth of the Dragonja, had to follow the equidistance line through the Bay (which was not internal waters) and further up to the Osimo line, the sea border with Italy. According to Croatia, there were no special circumstances warranting a departure from the equidistance line (PCA press release, 17 June 2014: 2; see also V.2.1).

With regard to the foreseen “junction”, Croatia repeated its view that “junction” did *not* include the notion of territorial contact. As to the interpretation of “vital interests” mentioned in the Preamble of the Arbitration Agreement, they related to the Parties’ commitment to the peaceful settlement of disputes. With regard to Croatia’s vital interests in the negotiation of the Arbitration Agreement, they concerned (i) the country’s territorial integrity, including its

territorial sea, first of all, and (ii) EU membership (PCA Final Award, 2017: 288, para 933; for maritime delimitation and Article 15 UNCLOS see also V.2.1).

Further on the terms “junction” and “regime” (for the use of the maritime areas) referred to in Article 3(1)(b) and (c) of the Arbitration Agreement, Croatia stressed its position that they could not affect the course of the territorial sea boundary. Rather, these terms would be “limited exclusively to matters of maritime access and communications”, i.e. the existing IMO traffic separation scheme in the Northern Adriatic (PCA press release, 17 June 2014: 2-3; see also VI.3.2.1.1 (iii)). Croatia further noted that it had “legitimate interests” with regard to “security and defence concerns” and that the area south of the point where the Croatian territorial waters meet the sea border with Italy was not a relevant area in terms of the Arbitration Agreement and thus “excluded from any determinations by the Tribunal” (PCA press release, 17 June 2014: 3).

#### VI.3.2.2.2 Slovenia’s position

Slovenia’s Agents introduced their country’s pleadings referring to the Arbitration Agreement as a compromise respecting “the vital interests of both Slovenia and Croatia”. The vital interest of Slovenia was the junction in terms of “direct geographical contact” to the high seas. That link was to be determined “by applying equity and the principle of good neighbourly relations in addition to international law” as stipulated in Article 4(b) of the Arbitration Agreement. The task of establishing such direct geographical contact was the *conditio sine qua non* for Slovenia’s signing and ratifying of the Arbitration Agreement. Croatia’s vital interest, according to Slovenia, was to become an EU member, a condition met by the time the Arbitration Agreement was adopted. Foreign Minister Karl Erjavec said the junction to the high seas was a “*quid pro quo* for the conclusion of the Arbitration Agreement”, whilst the Slovenian Agent drew on the country’s wider considerations in terms of security, navigation, historic and fishing rights, environmental protection, and the notion of the Slovenian identity of a European sea-faring nation (PCA press release, 17 June 2014: 3).

As for the land boundary, Slovenia called for the delimitation of the whole land border on the basis of legal title as of the critical date 25 June 1991. In the Mura River sector and the Central sector, delimitation based on existing historic legal title should be the rule, whereas in the Istria sector (including Snežnik and the lower Dragonja) the boundary should follow the cadastre as there was “no historic root of title”. The Croatian reference to Slovenian activities on Trdinov Vrh/Sveta Gera and Sveti Martin na Muri was beyond the Tribunal’s task, i.e. *ultra vires* (PCA press release, 17 June 2014: 4; for the history of Istria see also IV.2-IV.4).

In relation to Piran Bay, Slovenia argued it was entirely internal waters of Slovenia as during SFRY times the Bay had been both a juridical and a historic bay. The status of the Bay “did not change after the dissolution of [...] Yugoslavia” and therefore the principle of *uti possidetis juris* applied meaning it belonged to Slovenia which had “administered” the Bay from Piran for centuries (PCA press release, 17 June 2014: 4; see also Cataldi, 2013: 7-8; for juridical bays see V.1.1.2).

With regard to maritime delimitation, Slovenia addressed Article 15 UNCLOS (just as Croatia did) with an emphasis on the Article’s second sentence covering special circumstances warranting a departure from the equidistance line. To that end, the Slovenian Counsel mentioned the “coastal concavity and the cut-off effect of the Istrian peninsula and Cape Savudrija”, and the Slovenian continental shelf claim (PCA press release, 17 June 2014: 4).

The terms “maritime delimitation”, “junction” and “regime”, according to Slovenia, mentioned in Article 3(1)(a), (b) and (c) of the Arbitration Agreement, were three separate issues of one joint task the Tribunal was bound to fully comply with. As for the meaning of “junction” in particular, Slovenia argued that it would have to be “a line joining Slovenia’s territorial sea to the high seas” which was an interpretation that covered both the term’s ordinary meaning and “the drafting history of the Arbitration Agreement” whilst it was in line with “international law, equity and the principle of good neighbourly relations”. Further, the existence of such junction would entail Slovenia not being separated from the high seas or any future economic zone.

In relation to the regime for the use of the relevant maritime areas, Slovenia posited that the area south of the junction proposed by Slovenia, which was in line with UNCLOS, would remain high seas. That matter would go in line with Slovenia’s continental shelf claim. Further, Slovenia stressed its “historic fishing rights in Croatia’s territorial sea off the coast of Istria would be preserved” (PCA press release, 17 June 2014: 4).

### **VI.3.3 Summer of Disruption 2015**

The first time the Tribunal learnt of the fact that breaches of the confidentiality requirements of the arbitral proceedings<sup>289</sup> had possibly occurred was on 30 April 2015, by means of a Croatian letter including a *note verbale* (diplomatic note) to Slovenia dated 24 April 2015 (PCA Partial Award, 2016: 12, para 67).<sup>290</sup> Foreign Minister Vesna Pusić expressed her government’s concern vis-à-vis the Tribunal about two public statements of Slovenia’s Foreign Minister from 07 January 2015 and 22 April 2015. The Croatian Foreign Minister also informed the President and the First Vice-President of the European Commission<sup>291</sup> as the Commission had facilitated the Arbitration Agreement in the first place.

#### **VI.3.3.1 Statements of the Slovenian Foreign Minister**

The Croatian Minister’s letter to the Tribunal quotes the Foreign Minister of Slovenia saying on the TV channel SLO 3 that he

“had talks in The Hague last year. And I made it very clear to the Arbitral Tribunal<sup>292</sup> that if they do not fulfil this task - we in Slovenia shall consider that the Arbitral Tribunal has not executed its mandate. Because the contact with the high seas has not been determined” (letter from the Ministry of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal, 30 May 2015: 2).

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<sup>289</sup> Article 6(5) of the Arbitration Agreement reads: “The proceedings are confidential [...]” Section 9.1 of the Terms of Appointment for the members of the arbitral tribunal stipulates that “[t]he Parties shall not engage in any oral or written communication with any member of the Arbitral Tribunal ex parte in connection with the subject matter of the arbitration or any procedural issues that are related to the proceedings” (Letter of the Tribunal to the Parties’ Agents, 05 May 2015: 1).

<sup>290</sup> Another letter from the Croatian Minister for Foreign and European Affairs to the Registrar of the Arbitral Tribunal reiterating the contents was sent on 30 May 2015.

<sup>291</sup> Letter from the Minister of Foreign and European Affairs of Croatia to Frans Timmermans, 07 May 2015.

<sup>292</sup> The Arbitral Tribunal asserts that “no private meeting between the Tribunal and Minister Erjavec occurred. The only occasions on which the Minister addressed the Tribunal were the hearings [...] held at the Peace Palace in The Hague” (PCA Partial Award, 2016: 12, footnote 8).

With regard to another interview with the Slovenian TV on 22 April 2015, the Slovenian Foreign Minister is quoted as saying:

“According to the information that I have, which is very much unofficial, as well as on the basis of a feeling that our legal team has, being composed of the world’s best renowned scholars of the law of the sea, we are somehow optimistic in a way that the Arbitral Tribunal will determine that contact with the high seas” (letter from the Ministry of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal, 30 May 2015: 1).

Croatia was “deeply troubled by the language of both statements” suggesting they could be seen as “implying that one of the Parties to the proceedings may have an informal channel of communication with the Tribunal that may compromise the arbitration procedure” (letter from the Ministry of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal, 30 May 2015: 2). The Croatian Foreign Minister’s suspicion appears to have been triggered at an early stage already in September 2014 when she noted that the Secretary General of the Permanent Court of Arbitration (PCA) was a guest of the Slovenian government at the occasion of the annual Bled Forum (interview Vesna Pusić, 24-02-2017). Slovenia, in a reply from 01 May 2015, submitted that it „ha[d] no information whatsoever concerning the outcome of the arbitration, nor any 'informal channel' of communication with the Tribunal” (PCA Final Award, 2017: 52, para 175).

The Tribunal itself sent a letter to the Parties’ Agents on 05 May 2015<sup>293</sup> stating that

„[t]he Tribunal is seriously concerned by the suggestion that one Party would have been privy to confidential information related to the Tribunal’s deliberations. The Tribunal considers that such a meaning could be attributed to statements by the Slovenian Foreign Minister, and takes the view that such statements are unhelpful for the resolution of the present dispute [...].

In this regard, the Tribunal [...] recalls the duty, incumbent on the arbitrators and the Parties’ representatives alike [...] that '[t]he Parties shall not engage in any oral or written communication with any member of the Arbitral Tribunal ex parte in connection with the subject matter of the arbitration or any procedural issues that are related to the proceedings’. To the Tribunal, safeguarding the confidentiality of the deliberations until the issuance of an award is a matter of highest priority [...].

The Tribunal has also requested the PCA [...] to review the processes that it has put in place to protect confidential information and has found these to be satisfactory [...] The Tribunal is therefore confident that no information about the likely outcome of any aspect of the arbitration has been disclosed” (Letter of the Tribunal to the Parties’ Agents, 05 May 2015: 1-2).

#### VI.3.3.2 Published transcripts/audio files of *ex-parte* communication

On 10 July 2015, the Tribunal informed the Parties that it “contemplates rendering the award in mid-December 2015” (PCA press release, 10 July 2015).

On 22 July 2015, a Croatian daily newspaper (*Večernji list*) and a Serbian weekly newspaper (*Newsweek Srbija*) published transcripts and audio files of “two telephone conversations reportedly involving the arbitrator appointed by Slovenia [...] and one of Slovenia’s Agents [...]” occurring on 15 November 2014 and 11 January 2015 (PCA Partial Award, 2016: 13,

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<sup>293</sup> The letter was published on the PCA website on 20 June 2015 after the consent of both Parties. The official disclosure of any information relating to confidential arbitral proceedings can be regarded as exceptional.

para 74; see also Ministry of Foreign and European Affairs of the Republic of Croatia, Termination of the Arbitration Process between Croatia and Slovenia: Causes and Consequences<sup>294</sup>).

It is worth noting that no explanation had been provided as to the relation between the reported dates of the recordings and their publication, the source of the intercepted phone conversations, and how the recordings were handed on to the media (see PCA Partial Award, 2016: 13-4, para 74).

Yet, very lately, at the beginning of April 2019, the Slovenian Prime Minister publicly announced that he had learnt from his intelligence service (SOVA) that the Croatian intelligence service (SOA) crafted the recordings (STA news, 04 April 2019). Further, it was revealed that a SOA operative was trying to prevent the Slovenian commercial TV station POP from breaking the news (STA news 09 April 2019). The Foreign Ministry of Slovenia subsequently withdrew its Ambassador from Croatia for consultations (Foreign Affairs Ministry of Slovenia press release, 09 April 2019).

The matters touched upon in the recorded conversations mainly relate to (i) the arbitrators' preliminary views on contested issues, (ii) attempts to identify opportunities to influence Tribunal members, and (iii) documents received from the Slovenian Agent which the arbitrator appointed by Slovenia would submit to the arbitrators as his own.

The following excerpts are taken from the PCA Partial Award and constitute certified translations commissioned by the PCA Registry.<sup>295</sup>

(i) Arbitrators views on contested issues:

“Drenik: Maybe Vaughan Lowe<sup>296</sup>. Vaughan Lowe is more interested in these ecological issues, I think. Maybe he could...

Sekolec: But he, he was quiet.

[...]

Drenik: This is typically French, if you ask me. ... This is the same, the exact same mentality as Pellet<sup>297</sup>, he said to me 'knowing Guillaume<sup>298</sup>, he said to me. We will get the major part of the Gulf of Piran, we'll get the junction, but we will lose on Dragonja. We will lose on Dragonja [the speaker corrects herself].

Sekolec: Yes, yes. It seems ... from the way he looks at things ...“ (Recording dated 05-11-2014; PCA Partial Award, 2016: 14, para 76).

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<sup>294</sup> <http://www.mvep.hr/en/other/termination-of-the-arbitration-process>; The website lists events between 30 April 2015, when the Tribunal was made aware of the statements of the foreign minister of Slovenia, and 25 June 2017, four days before the PCA Final Award. With regard to 22 July 2015, the Croatian Ministry has produced excerpts (translations from Slovene into English) of the published recorded conversations, see <http://www.mvep.hr/files/file/dokumenti/arbitraza/en/150820-excerpts-from-recordings-between-dr-sekolec-and-mr-drenik-14082015.pdf>.

<sup>295</sup> For translated excerpts of the recordings in their entirety, see the Croatian Foreign Ministry website referred to in the last but one footnote above. Those transcripts, notably, do not constitute certified translations commissioned by the PCA Registry.

<sup>296</sup> Professor Vaughan Lowe was a Member of the Arbitral Tribunal.

<sup>297</sup> Professor Alain Pellet worked as special advisor for Slovenia in the arbitral proceedings.

<sup>298</sup> Judge Gilbert Guillaume was the President of the Arbitral Tribunal.

(ii) Identifying opportunities to influence Tribunal members:

“Drenik: What if you ... I'm thinking ... what if you ... a day before, I don't know ... or whenever ... meet with Bruno, for example, with Simma<sup>299</sup>?”

Sekolec: I have a dinner appointment with Bruno at his place anyway. Just the two of us.

Drenik: Excellent! You see, and you could just give him ... 'I'm fine with that, I understand', you see, take-it-easy attitude ... 'but look, I've checked this and here, I think that ...' The point is not to give him 500 arguments, but just to say 'I still think it wasn't quite like this here.' Maybe he would then bring it up ...

Sekolec: Yes, yes.

Drenik: ... because if it's you who does it [brings it up], Guillaume will wonder, but if Simma says 'I think we should nevertheless look into it a bit more ...'

Sekolec: I understand. I will ...

Drenik: Simma is certainly the one who knows best and the one who will delve into it.

Sekolec: Yes, I will work on Simma. This has been agreed already. The dinner.“ (Recording dated 11-01-2015; PCA Partial Award, 2016: 14-5, para 77)

(iii) Documents from the Slovenian Agent which he arbitrator appointed by Slovenia would submit as his own:

“Drenik: Well, you see, I could prepare all this for you, but there is something else. It would be a good thing to forward all these documents .... if you are going to forward them .... in such a way .... that you would bring your computer ...

Sekolec: Yes, so that I have the file.

Drenik: ... and that we open a file in your computer and just transfer the documents, you know, the text.

Sekolec: Yes.

Drenik: This is very simple to do, you see, so that you are registered as the author of the file.

Sekolec: I understand, I understand yes, yes.

Drenik: Because otherwise, the text doesn't have an author and that would look strange and also, someone may break in and find it ... if I am the author of the file.

Sekolec: Yes, yes.

Drenik: But if I only open it on a [USB] key on my computer and transfer it to a new file ... So, for each *effectivité*<sup>300</sup> we open a new file on your computer and save it, this is the most safe, [...] this would be a good thing to do” (Recording dated 05-11-2014; PCA Partial Award, 2016: 15-6, para 78).

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<sup>299</sup> Judge Bruno Simma was a Member of the Arbitral Tribunal.

<sup>300</sup> An *effectivité* is a territorial claim based on the factual and administrative control of an area (as opposed to legal title).

On 24 July, the day after the arbitrator appointed by Slovenia had resigned (PCA press release, 23 July 2015), the Croatian Foreign Minister sent a letter to the Tribunal indicating her government's "serious doubt [about] the integrity and fairness of the entire arbitration proceedings" in the light of the "shocking developments" (letter from the Minister for Foreign and European Affairs to the Registrar of the Tribunal, 24 July 2015: 1). The letter went on to state that

"The conversations [...] reveal that the most fundamental principles of procedural fairness, due process, impartiality and integrity of the arbitral process have been systematically and gravely violated, to the prejudice of Croatia. As you will be aware, the Terms of Appointment provide in Section 9.1 that 'the Parties shall not engage in any oral or written communication with any member of the Arbitral Tribunal *ex parte* in connection with the subject matter of the arbitration or any procedural issues that are related to the proceedings.'

[...]

[...] The communications appear to reveal that Arbitrator Sekolec *inter alia* disclosed critical elements of the Arbitral Tribunal's deliberations to Slovenia's Agent; advised her on the issues on which he believed the Tribunal was inclined to rule in Slovenia's favour, and on which issues it was not so inclined; requested [...] arguments and 'facts' not already in the record so that he could use them in his discussions with other members of the Arbitral Tribunal as his own; conspired with Ms. Drenik to assure that the other members of the Tribunal would not know their true source; communicated these arguments and 'facts' to the other members of the Tribunal on the basis that they were his own.

[...]

[...] Croatia considers that the entire arbitral process has been tainted by the actions of Arbitrator Sekolec and Ms. Drenik [...] Croatia has difficulty understanding how it would be possible, at this juncture, for the other Members of the Tribunal, or the PCA staff, to distinguish between the arguments and 'facts' presented by Slovenia through Arbitrator Sekolec, and those developed solely by Arbitrator Sekolec on his own. The official records appear to have been corrupted by improper argument and 'facts' submitted by one of the Parties after the close of the written proceedings and the hearings.

*In these circumstances, Croatia asks the Tribunal to suspend the proceedings with immediate effect [and] to review the totality of the materials presented, and reflect on the grave damage that has been done to the integrity of the entire proceedings [...]*" (letter from the Minister for Foreign and European Affairs to the Registrar of the Tribunal, 24 July 2015: 1-2; emphasis added).

In a reply to a letter from the Tribunal from 25 July 2015 to Slovenia asking to provide any feedback on Croatia's letter, Slovenia, on 26 July 2015, responded informing the Tribunal of the resignation of Ms. Drenik, and conceded that "the conduct of one of the arbitrators and Slovenia's former Agent" had been "entirely inappropriate and intolerable" (PCA Partial Award, 2016: 17, para 82; 42, paras 170-1; letter from the Republic of Slovenia to the Registrar of the Tribunal, 26 July 2015). Further, Slovenia opposed Croatia's view that the arbitral proceedings should be suspended (PCA Partial Award, 2016: 17, para 83) positing that the Tribunal was still charged with fulfilling the task of settling the dispute that had been submitted to it (letter from the Republic of Slovenia to the Registrar of the Tribunal, 26 July 2015). On 28 July 2015, Slovenia appointed Ronny Abraham, President of the International Court of Justice (ICJ), as the new arbitrator to replace Jernej Sekolec (PCA Final Award, 2017: 53, para 181).

### VI.3.3.3 Croatia's termination request

In an extraordinary session on 29 July 2015, the Croatian Parliament (Sabor) unanimously “[put] the Government of the Republic of Croatia under an obligation to begin the procedure of termination of the Arbitration Agreement [...] for reasons of material breach of its provisions by the Republic of Slovenia” (Sabor Resolution 29 July 2015). In a diplomatic note (*note verbale*) the following day, Croatia notified Slovenia that, pursuant to the Sabor Resolution,

“[t]he Republic of Croatia considers it is entitled to terminate the Arbitration Agreement [...] In accordance with Article 60, paragraph 1 of the Vienna Convention on the Law of the Treaties, the Republic of Croatia considers that the Republic of Slovenia has engaged in one or more material breaches of the Arbitration Agreement. The Republic of Croatia hereby provides the notification pursuant to Article 65, paragraph 1 of the Vienna Convention that it proposes to terminate forthwith the Arbitration Agreement.

[...] As a result of the actions of [...] Slovenia, the impartiality and integrity of the arbitral proceedings have been irrevocably damaged, giving rise to a manifest violation of the rights of Croatia.

The actions for which Slovenia is internationally responsible have violated *inter alia* Article 6 of the Arbitration Agreement, by violating the agreed procedure and rules of confidentiality and Article 10 of the Arbitration Agreement, which obliges the parties to ‘refrain from any action or statement which might [...] jeopardize the work of the Arbitral Tribunal’.

[...]

The principles of fairness and integrity have been violated, irreparable harm has been done to the legitimacy and prospects of the process. In the absence of any possibility that the arbitral process will now be seen to be fair and proper, and to meet all applicable standards, the object and purpose of the Arbitration Agreement cannot be accomplished.

Taking all this into account, [...] *Croatia has the honour to notify its entitlement to propose the termination of the Arbitration Agreement between [...] Croatia and [...] Slovenia [and] also notifies [...] Slovenia that from the date of this note [...] Croatia ceases to apply the Arbitration Agreement*” (*Note verbale* from the Ministry of Foreign and European Affairs of Croatia to the Ministry of Foreign Affairs of Slovenia, No. 3303/2015, 30 July 2015; emphasis added).

Croatia also informed the European Commission of the Sabor Ruling and the government's termination request (letter from the Minister for Foreign and European Affairs of Croatia to Frans Timmermans, Vice-President of the European Commission, 30 July 2015), and subsequently sent a letter to the Tribunal notifying the arbitration body that, as of 31 July 2015, Croatia terminates the Arbitration Agreement (and the arbitral proceedings as such) relieving Croatia's Agent, Co-Agent, Counsels and assistants “from their engagement in the case” (letter from the Ministry of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal, 31 July 2015: 2).

The Croatian government took the view that “*the Tribunal is without competence* to express any views as to the requirements for the termination of the Arbitration Agreement” (letter from the Ministry of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal, 31 July 2015: 2; emphasis added. For the Tribunal's deliberations on the legality of the Croatian termination request see VI.3.4.3.3). To that end, however, it must be mentioned that it is a well-established principle that an International Court or Tribunal can decide itself in matters of jurisdiction (*compétence de la compétence* or *Kompetenz-*

*Kompetenz*); see e.g. Bantekas, 2015: 109-112, or the ICJ Nottebohm Case (ICJ Reports 1953: 111, para 119). In other words, “procedurally, Croatia was not on a strong footing with withdrawal” (interview Damir Arnaut, 25-01-2018).

The Croatian move was not free of controversy in EU circles either. As the then chairman of the Foreign Affairs Committee in the European Parliament put it: “The Croats have organised their withdrawal from the arbitration procedure within a couple of hours, and they did it in the most brutal way possible. One has to acknowledge at the same time that they politically capitalised on the events in a professional way.” (interview Elmar Brok, 15-11-2015)

#### VI.3.3.4 Reconstitution of the Tribunal

The arbitrator appointed by Croatia had resigned on 30 July 2015 on the grounds of the “gravity [of the] wrongful behaviour” of the former arbitrator appointed by Slovenia and the former Slovenian Agent (letter of resignation of Budislav Vukas, 30 July 2015). The arbitrator newly appointed by Slovenia on 28 July 2015, the President of the ICJ, stepped down on 03 August 2015 on the grounds that “the current situation cannot meet [the] expectation [...] to help restore confidence between the Parties and the Arbitral Tribunal and to allow the process to continue normally [...]” (PCA press release, 05 August 2015).<sup>301</sup>

The two vacancies for the respective posts of party-appointed arbitrators remained unfilled by the Parties for the time being (Slovenia refrained from making a re-appointment in order to “preserve the integrity [of the] ongoing proceedings”, and Croatia had not made an appointment for reasons of principle due to its *de-facto* withdrawal). On 25 September 2015, the President of the Tribunal appointed Rolf Einar Fife of Norway and Professor Nicolas Michel of Switzerland as new Members thus reconstituting the Tribunal (PCA press release, 25 September 2015; see also PCA Partial Award, 2016: 7, para 49).<sup>302</sup>

On the same occasion, the Tribunal already indicated that it would now consider the Parties’ position with regard to “Croatia’s stated intention to terminate the Arbitration Agreement and in respect of the possible implications for the present proceedings of the events reportedly underlying Croatia’s decision”, and that it “may invite further submissions from the Parties” (PCA press release, 25 September 2015).

The European Commission actively supported the Tribunal’s decision to continue the proceedings. In a letter to Prime Minister Cerar and Prime Minister Milanović, Commission President Juncker and the First Vice-President Timmermans wrote:

“We are pleased [...] that the Panel [...] has appointed two new members and is now again operational. While the setting of borders between Member States does not fall directly within the competences of the Union, the European Commission reiterates that open border conflicts between Member States shall be resolved promptly, not least because these *can have an impact on the application of EU law*. We, therefore, are confident that both Member States act in the spirit of sincere cooperation.

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<sup>301</sup> Sands (2016: 897-8) argues that the quick resignation simply mirrors the fact that the appointment of the President of the ICJ was an “error” in the first place as the ICJ President acts as (last-resort) appointing authority in Article 2(1) of the Arbitration Agreement. For that reason, the appointing authority itself cannot possibly be appointed to the Tribunal. Philippe Sands was a member of the Croatian delegation in the arbitration procedure.

<sup>302</sup> Both Rolf Einar Fife and Professor Nicholas Michel were on the list proposed to the Parties by the then EU Commissioner for Enlargement Olli Rehn on 11 June 2009 (see also VI.2.6).

The Commission supports the continuation of the work of the Arbitration Tribunal. We trust that the arbitration process will provide for the appropriate mechanisms to deal with all issues that have arisen in full respect of the Arbitration Agreement, and that the parties will respect the decisions of the Tribunal” (letter from the European Commission President and the First Vice-President to the Prime Minister of Slovenia and to the Prime Minister of Croatia, 30 September 2015; emphasis added).

The Croatian government, however, noting the Tribunal persisted, made it clear that it had no intention whatsoever to come back to the arbitral proceedings, and it dismissed any relevance of the case with regard to the application of EU law. Prime Minister Zoran Milanović stated:

“We are convinced that the Commission has no legal basis and thus should not be actively involved in this and a number of similar border disputes among numerous Member States. In this respect, I do not believe that any of these disputes has ‘an impact on the application of EU law’.

The Croatian Government has initiated the procedure of withdrawal from the Arbitration Agreement following an unanimous vote in the Croatian Parliament. Thus, consequently, it has withdrawn from [the] arbitration proceedings, it shall not comment the possible intentions of the Tribunal, shall not participate in its work, and shall not consider itself obliged to receive and act upon any decisions the Tribunal may or may not reach.

We remain convinced that the only decision this ad-hoc Tribunal can reach to address the consequences of the actions of one of the Parties, while acting in accordance with the highest legal, moral and ethical standards [...] - is to dissolve itself” (letter from Prime Minister Zoran Milanović to the President of the European Commission, Jean-Claude Juncker, 01 October 2015).

The real motifs of the Croatian government will be difficult to explore. Yet, one cannot neglect a general sense amongst the political elite in Croatia that arbitration was just another issue of external pressure. Fundamentally, Croatia had consumed sovereignty on paper only in its initial years. The UNPROFOR troops in the country from 1991-1998 are one issue, another being the EU requirement to collaborate with the ICTY (interview Dejan Jović, 02-11-2017).

In a letter to the Parties from 01 December 2015, the Tribunal announced to hold a hearing on the legality of the Croatian termination request on 17 March 2016 setting deadlines for submissions. Annexed to the letter were two internal documents from Jernej Sekolec, the initial arbitrator appointed by Slovenia, on (i) “notes regarding the border on and around Dragonja”, and (ii) “Mura River Sector: Various effectivités<sup>303</sup> by Slovenia”. Whilst Croatia did not make any submission, Slovenia filed its written submission on 26 February 2016 (PCA Partial Award, 2016: 8-9, paras 52-54; 57).

### **VI.3.4 Written submissions, hearing and Partial Award 2016<sup>304</sup>**

On the eve of the hearing, Croatia sent a *note verbale* to all Permanent Missions and Permanent Observer Missions at the United Nations confirming it was not going to participate in the actual hearing on 17 March 2016 (*note verbale* 55/2016 from the Permanent Mission of

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<sup>303</sup> An *effectivité* is a territorial claim based on the factual and administrative control of an area (as opposed to legal title).

<sup>304</sup> No distinction is made here in terms of sub-paragraphs between written submissions and the hearing as (i) Croatia did not make any submission anyway, and (ii) the Tribunal, in its account of the Parties’ arguments in the Partial Award, has not separated the written submission from the oral hearing.

the Republic of Croatia to the U.N. to Permanent Missions and Permanent Observer Missions to the U.N., 16 March 2016; see Appendix 3).<sup>305</sup>

The Parties took opposing views on whether the proceedings should continue. Their legal arguments centre around three items:

- (i) the jurisdiction of the Tribunal,
- (ii) the obligation and/or ability to continue the proceedings, and
- (iii) the legality of the Croatian termination of the Arbitration Agreement.

#### VI.3.4.1 Croatia's legal arguments

Croatia did not appear at the hearing on 17 March 2016, nor had it filed any additional submissions prior to that hearing. The Tribunal, however, for the purpose of their deliberations, did take on board the positions from two Croatian letters to the Tribunal from 24 and 30 July 2015 (see VI.3.3.2).

On (i) jurisdiction, Croatia contended that the Arbitration Agreement contained no provision as for disputes on the validity of the Arbitration Agreement, and that the Tribunal therefore had no competence on the matter of termination (PCA Partial Award, 2016: 20, para 89).

On (ii) the Tribunal's duty and ability to continue the proceedings, Croatia held that "essential procedural rules have been violated [and that] such violations cannot be remedied by the Tribunal" concluding that the arbitral proceedings had been "totally and irreversibly compromised" (PCA Partial Award, 2016: 21-2, paras 90-94).

As for (iii) the legality of the termination request, Croatia claimed it was entitled to terminate the Arbitration Agreement as the *ex-parte* communication on the part of Slovenia constituted a material breach of the Arbitration Agreement in such a way that the violations threatened the *object and purpose*<sup>306</sup> of the Arbitration Agreement in relation to Article 60(3) of the Vienna Convention on the Law of Treaties (PCA Partial Award, 2016: 22-3, paras 95-101).<sup>307</sup>

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<sup>305</sup> This *note verbale*, of which the Tribunal only learnt because it had been forwarded by Slovenia, in fact sets out the Croatian account of the arbitral proceedings in a comprehensive way and is perhaps the single most concise and insightful document shedding light on the rationale of the Croatian approach.

<sup>306</sup> For the object and purpose of the Arbitration Agreement see VI.3.4.3.3.

<sup>307</sup> The Vienna Convention, signed on 23 May 1969, entered into force on 27 January 1980; for the Convention see [http://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

#### *Article 60 Vienna Convention on the Law of Treaties (VCLT):*

##### *Termination or suspension of the operation of a treaty as a consequence of its breach*

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
2. A material breach of a multilateral treaty by one of the parties entitles:
  - (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
    - (i) in the relations between themselves and the defaulting State; or
    - (ii) as between all the parties;
  - (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
  - (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.
3. A material breach of a treaty, for the purposes of this article, consists in:
  - (a) a repudiation of the treaty not sanctioned by the present Convention; or

#### VI.3.4.2 Slovenia's legal arguments

Slovenia, in relation to (i) jurisdiction, held that the Tribunal was competent to decide on the Croatian termination request referring to the well-established principle in international law named *compétence de la compétence/Kompetenz-Kompetenz* stipulating that an International Court or Tribunal can decide by itself in matters of jurisdiction (PCA Partial Award, 2016: 24-27, paras 102-110; for the *Kompetenz-Kompetenz* power of arbitral tribunals see also e.g. Bantekas, 2015: 109-112).

On (ii) the Tribunal's duty and ability to continue the proceedings, Slovenia noted that the general duty and competence of the Tribunal had been set out in the Arbitration Agreement, and that the duty to settle the submitted dispute had been confirmed by many decisions of international courts and tribunals. Further, Croatia, having achieved its vital interest of becoming an EU member, was not to "be released from its commitment to arbitrate". Moreover, the Tribunal had "the possibility to redress the breach of confidentiality"<sup>308</sup> and that it had done so by replacing the party-appointed arbitrators, and by the *de-novo* deliberations (PCA Partial Award, 2016: 27-31, paras 111-123).

With regard to (iii) the legality of the Croatian termination request, Slovenia argued that only "a gross infringement of an essential provision" of the Arbitration Agreement merited triggering Article 60(3)(b) of the Vienna Convention, i.e. entitling a party to terminating the obligation to arbitrate, which was not the case in the present circumstances. Therefore, according to Slovenia, the Tribunal did have "the means to accomplish the object and purpose of the Arbitration Agreement" (PCA Partial Award, 2016: 34-36, paras 133-140).

#### VI.3.4.3 Partial Award

On 30 June 2016, the Tribunal issued its Partial Award on the contested issue of whether the arbitral proceedings will continue. The Tribunal members unanimously decided that

- Slovenia had been in violation of the Arbitration Agreement, but the Arbitration Agreement as such remained in force.
- Thus, the arbitration procedure would continue (Partial Award, 2016: 57, para 231).

Yet, it is worth looking at the Tribunal's analysis in more detail: The Tribunal noted that Croatia did not make any formal submissions prior to the hearing on 17 March 2016, nor did Croatia participate in the hearing. However, Croatia had made its views clear by means of the letters to the Tribunal from July 2015 (see VI.3.3.2 and VI.3.4.1) and via the *note verbale* from 16 March 2016 (see VI.3.4 and Appendix 3). Further, the Tribunal noted that Croatia was provided with the Slovenian submissions and the transcripts of the 17 March 2016 hearing. In procedural terms, the Tribunal referred to the "well-established principle of international procedural law that a unilateral decision to withdraw from dispute settlement

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(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

<sup>308</sup> Slovenia recalled (i) the ICJ *Nuclear Tests case (Australia v. France)*, I.C.J. Reports, 1974: paras 259-260, and (ii) the *Victor Pey Casado et al v. Chile ICSID case* (No. ARB/98/2, Award 08 May 2008, paras 34-43) where both judicial bodies continued the proceedings under similar circumstances.

proceedings cannot bring such proceedings to a halt” and that this principle was also set out in the PCA Optional Rules<sup>309</sup>. Therefore, the Tribunal was in a position and under an obligation to carry on with the arbitral proceedings (PCA Partial Award 2016: 36, paras 141-143).

#### VI.3.4.3.1 Jurisdiction

The Tribunal cited various court and arbitral decisions<sup>310</sup>, *inter alia* the ICTY *Tadić* case:

“This power, known as the principle of ‘*Kompetenz-Kompetenz*’ in German, or ‘*compétence de la compétence*’ in French, is [...] indeed a major part of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its ‘jurisdiction to determine its own jurisdiction’. It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals” (Prosecutor v. Duško Tadić a/k/a “Dule”, ICTY Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 02 October 1995, para 18).

The Tribunal concluded that, under general international law, an arbitral tribunal or judicial body had “the jurisdiction to determine its own jurisdiction” (PCA Partial Award, 2016: 39, para 157).

As for the Arbitration Agreement and the Tribunal’s jurisdiction to decide on the validity of the Croatian termination request, the Tribunal, amongst other things, quoted from the *ICAO Council* case of the ICJ:

“[A] merely unilateral suspension *per se* [cannot] render jurisdictional clauses inoperative, since, one of their purposes [might be] to enable the validity of the suspension to be tested. If a mere allegation, as yet unestablished, that a treaty was no longer operative could be used to defeat its jurisdictional clauses, all such clauses would become potentially a dead letter, even in cases like the present, where one of the very questions at issue on the merits, and as yet undecided, is whether or not the treaty is operative - i.e. whether it has been validly terminated or suspended. The result would be that means of defeating jurisdictional clauses would never be wanting” (I.C.J. Reports 1972: 53-4, para 16).

In conclusion, there was “no doubt that the Tribunal also has inherent jurisdiction to decide” whether the arbitral proceedings can continue (PCA Final Award, 2016: 58, para 168).

#### VI.3.4.3.2 Continuation of the arbitration procedure

The Tribunal noted that, by means of the *ex-parte* communication (see VI.3.3.2), the Agent of Slovenia and the arbitrator appointed by Slovenia “acted in blatant violation of [the confidentiality] provisions” (PCA Partial Award, 2016: 43-4, para 175).

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<sup>309</sup> Article 28(2) and (3) of the PCA Optional Rules read: “2. If one of the parties, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration. 3. If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.” For the full PCA Optional Rules for the arbitration between two States see [https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/Optional-Rules-for-Arbitrating-Disputes-between-Two-States\\_1992.pdf](https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/Optional-Rules-for-Arbitrating-Disputes-between-Two-States_1992.pdf).

<sup>310</sup> Such as the *Guano* case (Chile v. France) from 1900, the *Walfish Bay Boundary* case (Germany v. Great Britain) from 1911, or the *Rio Grande Irrigation and Land Company* case (Great Britain v. United States) from 1928, see Partial Award (2016: 38-9, paras 150-153).

As for cases comparable to the present one, the Tribunal looked into *Victor Pey Casado et al v. Chile* where one of the party-appointed arbitrators had provided that party with a draft decision from the Tribunal's deliberations. That arbitrator and a second one who had been challenged on different grounds resigned. Two new arbitrators were appointed, and, to ensure a level playing-field, the draft decision was communicated to the other party.<sup>311</sup> After a new hearing the then Tribunal rendered an award (PCA Partial Award 2016: 45-6, para 182).

The Tribunal subsequently explored whether the integrity of the proceedings in the Croatia-Slovenia case can be preserved, and, if so, in what way. It recalled that the Tribunal was recomposed properly with two new and independent Members following the resignation of the two party-appointed arbitrators (PCA Partial Award 2016: 46-7, para 183-6; see also VI.3.3.4). In relation to the two documents the arbitrator appointed by Slovenia had introduced into the proceedings after the *ex-parte* communication with Slovenia's Agent, the Tribunal found that the arbitrator had not presented any new arguments or facts that were not already in the official record of the Tribunal.<sup>312</sup> Besides, the views expressed by both party-appointed arbitrators vis-à-vis the arguments and facts on the Tribunal's record were of no relevance for the work of the Tribunal as they both had resigned, so procedural imbalance could not be observed, either. In conclusion, the Tribunal noted no obstacles as to the continuation of the arbitral proceedings (PCA Partial Award, 2016: 48-9, paras 187-196).

#### VI.3.4.3.3 Legality of the Croatian termination request

The Tribunal examined whether the actions of the arbitrator appointed by Slovenia and Slovenia's Agent constituted a material breach of the Arbitration Agreement by Slovenia which would entitle Croatia to terminate the Arbitration Agreement under Article 60(1) of the Vienna Convention (see VI.3.4.1). It is important to note, that the breach of the provisions under Article 60(3)(b) cannot be measured in terms of gravity or intensity, but that the crucial issue here is whether a breach is essential for the accomplishment of the treaty's, i.e. the Arbitration Agreement's *object and purpose* (see PCA Partial Award 2016: 53, para 215).

According to the Tribunal, the first object and purpose of the Arbitration Agreement was to secure Croatia's access to the EU, and that therefore "a nexus was established between the settlement of the territorial and maritime dispute and the [EU] accession of Croatia" (PCA Partial Award, 2016: 54-5, para 220). The second object and purpose was "the settlement of the maritime and territorial dispute between the Parties", so that the "decisive question" was whether the breaches of the Arbitration Agreement's provisions by Slovenia rendered the very settlement of the border dispute unattainable (PCA Partial Award, 2016: 55, para 222).

The Tribunal found that, by (i) communicating to the Parties the two documents that had been submitted by the arbitrator appointed by Slovenia in collaboration with Slovenia's Agent, (ii) demonstrating that the documents contained no new arguments or facts not already presented in the written or oral pleadings, and through (iii) recomposing the Tribunal to safeguard its independence and impartiality<sup>313</sup>, "the procedural balance between the Parties is secured" (PCA Partial Award, 2016: 55, para 224). In conclusion, the Tribunal held that remedial

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<sup>311</sup> ICSID Case No. ARB/98/2, Award 08 May 2008, paras 34-43.

<sup>312</sup> By late 2014, the Tribunal's Registry had prepared a list of both Parties' evidence of (i) legal title and (ii) *effectivités* of 142 pages (PCA Partial Award 2016: 47-8, para 190).

<sup>313</sup> The Tribunal "has found no reason to consider that any aspect of its future decision on the merits would be affected by past events, for which none of its current members was responsible (PCA Partial Award, 2016: 56, para 227).

action was taken so that breaches of the Arbitration Agreement by Slovenia did “*not* defeat the object and purpose of the Agreement” with regard to Article 60(1) of the Vienna Convention, and that therefore the Arbitration Agreement remained in force and the arbitration proceedings could continue (PCA Partial Award, 2016: 55, para 225; emphasis added).

#### VI.3.4.4 Alternative views

Whilst it would be difficult to challenge the jurisdiction of the Arbitral Tribunal arising from the well-established *Kompetenz-Kompetenz* principle (see VI.3.3. and VI.3.4.3.1), there have been alternative views as to both the continuation of the arbitral proceedings and the legality of the Croatian termination request.

In the aftermath of the publication of the *ex-parte* communication, Sands (2016) felt that, notwithstanding the fact that he had acted as counsel for Croatia in the proceedings, “the centrality of the independence of the adjudicator” was at stake, and that the affair was going to cause “tremendous harm to the system of international arbitration both within and outside the PCA system” (2016: 898). On the way ahead, Savarian and Baker (2015) argued that it was legally and politically impossible to continue the arbitral proceedings since (i) it would be very difficult to enforce a final award under the circumstances of one party determined to withdraw from both the Arbitration Agreement and the arbitration process, and (ii) that, given the *ex-parte* communication, there would be doubts about the award as such irrespective of its contents. Thus, the Tribunal itself should “terminate the proceedings citing grave procedural misconduct” to avoid “an unenforced and discredited award”. Savarian (2016), ahead of the Partial Award, however, opined that Croatia was not entitled to terminate the Arbitration Agreement (as opposed to the arbitral proceedings as such), i.e. the *quid-pro-quo* nexus remained and “Croatia would either have to accept a re-start of the arbitration [...] or [...] have to agree with Slovenia on alternative means [such as ICJ or ITLOS] to settle the dispute”.

With regard to the PCA Partial Award, Ilić (2017) contends, *inter alia*, that the object or purpose of the Arbitration Agreement was to be found in (i) Article 4(b) of the Agreement mandating the Tribunal to apply “international law, equity, and the principle of good neighbourly relations”<sup>314</sup>, and in (ii) the PCA Optional Rules’ provisions on arbitrator impartiality.<sup>315</sup> Therefore, according to Ilić, the Tribunal had “placed too much weight on finality as the main goal of arbitration” (2017: 373), and the nexus between the arbitration procedure and Croatian EU accession (see VI.3.4.3.3) was “not as strong as the Tribunal described it” (2017: 374). In his view, the *quid-pro-quo* aspect of arbitration in terms of EU accession of Croatia could not contradict the purpose “to settle all disputes in an impartial and procedurally fair manner” which was why the *ex-parte* communication could well be seen as a material breach under Article 60 of the Vienna Convention (2017: 375) thus entitling Croatia to terminate the proceedings. As to the replacement of the party-appointed arbitrators, Ilić holds that what was impossible to remedy is that the Slovenian side had learnt about the

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<sup>314</sup> This author, however, considers the provision in Article 4(b) of minor relevance in terms of *object* or *purpose* of the Arbitration Agreement as the above article defines the Tribunal’s tool-box of applicable law for the actual maritime delimitation *stricto sensu* (in particular the high seas corridor and the regime for the maritime areas in relation to Article 3 of the Arbitration Agreement labelled “task of the arbitral tribunal”; see also VI.2.4).

<sup>315</sup> Article 15(1) PCA Optional Rules: “Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case.”

other arbitrators' viewpoints on certain facts or arguments (2017: 377) providing Slovenia with some "strategic insight [...] as to how the Tribunal might in the future react to particular arguments (2017: 382). In conclusion, the arbitral proceedings had been affected unfairly to the detriment of Croatia rendering the task of the Tribunal "impossible to fulfil" (2017: 382).

### VI.3.5 Final Award 2017

On 29 June 2017, one year after the Partial Award, the Tribunal issued the Final Award. The following sections will focus on the Tribunal's decision on the *maritime* border and areas. Nevertheless, the *land* border decision will be briefly addressed whilst a full land-border survey regrettably is beyond the scope of this study.<sup>316</sup>

#### VI.3.5.1 Land border

In its analysis with regard to the land border (as well as the maritime border), the Tribunal was bound to strictly apply *international law* as stipulated in Articles 3(1)(a) and 4(a) of the Arbitration Agreement (see VI.2.4). It is worth noting in this context that, therefore, "the Tribunal is required to decide the matter from the legal, and not from the historical or political or sociological perspective. This is what the two [g]overnments have chosen and mandated" (PCA Final Award, 2017: 108, para 335).

The *approach* of the Tribunal as for the delimitation of the land border was as follows:

- (i) The Tribunal's starting point was to check whether the cadastral limits of Croatia and Slovenia were aligned at the time of the independence in 1991 in the respective disputed spots;
- (ii) Disputed land border spots were cleared starting with the principle of legal title (*uti possidetis juris*) including historic evidence or agreements between the Parties;
- (iii) Where no title could be established, the factual administrative control of the area (*uti possidetis effectivités*) served as a basis for the Tribunal's decision (PCA Final Award, 2017: 109-110, paras 340-343).<sup>317</sup>

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<sup>316</sup> For the Final Award see <https://pcacases.com/web/sendAttach/2172>; for the read-out video of the press conference (01:55) see [https://files.pca-cpa.org/hr-sl/2017-06-29\\_VOD\\_V4.mp4](https://files.pca-cpa.org/hr-sl/2017-06-29_VOD_V4.mp4).

<sup>317</sup> It may be useful to illustrate that the Tribunal approached the handling of *effectivités* with great caution: "[The] evaluation of *effectivités* is not a matter of counting or comparing instances of the exercise or display of authority *à titre de souverain*. Each instance - and the number of relevant instances put before an international tribunal in cases such as this tends to be low - must be examined in order to identify precisely what can properly be inferred from it. For example, a payment of taxes to an authority of State A and not of State B may evidence a belief that State A and no other State has authority over a particular place, or it may evidence no more than the fact that although both State A and State B maintained claims to the location in question, it was decided that the tax-payer should not (at least on that occasion) be required to pay twice. To take another example, the referral of a dispute to a particular court may be based upon the presence of the property in question or one or both of the litigating parties, or the making of a relevant legal instrument such as a will, within the jurisdiction of the court, or upon an agreement between the litigating parties. An exercise of sovereign authority with respect to facts or things at a particular location should not be assessed in isolation: it does not necessarily evidence the existence of exclusive sovereign authority at that location. The Tribunal has accordingly taken particular care to look for evidence that points clearly to the assertion of the public power of the State at the location in question, to the exclusion of the public power of other States. In doing so, it has been mindful of the fact that some activities, such as the levying of taxes, the organization of elections, conscription for military service, and law enforcement, are more likely to demonstrate the exercise of authority *à titre de souverain* than others, such as the delivery of mail or the provision of telephone or other services" (PCA Final Award, 2017: 110-111, paras 342-3).

Further, it is important to note that there are “limits to the degree of detail” of any delimitation decision as for the later *demarcation* on the ground (PCA Final Award, 2017: 113, para 354) for a number of reasons:

- (i) The Tribunal had to work with the maps and verbal descriptions provided by the parties, so the precision of the decision may be seen as “inherently limited”. As this makes it impossible to determine “every metre” of the land boundary, the parties will in any event need to deal with minor adjustments at the stage of demarcation (PCA Final Award, 2017: 113, para 355);
- (ii) In its analysis, the Tribunal was limited to the submissions of the parties. It had been agreed on that the Tribunal would *not* carry out any independent on-site investigation themselves (PCA Final Award, 2017: 114, para 356);
- (iii) There are cases where matters of convenience or practicality (such as avoiding meanders or enclaves) could *not* be considered, since the Tribunal was strictly bound to international law. This meant the parties may reach diverging practical arrangements for the course of the border on the ground (PCA Final Award, 2017: 109, paras 337-9; 114, para 357).

With regard to the course of the land border, the Tribunal divided the boundary up into three sections: (I.) Mura River Region, (II.) Central Region, and (III.) Istria Region. For illustration purposes, a tiny few prominent or noteworthy particular land border spots in the aforementioned regions must be addressed, such as

- (i) in the Mura river region (starting at the border tripoint Croatia-Slovenia-Hungary following the river downstream for about 25 km) where the border crosses the river many times - with all the impracticalities that entails for agriculture or river ferries, for example - a number of delimitations were made<sup>318</sup>, such as the Brezovec-del/Murišće hamlet which was determined to be Slovenian (PCA Final Award, 2017: 131-6, paras 405-414);
  - (ii) in the Haloze/Macelj area of the Central Region, a tiny forest strip of 0.5 ha which was *not* recorded in either of the border municipalities (sic) was delimited according to a historic map from 1914 (PCA Final Award, 2017: 163-4, paras 502-5);
  - (iii) the peak of Sveta Gera/Trdinov Vrh, also in the Central Region, owing its significance to a television tower and a military facility constructed by the former Yugoslav Army and staffed by the Slovenian Army since October 1991 was delimited to the effect that the border runs between the television tower (Slovenia) and the military facility (Croatia; PCA Final Award, 2017: 189-190, paras 586-590);
  - (iv) the Three Hamlets (Istria Region) south of the Dragonja river (see VI.1.2.2) were allocated to Croatia as the river was the boundary (PCA Final Award, 2017: 241, para 769).<sup>319</sup>
- For the entire land boundary decision see PCA Final Award, 2017: 114-241, paras 359-770.<sup>320</sup>

#### VI.3.5.2 Sea border/maritime areas

It is useful to bear in mind that the Arbitral Tribunal was mandated to delimitate the maritime boundary and to decide on the maritime areas according to the Arbitration Agreement, i.e.

- (i) the (land and) maritime border by applying *international law* (Art. 3(1)(a));

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<sup>318</sup> The Tribunal would not rely on the bilateral Expert Group Report findings from 1996 (see V.1.1), but base its decisions on the many *effectivités* invoked by the Parties by means of the written and oral submissions (PCA Final Award 2017: 133, para 411).

<sup>319</sup> The Tribunal gives express mention to the fact that its decision “may present some practical inconvenience” to the inhabitants of the settlements as they “are economically tied to the Slovenian town of Sečovelje” and appeals “to the Parties to cooperate in order to ensure that inhabitants in the hamlets on the Croatian side of the border have adequate facilities and access rights to Slovenia” (PCA Final Award 2017: 241, para 770).

<sup>320</sup> For a summary see PCA press release 29 June 2017 available at <https://pcacases.com/web/sendAttach/2175>.

- (ii) Slovenia’s junction to the high seas and the regime for the maritime areas by applying “*international law, equity and [...] good-neighbourly relations [...] to achieve a fair and just result by taking into account all relevant circumstances [...]*” (Art. 4(b); emphases added).

The decisions will be outlined below followed by a brief discussion of scholarly views on the maritime aspects of the Final Award.

#### VI.3.5.2.1 The Bay

The Tribunal first determined the status of Piran Bay and concluded that, prior to the dissolution of the SFRY, the Bay had the status of juridical bay (see V.1.1.2) and had been declared internal waters by Yugoslavia through the Coast Sea Acts from 1963 and 1987, and that the latter Act also defined the closing line of the Bay. That closing line was also included in a negotiating document from 1964 leading to the bilateral Osimo Treaty 1975 between Italy and Yugoslavia on the territorial sea border. The Tribunal thus decided that on 25 June 1991 the Bay was internal waters of Yugoslavia<sup>321</sup> closed by a line between the low-water marks of Cape Madona and Cape Savudrija (PCA Final Award, 2017: 267-272, paras 862-885).

As there are no UNCLOS provisions on the delimitation of internal waters, the Tribunal took the view that the delimitation in the Bay had to follow the same principles as the delimitation of a *land* boundary, notably the principle of *uti possidetis (juris and effectivités)*. As there was no division of the Bay in SFRY times, neither a legal title inherited by any of the Parties, nor a condominium arrangement, delimitation was thus to be made on the basis of *effectivités*, i.e. claims of sovereignty based on factual control or administration of the area in question (PCA Final Award, 2017: 273, paras 886-8).

The Tribunal mainly looked at fishing activities and police patrolling in the Bay at the date of independence (25 June 1991). The arbitrators noted that the Slovenian fishing reserve was established in 1962 and managed throughout up until 1991, whereas the Croatian fishing reserve was created in 1976 without any follow-up management activity. The municipalities of Buje (Croatia) and Piran (Slovenia) did, however, get in touch in 1975 to co-ordinate the limits of the fishing reserves and reciprocal consent was sought and given in 1976 and 1978 respectively. This led the Tribunal to conclude that the fishing reserves covered the entire Bay eastward of the closing line, but that there was no express mutual recognition of the respective territorial extent of each of them (PCA Final Award, 2017: 274-6, paras 891-901).

As for policing, the Tribunal noted that whilst the coast was controlled by the Yugoslav Navy stationed in Pula operating a radar facility at the Savudrija promontory<sup>322</sup>, at Republican level it was the police stations in Koper and Umag exercising the patrols to enforce safety regulations and the fight against illegal fishing and smuggling. The arbitrators found that Koper police station patrolled the Bay with two vessels supported by a radio link with the Savudrija Navy observatory, and that Umag police station was active mostly in the immediate vicinity of the Bay’s Croatian shores (PCA Final Award, 2017: 276-9, paras 902-913).

In view of the above *effectivités*, the Tribunal decided that the delimitation line in the Bay was to be between the lines claimed by Croatia (equidistance) and Slovenia (entire Bay) expressly

<sup>321</sup> Slovenia had claimed the status of internal waters, Croatia had repudiated it calling for territorial sea delimitation inside the Bay (PCA Final Award 2017: 247-8, para 790).

<sup>322</sup> The Savudrija radar facility is now used by the Croatian Navy (author’s field notes, 27-07-2015).

adopting the line from the bilateral Initialled Draft Agreement 2001 (Drnovšek-Račan Agreement; see VI.1.4). The said delimitation line meets the closing line of the Bay at a point “which is at a distance from Cape Madona that is three times the distance from that same point to Cape Savudrija” (PCA Final Award, 2017: 279, para 912). As a result and in terms of surface, the Tribunal apportioned roughly four fifths of the Bay to Slovenia and one fifth to Croatia.

#### VI.3.5.2.2 Territorial sea boundary

Ahead of its analysis of the Parties’ arguments, the Tribunal started out by clarifying that it was bound to conduct a *sequential* analysis of the tasks it was mandated in Article 3(1) of the Arbitration Agreement, i.e. the Tribunal needed to determine the course of the land and maritime boundary first, followed by the determination of the Slovenian junction to the high seas, and lastly by a decision on the regime for the maritime areas. Practically, the Tribunal outlined to look at (i) the delimitation of the territorial sea between Croatia and Slovenia, (ii) the determination of the junction to the high seas, Slovenia’s claim to a continental shelf, and to the regime for the maritime areas (PCA Final Award, 2017: 292, paras 947-8).

It must be noted that the Parties had taken different views on the question of whether the Arbitration Agreement did foresee distinct steps of analysis. Croatia argued that the drafting history of the Arbitration Agreement (see VI.2.3-VI.2.5) clearly mirrored the fact that the issues territorial sea boundary, junction to the high seas, and regime for the maritime areas had been carefully kept apart on purpose. Slovenia, however, contended that the Tribunal had discretionary powers to decide the issues under Article 3(1) separately or together to arrive at a workable result (PCA Final Award, 2017: 285-6, paras 922-5).

Referring to the three-stage approach<sup>323</sup>, the arbitral tribunal first drew a provisional equidistance line between the point where the delimitation line established in the Bay met the closing line at the mouth of the Bay and the maritime boundary between Italy and Yugoslavia inherited by the 1975 Treaty of Osimo (see IV.4.3) which delimited the territorial sea in the Gulf of Trieste (PCA Final Award, 2017: 312-313, paras 1002-3).

Considering special circumstances which would warrant a departure from the provisional equidistance line, the Tribunal dismissed several of Slovenia’s arguments notably the concave nature of the coast along the Gulf of Trieste, and the (short) length of the Slovenian coast in relation to the (very long) overall Croatian coastline. Slovenia had also claimed maritime entitlements it considers to have inherited from the SFRY. The Tribunal noted that the Yugoslav Republic of Slovenia enjoyed these maritime entitlements “as a matter of the SFRY law to share and participate in the uses of the maritime zones of the SFRY” and went on to state that “[a]s a sovereign coastal State, Slovenia’s entitlement is to the maritime zones generated by its own coastline alone, limited as that might be. It is very well established that international law cannot refashion nature by allocating to a State a maritime entitlement other than that generated by its own coastline” (PCA Final Award, 2017: 315, para 1006).

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<sup>323</sup> Drawing of provisional equidistance line, consideration of special circumstances warranting a departure from the provisional line, and proportionality test to check for alignment with ratio of relevant coastal lengths and maritime areas; see V.2.2.3. For the UNCLOS provisions on territorial sea delimitation (Article 15) see V.2.1.

The length of the coastal fronts of Slovenia and Croatia the Tribunal did not consider a special circumstance. No historic titles<sup>324</sup> had been established on the part of Slovenia either. The arbitrators did, however, consider the *coastal configuration* a special circumstance:

“[T]he coastline of Croatia turns sharply southwards around Cape Savudrija, so that the Croatian basepoints [controlling] the equidistance line are located on a very small stretch of coast whose general (*north*-facing) direction is markedly different from the general (*southwest*-facing) direction of much the greater part of the Croatian coastline [...], and deflect the equidistance line very significantly towards the north, *greatly exaggerating the ‘boxed-in’ nature of Slovenia’s maritime zone*” (PCA Final Award, 2017: 319, para 1011; emphasis added).

The arbitrators thus modified the provisional equidistance line in a way to make sure that the delimitation line does “not *disproportionately* exacerbate Slovenia’s boxed-in condition”. This resulted in the final delimitation line of the territorial sea border between Slovenia and Croatia pointing slightly further southwest being approximately parallel to the first seaward stretch of the Slovenian-Italian territorial sea border starting out at San Bartolomeo Bay (PCA Final Award, 2017: 321-2, para 1014; emphasis added).

This author argues that the Tribunal has applied the proportionality test only to a limited degree. There is no formal third delimitation stage. Rather, the arbitrators’ decision refers to avoiding an exacerbation of the boxed-in Slovenian maritime zone by using the term *disproportionately*. Whilst this may not be free of controversy from a strictly procedural point of view, it can be observed that the Tribunal had, in the first place, *not* established as special circumstance any criteria relating to measurable coastal lengths or maritime areas with ratios to be calculated. The coastal configuration chosen as special circumstance is beyond mathematical calculations. Thus, (dis)proportionality was considered, but could not be tested.

#### VI.3.5.2.3 Junction Area

The Tribunal first interpreted the term “junction” which was highly disputed between the Parties (see VI.2.4; see also PCA Final Award, 2017: 324-331, paras 1016-1033). The arbitrators took the view that “the term ‘junction’ has an essentially spatial meaning and connotation” (PCA Final Award, 2017: 342, para 1073) and determined that “‘junction’ signifies the physical location of a connection between two or more areas. In the present case, the Tribunal defined the term ‘junction’ as the connection between the territorial sea of Slovenia and an area beyond the territorial seas of Croatia and Italy” (PCA Final Award, 2017: 344, para 1076).

As for the location of the Junction Area, the Tribunal decided that it be along the sea border between Croatia and Italy (Osimo border) inside Croatia’s territorial sea with a width of 2.5 nm<sup>325</sup> running from Slovenia’s territorial sea border to the high seas (see fig. 21 overleaf).

#### VI. 3.5.2.4 Continental shelf

Slovenia had made a continental shelf (CS) claim overlapping with the Croatian CS and asked the Tribunal to delimitate the Parties’ continental shelves on the grounds that a CS was to be subsumed under “relevant maritime areas” in article 3(1)(c) of the Arbitration Agreement.

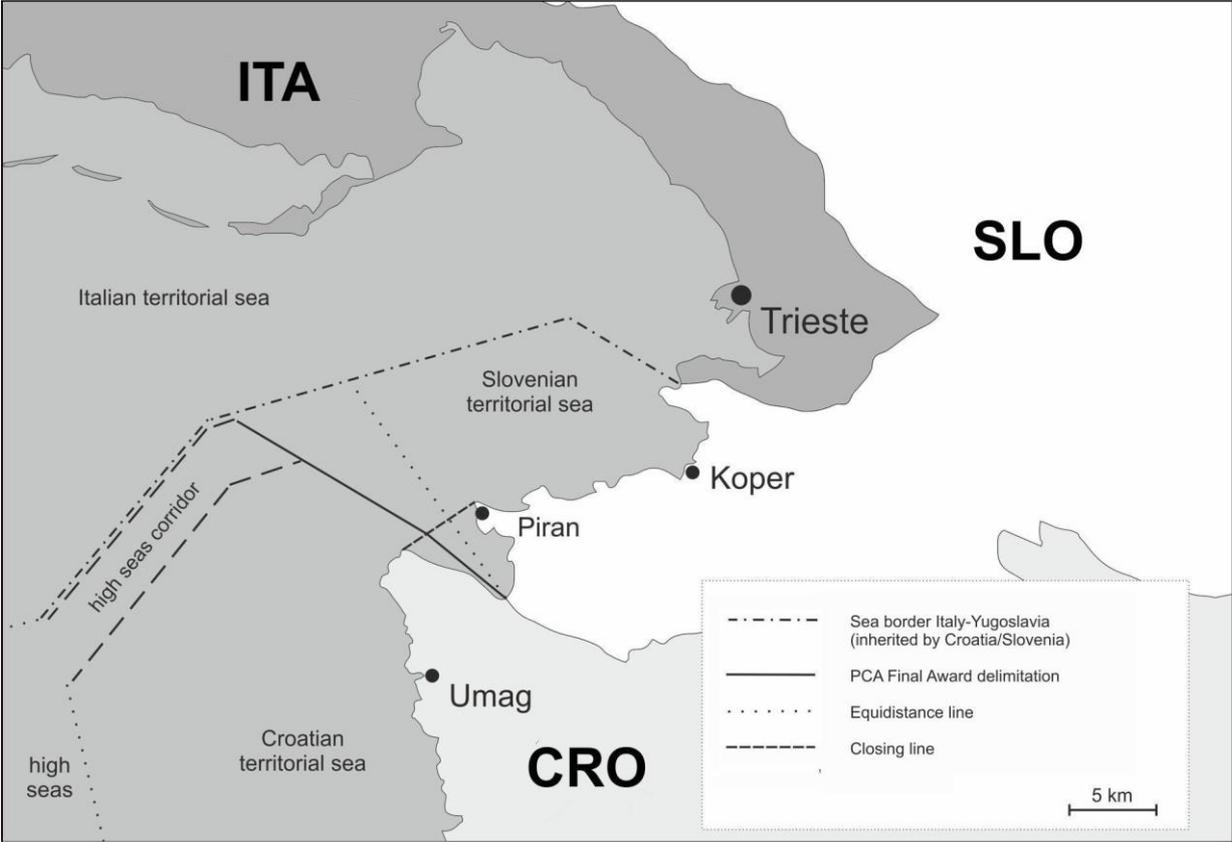
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<sup>324</sup> Both historic title and special circumstances warrant a departure from the equidistance line; see V.2.1.

<sup>325</sup> Slovenia had requested 3 nm (PCA Final Award, 2017: 340, para 1060).

The Tribunal determined in one single paragraph that the territorial sea boundary between Slovenia and Croatia established between the point on the closing line of Piran Bay and the Osimo border was an all-purpose boundary and that Slovenia thus “has no maritime zones extending west beyond that maritime boundary”. Further, “Slovenia’s claim to continental shelf rights is therefore incompatible with the Tribunal’s determination of the entitlements of the two States in this area, and no question of continental shelf determination arises” (PCA Final Award, 2017: 354, para 1103).

Figure 21: Maritime delimitation in Piran Bay and the Gulf of Trieste according to the 2017 Final Award (schematic view)



VI. 3.5.2.5 Regime for the use of the maritime areas

Applying the mandate of Article 4(b) of the Arbitration Agreement (“international law, equity and the principle of good-neighbourly relations in order to achieve a fair and just result”) as the applicable law, the Tribunal determined a regime which “is intended to guarantee both the integrity of Croatia’s territorial sea and Slovenia’s freedoms of communication between its territory and the high seas” (PCA Final Award, 2017: 360, para 1123).

The *freedoms of communication* in the Junction Area are characterized as follows:

- > Uninterrupted and uninteruptable access to and from Slovenia including its airspace;
- > Freedom of navigation and overflight, and the lying of submarine cables and pipelines;
- > All ships and aircraft of all States enjoy these freedoms irrespective of their nationality;
- > Passage is unconditional and cannot be suspended under any circumstances;

- > Submarine vessels have no duty to navigate on the surface<sup>326</sup>;
- > No exploring or exploiting of natural resources, i.e. no fishing or oil/gas exploitation.

The *guarantees and limitations* of the freedoms of communication in the Junction Area are:

- > No boarding, arrest, detention or other interference of ships or aircraft by Croatia;
- > Croatia cannot enforce its laws and regulations for ships and aircraft in the Junction Area;<sup>327</sup>
- > Croatia may provide assistance to vessels when called upon including emergency situations (PCA Final Award, 2017: 360-3, paras 1123-1136).

With regard to the “*Duty of Cooperation and Other Agreements between the Parties*” (emphasis added), the Tribunal, *inter alia*, raises the following main issues:

The Junction Area regime must be exercised with due regard also to the rights and obligations of other States. The Tribunal noted that “given the small size of the Junction Area and its *proximity to adjacent States*, this obligation is a particularly important element of the legal regime of the Junction Area” (PCA Final Award, 2017: 362, para 1134; emphasis added).

Further, the arbitrators noted that the Award does not affect any existing or future agreements (on implementation, for example) between Croatia and Slovenia. In the same vein, the *IMO Traffic Separation Scheme in the North Adriatic* (with designated sea-lanes for vessels going to and from the Gulf of Trieste and to/from the ports of Koper and Trieste) and international rules for air navigation, i.e. those of the International Civil Aviation Organization (ICAO), shall not be affected either. Similarly, the rights and obligations of Slovenia under *EU law* are not touched upon (PCA Final Award, 2017: 363, paras 1136-7). Nevertheless, this author suggests that the Junction Area provisions of the Final Award do have practical implications not least on the Traffic Separation Scheme; see VIII.1.1.1.

## Discussion

As for the Tribunal’s decision to modify the provisional equidistance line for the maritime boundary recognizing the coastal configuration around Cape Savudrija as a special circumstance, Solomou (2017: 5) opines that the half-effect<sup>328</sup> given to the Cape and its coast was predictable and “in line with *jurisprudence constante* [...] as established by a series of cases handled by the ICJ, ITLOS and arbitral tribunals alike”. In the same vein, Grbec (interview 10-07-2018) takes the view that, generally, the Tribunal did not depart from settled jurisprudence.

Bankes (2017: 3) notes that the Tribunal’s decision stipulating that the legal status of Piran Bay remains internal waters, and is thus inherited from SFRY times, is consistent with the ICJ’s 1992 judgement in the *Bay of Fonseca* case (El Salvador/Honduras/Nicaragua) where the status of internal waters was confirmed for a pluri-national bay following de-colonisation. Grbec (interview 10-07-2018) highlights that it was “a balanced and sound Award” and by

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<sup>326</sup> Non-suspendable transit passage (Art. 39 1(b) UNCLOS) applying to international straits used for international navigation (such as the Strait of Gibraltar, The Sound/Öresund, or the Strait of Otranto) does *not* include the freedom for submarine vessels to navigate under the surface (see e.g. Tanaka, 2015: 109).

<sup>327</sup> Ships and aircraft, however, must comply with Croatian laws and regulations, and Croatia can take enforcement action *outside* the Junction Area in accordance with international law.

<sup>328</sup> “Half-effect” refers to islands or coastal configurations being identified by a court or tribunal as to leading to distorting effects in maritime boundary delimitation, such as in the present case, and thus recognized as special circumstance (see e.g. Beazley, 1979: 154).

confirming the Bay of Fonseca judgement the Tribunal had set a precedent for maritime issues in the post-Yugoslav region in the Adriatic. Further, this decision confirmed the principle of *uti possidetis* and that there was no automatic switch to territorial waters after independence. By delimitating using *uti possidetis effectivités* the Tribunal did not apply maritime law, but a principle otherwise used for delimitation on land. The 80-20 partition of the Bay, according to Grbec, pretty much reflected an informal agreement from February 1991 by the authorities on the ground for policing purposes which was applied at least up until the date of independence.<sup>329</sup>

Oude Elferink (2017) is critical of the Tribunal's determinations, notably as for its treatment of Cape Savudrija as a special circumstance. First, in looking at the seaward projection of the southwest-facing part of the Croatian coastline south of Cape Savudrija, the Tribunal took "into account a part of the coast of Croatia that is *not* part of the *relevant* coast for the territorial sea delimitation" (2017: 6; emphasis added). According to Oude Elferink, "the limited maritime zone of Slovenia is not due to a notional cut-off effect resulting from the equidistance line [...], but the result of the limited dimensions of the Gulf of Trieste" with Slovenia being in a different geographical situation than Croatia "which faces the Adriatic proper beyond the Gulf of Trieste" (2017: 5-6).

On the Junction Area and its regime, Grbec (interview 10-07-2018) posits that it was clear that the Tribunal could not take away any territorial sea from Croatia. With the solution of the Junction Area still being Croatian territorial sea, but with high-seas freedoms and absolute passage, the Tribunal had "reconciled the battle of principles in maritime delimitation" which constituted a highly interesting precedent. Bankes (2017: 4) considers the solution of the Tribunal "certainly elegant" in terms of offering Slovenia *de-facto* high seas access, albeit without resource-related rights such as fishing or seabed exploitation, and keeping the limitation of Croatia's sovereignty in the Junction Area to a minimum.

Cataldi (interview 18-07-2018) posits that the Junction Area and its location are not free of controversy, mainly because it was not clear yet how Italy as the adjacent State should react. Italy was affected by that corridor solution, but not a party to the conflict. He goes on to question the need for a *sui-generis* corridor for Slovenia altogether as innocent passage was a far-reaching principle where the riparian State hardly had any means to stop a ship in its territorial sea anyway. Scovazzi (interview 03-08-2018) holds that the Tribunal's decision on the Junction Area was well explained, and that the Junction Area was the crucial point for Slovenia outweighing by far the territorial sea delimitation. Yet, with regard to the regime inside the Junction Area, the fact that Croatia retained the right to adopt legislation, but was not going to be able to enforce domestic legislation in the Junction Area, was "strange".

This author submits that the Tribunal's decision on the Junction Area is indeed fully in line with the mandate from the Arbitration Agreement. Further, there is some precedent-setting value in terms of, first, interpreting the term "junction", notably a new term in the jurisprudence of maritime delimitation, and, second, developing a regime for a junction corridor in the territorial sea of a State having to marry the principle of territorial sovereignty with the principle of freedom of navigation under the delicate circumstances arising from the Arbitration Agreement. It is not difficult to agree with Bankes (2017) that the Tribunal acted

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<sup>329</sup> Slovenia holds that there were two meetings between the police authorities of both countries on 29 January and 26 February 1991 in Pula where that agreement had been reached. Croatia denies that such agreement was arrived at. The arbitral tribunal, however, could not take on board any of these arguments as there are no agreed records of the Pula meetings (PCA Final Award, 2017: 278, para 909).

rather elegantly on that issue. The precedent-setting value of the junction regime must not be underestimated in the post-SFRY context. There are pending maritime disputes or provisional arrangements calling for a permanent solution between Croatia and Montenegro, and between Croatia and Bosnia-Herzegovina, both in the context of the two countries' EU accession process. This issue will be addressed in more detail in VIII.1.2 and VIII.2.5.

With regard to the application of the three-stage approach as the delimitation method for the territorial sea border (see V.2.2.3), it may be observed that the Tribunal appears to have applied the third stage, the (dis)proportionality test, in an obscure way through not applying the test expressly but somewhat implicitly (see also last paragraph of VI.3.5.2.2). This calls for two comments: First, the Tribunal's express mention of the three-stage approach referring to its application by the ICJ's recent 2014 *Peru v. Chile* case (Final Award, 2017: 311, para 999) in contrast with the effective non-use of the test by the Tribunal itself later on creates some confusion as to the application and the need of the proportionality test generally. Second, this leaves the (dis)proportionality test - where no court or tribunal has ever managed to produce objective criteria in a scientific manner - ever more contested (see also Tanaka, 2018). When every allowance is made for the fact that the proportionality test remains a sensitive issue, it would have been a good idea, for the sake of transparency, for the Tribunal to explain *why* it was not in a position to apply the test under the specific circumstances of *Croatia v. Slovenia*. It appears that simply no mathematical calculation was possible as no coastal lengths were identified in the first place where a ratio with the maritime areas apportioned could have been established.

### **VI.3.6 Follow-up to the Final Award**

There were a number of responses to the Final Award. For the analytical purposes of this study, it is useful to distinguish between the bilateral and the third-party level.

#### **VI.3.6.1 Bilateral**

On the day the PCA Final Award was handed down, the Slovenian Prime Minister Miro Cerar said at a press conference in Ljubljana:

“In accordance with the arbitration ruling we will first call on the Republic of Croatia to pursue joint implementation. To this end, [...] we will shortly [...] be sending the Croatian side a formal call for dialogue regarding fulfillment and implementation of the ruling within a reasonable time frame [...]

I expect Croatia to respond to this and for us to be able to agree on joint further steps regarding implementation. We have six months to prepare for implementation of the ruling. And we will resolve any possible complications with our neighbouring country in an amicable and responsible manner, in accordance with the principle of observing good neighbourly relations.” (Slovenian Prime Minister's Office press release, 29 June 2017)

At a press conference in Zagreb on the same day, the Croatian prime minister Andrej Plenković said:

“The first and most important message [...] is that today's arbitration decision does not bind us in any way, nor are we thinking about applying its contents. The second message is that Croatia adopted its position on the arbitration very clearly and unambiguously in parliament two years ago today [...]

For us, this arbitration has no legal effect, but we remain willing for talks with Slovenia on resolving the outstanding border issue and we don't expect Slovenia to take any unilateral steps [...]. Croatia, too, believes in peaceful ways of resolving disputes, including in arbitration, but only when it is clean, fair and in line with agreed rules.” (Croatian Prime Minister’s press release, 29 June 2017)

#### VI.3.6.1.1 Ljubljana meeting

On 12 July 2017, Cerar and Plenković discussed the way forward in a 40-minute tête-à-tête meeting in Ljubljana, agreed to keep in touch on the border issue, not to raise tensions, refrain from any unilateral acts, and to continue the dialogue at their next meeting agreed to be held in Zagreb in September. In the second part of the meeting, the delegations were tasked with preparatory work for the Zagreb meeting on the border issue and all other open bilateral issues (interview Miro Cerar, 15-10-2018, interview Andrej Plenković 28-06-2018).

Whilst there appears to have been some sense of de-escalation at the above bilateral Ljubljana meeting, things soon re-escalated, however. At a Council meeting of the Organization for Economic Co-operation and Development (OECD) in Paris on 08 September, Slovenia and Hungary objected to Croatia’s bid for OECD membership. Slovenia opposed the Croatian bid on the grounds that Zagreb was not implementing the arbitral award on the border (STA News, 08 September 2017).<sup>330</sup> Further, on 15 September 2017, Slovenia filed a lawsuit against the European Commission for granting Croatia the derogation right to use “Teran” on wine labels of Croatian Istrian origin, “Teran” originally being a Slovenian Protected Designation of Origin (STA News, 15 September 2017; European Commission news, 19 May 2017).

#### VI.3.6.1.2 New York incident

On the sidelines of the UN General Assembly in New York on 19 September 2017, Plenković and Cerar agreed to hold the bilateral follow-up meeting in Zagreb on 27 September. Two days later, however, Plenković, in his speech before the UN referring to Slovenia’s *ex-parte* communication during the arbitration procedure, publicly accused Slovenia of “undermining the rule of law” (Address at the 72nd Session of the General Assembly, 21 September 2017: 6).<sup>331</sup> That statement came only a few hours after a bilateral meeting in a very good atmosphere. Cerar was “shocked” at Plenković’s “impolite and unacceptable” wording, so that he cancelled his visit to Zagreb foreseen later that month (interview Miro Cerar, 15-10-2018).

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<sup>330</sup> Hungary’s objection related to Croatia’s arrest warrant vis-à-vis the CEO of Hungary’s energy company MOL (MTI news, 11 September 2017).

<sup>331</sup> The Croatian prime minister said the following: “We believe that disputes should be resolved through peaceful means and in conformity with international law. It is of the utmost importance that all international adjudications meet the highest legal standards and fully respect their relevant rules. Compromising the impartiality or independence of international adjudicators and tribunals, as was the case in the *terminated* Arbitration Process between Croatia and Slovenia, *makes their decisions legally void* and left Croatia with no choice other than to withdraw from the arbitration process. We consider that this example of *undermining the rule of law* is a discouragement for States considering third-party dispute settlement” (Address UN General Assembly Session, 21 September 2017: 5-6; emphasis added). One must keep in mind that the Tribunal, in its Partial Award, found that (i) Slovenia did violate the Arbitration Agreement, but not to such extent that a termination would be justified, (ii) the files introduced by the arbitrator appointed by Slovenia contained no new facts which were not already there at the record of the written or oral pleadings, (iii) the Arbitration Agreement remained in force, and (iv) that the recomposed Tribunal’s ability to render a Final Award impartially was unaffected (PCA Partial Award, 2016: 36-58; see also VI.3.4.3).

#### VI.3.6.1.3 Zagreb meeting

The atmosphere proved tense for some time, and after an exchange of letters in October, Cerar finally came to Zagreb on 19 December 2017. The border issue was the main topic, and Plenković had presented a draft paper to Cerar which aimed at the bilateral *de-facto* implementation of main elements of the Final Award, but with a few adjustments.

It is worth quoting from the press conference with questions and answers. Miro Cerar, the Prime Minister of Slovenia, said:

“I came to Zagreb today primarily with the intention of discussing this issue that is important for both countries, given that the deadline for the preparation of the arbitral award implementation expires very soon, on 29 December.<sup>332</sup> I understand the standpoint presented by my colleague, Mr Plenković that the arbitral award is not binding for Croatia, although I cannot agree with it, personally and as the Prime Minister of the Republic of Slovenia [...].

The only way forward for Slovenia is to respect the arbitral award and to implement it together [...] The arbitral award is an indivisible whole and must be respected as such. It covers two different dimensions, one being the sea which the Arbitral Tribunal delineated by a very clear line that does not require any particular implementation arrangements. Naturally, the situation is different on the land border, which calls for a formation of a joint mixed committee that will carry out the demarcation, naturally within the framework of the arbitral award, considering that there are still some minor adjustments to be made [...] Slovenia insists on the application of the arbitral award, to which we are obliged by international law, as well as European law, because we are also aware of the European aspect of the award.” (Government of the Republic of Croatia News press conference notes, 19 December 2017)

Andrej Plenković, the Prime Minister of Croatia, said:

“As far as 29 December [2017] is concerned, for Croatia it is a date like any other in terms of international law [...] In order for us to reach agreement from these two positions, we need to maintain discussions, reach an understanding on elements that are dividing us [...] Our message is: the border, regardless of what it will look like in the end, needs to be set in a way that is acceptable to both countries and that it can be internally approved by both parliaments with the appropriate majority vote [...] This requires a certain flexibility from both sides.” (Government of the Republic of Croatia News press conference notes, 19 December 2017)

Plenković referred to the draft legal framework he had handed over to his Slovenian counterpart on how to proceed with a bilateral solution. Croatia’s aim was to

“agree on a protocol regarding the state border which would include several key elements. One of them would concern the land border, another one the sea border, the third would concentrate on the navigation regime in Croatian waters [Junction Area] beyond the Bay of Savudrija, the fourth on forming a mixed [bilateral] committee which would address aspects of the identification and demarcation of the border, while the fifth would concern the manner in which such a document would be submitted to the parliaments of both countries and ratified in the end” (Government of the Republic of Croatia News press conference notes, 19 December 2017).

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<sup>332</sup> There is an implementation deadline for the Final Award of six months laid down in Article 7(3) of the Arbitration Agreement. The expiry date for implementation was thus 29 December 2017; see VI.2.3.

Both sides apparently had a different understanding of where flexibility should apply. Fundamentally, however, it must be noted that whilst it is clear that any implementation of the decision of any judicial body on the course of the *land* border requires minor adjustments and demarcation on the ground<sup>333</sup>, sea border delimitations usually are absolute, fixed by the coordinates from the court/tribunal decision and require no fine-tuning, unless the parties agree to negotiate an alternative solution.

At the actual tête-à-tête part of the 19 December Zagreb meeting, Plenković had proposed to negotiate a bilateral agreement that would take the arbitration award as a starting point. His approach for the *land* border was that minor adjustments of the course of the land border could indeed be achieved during the demarcation stage. Yet, as regards the *sea* border, he mentioned to Cerar that he needed an adjustment of the delimitation line inside Piran Bay. “We wanted to see something closer to the equidistance line” than the partition determined by the Final Award, and that due to domestic pressure “I have no room for manoeuvre here” (interview Andrej Plenković, 28-06-2018).

Yet, Cerar firmly rejected the proposal to put aside the arbitration award and negotiate a bilateral agreement. “That approach was unacceptable to us. With the arbitration award we have something binding in our hands. Moreover, the border was in its entirety – on land and at sea - defined for the first time in the history of the two countries. Going down the bilateral path again, we would have the incalculable hurdle of ratification in Sabor.” There had been not-so-fond memories in Slovenia of the 2001 Drnovšek-Račan deal the ratification of which failed in Croatia. “Why should we try that option again? You can have the most brilliant bilateral agreement on paper, but we would have no guarantees that it is actually going to be implemented” (interview Miro Cerar, 15-10-2018).

#### VI.3.6.2 Third party

The European Commission already made it clear at their meeting on 04 July 2017 that the arbitration ruling had some direct effect on the implementation of EU law, and that infringement proceedings may well be on the cards.

According to the minutes of the meeting, European Commission Vice President Timmermans said that

“although the Commission was not a party to the arbitration agreement, it *had played a facilitating role in the process which led to the creation of an arbitration panel between Slovenia and Croatia*. The Commission had unequivocally supported this arbitration process which should provide legal certainty in the interests of both parties and ensure the *effective implementation of EU law* [...]. The Commission had clearly expressed the hope that both parties would respect the decision taken by the Arbitral Tribunal, thereby putting a definitive end to the border dispute between them. Although the award of the Arbitral Tribunal would not be directly binding on the Union as it was not a party to the agreement or the arbitral procedure [...] it was likely that, in future, the European Court of Justice would be asked for a preliminary ruling on *the award’s effects on EU law*.”

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<sup>333</sup> It is standard practise to have a bilateral identification and demarcation body to remove impracticable features of the course of the border determined by an international court or tribunal, so that the border does not run through buildings, installations, or farmlands, for example (see also PCA Final Award, 2017: 109, paras 337-9; 114, para 357).

Regardless of the substance of the award, *the principle of international law that the decisions of an arbitral tribunal must be complied with and implemented was all the more important* because it continued to be relevant in the context of territorial claims and border disputes [...]” (minutes of the 2219th meeting of the Commission held in Strasburg, 04 July 2017: 20-1; emphasis added).

The Director-General of the European Commission’s Legal Service reported that

“the *arbitral award was the result of a valid international agreement entered into by Croatia and Slovenia* and supported by the Union. The Commission had witnessed this agreement in the context of the accession negotiations with Croatia and had *played a facilitating role* in the appointment of arbitrators of the Arbitral Tribunal. In particular, the Accession Treaty of Croatia referred explicitly to the use of an arbitration procedure to settle the border dispute.

While the border between the two countries was a bilateral issue, it nonetheless had a *direct effect on EU law, and therefore the Union had jurisdiction in respect of this matter*. Pursuant to Article 17 of the Treaty on European Union, the Commission oversees the implementation of EU law under the control of the Court of Justice of the European Union. Lastly, *EU case-law left no room for doubt as to the obligation of the Union and the Member States to implement public international law*, which it would be bound to demonstrate in this case. In conclusion, the Union could be requested to clarify the effects of the award on EU law in the event of infringement proceedings” (minutes of the 2219th meeting of the Commission held in Strasburg, 04 July 2017: 22-3; emphasis added).

European Commission Vice President Timmermans said the day after that he “expects both parties to implement [the ruling]” (EC Daily News, 05 July 2017).

Several EU Member States and the U.S. issued statements. The Benelux Prime Ministers stressed “the importance of the rule of law as the foundation upon which the EU is built [...]” calling “on both sides to respect the arbitration award in a constructive spirit” (Joint Benelux Statement on Croatia-Slovenia arbitration award, 04 July 2017). A German Foreign Ministry statement had said that “[...] preserving the integrity of international courts and tribunals is in the common interest of all States. EU Member States must play an exemplary role in this” (German Foreign Ministry press release, 30 June 2017). The British Embassy in Zagreb, upon request, gave a statement to the Croatian media saying that the UK “support[ed] the Tribunal process [and] the lawful resolution of disputes”, but that “the bilateral dispute was a matter for the Croatian and Slovenian Governments, which the UK wishes to see solved” and that “it is for the two parties to decide themselves how that is achieved” (UK Embassy Zagreb statement, 30 June 2017). The U.S. Embassies in Ljubljana and Zagreb issued a statement saying “we are not taking sides in this dispute. It is up to [the] two countries, both EU members and NATO allies, to resolve this bilateral issue, and we are hopeful they can do so” (U.S. Embassy in Slovenia Statement, 29 June 2017).<sup>334</sup> It is worth noting in this context that the entire Slovenian political and diplomatic elite had been engaged in “silent diplomacy” over the preceding months to highlight the importance of the arbitration ruling (interview Tanja Fajon, 22-11-2016; interview senior Slovenian civil servant, 10-07-2017).

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<sup>334</sup> An identical text featured in the statement of the U.S. Embassy in Zagreb on 30 June 2017.

### VI.3.7 Road to article 259 lawsuit before the CJEU

The Slovenian government subsequently finalized preparations for a lawsuit before the Court of Justice of the European Union (CJEU) against Croatia for violations of EU law due to non-implementation of the 2017 Final Award.

It is useful to recall that there are two types of infringement procedures in the EU institutional set-up: proceedings (i) initiated by the European Commission against a Member State mostly on the grounds of insufficient or non-implementation of existing EU legislation (Article 258 TFEU), or those (ii) launched by a Member State against another Member State for not respecting norms in EU legislation or the Treaties (Article 259 TFEU).

Whilst the Commission, as Guardian of the Treaties, has launched hundreds of infringement procedures against Member States, legal proceedings of one Member State against another one are indeed very rare. So far and excluding the *Slovenia v. Croatia* case, there have only been five judgements handed down in the history of the EC/EU.<sup>335</sup>

Art. 259 TFEU provides that an EU Member State must bring the complaint against another EU Member State before the Commission first. The Commission may or may not, within three months after the submission of the complaint, and after each of the parties concerned have submitted their position, issue an opinion and bring the matter before the CJEU. If the Commission does not produce an opinion, the Member State lodging the complaint may bring the matter before the Court directly after the expiry of the three-months deadline.<sup>336</sup>

Slovenia's complaint was sent to the Commission on 16 March 2018 (STA News, 16 March 2018) following a consultation of the Foreign Affairs Committee of the Slovenian Parliament. The Foreign Affairs Committee mandated both the filing of the complaint with the European Commission and, in case of non-opinion by the Commission, the subsequent filing with the CJEU (STA News, 13 July 2018). Processing the complaint, an in-camera hearing with government representatives of Slovenia and Croatia was held at the European Commission on 02 May 2018. The three-months deadline for a Commission opinion expired on 17 June 2018. To that end, the Commission, for tactical-political reasons, refrained from issuing an opinion on the Slovenian complaint<sup>337</sup> in order to stay neutral (information obtained from several European Commission Cabinet members; the decision was taken at a meeting of Cabinets'

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<sup>335</sup> France v United Kingdom (on the designation of protection zones in fisheries, judgement 04 October 1979 [C-141/78](#)), Belgium v. Spain (on the labelling of the designation of origin on bottled wines, judgement 16 May 2000 [C-388/95](#)), Spain v. United Kingdom (on the right to vote for Commonwealth citizens in Gibraltar, judgement 12 September 2006 [C-145/04](#)), Hungary v. Slovakia (on the prohibition of the President of Hungary from entering Slovakia, judgement 16 October 2012 [C-364/10](#)), and Austria v. Germany (on the planned German road-toll scheme for car holders [C-591-17](#)).

<sup>336</sup> Article 259 TFEU: A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union. Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.

<sup>337</sup> In the event of proceedings before the CJEU at a later stage, the Commission may well present an opinion - and did so, on the Court's request regarding the issue of Croatian inadmissibility motion. Any Member State interested in making a submission to a CJEU file can do so, too. See Art. 196 Rules of Procedure CJEU.



*Union and with the Republic of Slovenia as laid down in Article 4(3) TEU. [...] The Republic of Croatia is making it impossible for the Republic of Slovenia to implement EU law throughout its mainland and marine territory and to act in accordance with that law, and in particular in compliance with the secondary Union rules relating to the territory of the Member States (first subparagraph of Article 4(3) TEU).*

Third plea in law:

The Republic of *Croatia is infringing* Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on *the Common Fisheries Policy, and in particular the mutual access regime* laid down in Article 5 thereof and Annex I thereto. The regime, which applies to Croatia and Slovenia since 30 December 2017, grants 25 fishing vessels from each country free access to the other country's territorial sea, as determined [...] under the arbitration award. The Republic of Croatia is not permitting the Republic of Slovenia to exercise its rights under that regime and is thus infringing Article 5 of that regulation due to the fact that: (i) it is refusing to implement the mutual access regime; (ii) it is refusing to recognise the validity of the legislation adopted by the Republic of Slovenia for that purpose; and (iii) by systematically applying fines, it is denying Slovenian fishing vessels free access to the marine waters which the arbitration award of 2017 has defined as Slovene, and, a fortiori, free access to Croatian waters falling within the scope of the mutual access regime.

Fourth plea in law:

The Republic of *Croatia is infringing* Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a *Community control system for ensuring compliance with the rules of the common fisheries policy* and Implementing Regulation (EU) No 404/2011 of 8 April 2011. Croatian police patrol boats [...] are accompanying Croatian fishing vessels when they fish in Slovenian waters, thereby preventing Slovenian fishing inspectors from carrying out controls. At the same time, the Croatian authorities are imposing fines on Slovenian fishing vessels for unlawful boundary crossing and illegal fishing when they fish in Slovenian waters which Croatia claims for itself. In addition, Croatia is not sending Slovenia the data regarding the activities of Croatian vessels in Slovenian waters, as is required by those two regulations. Thus, *the Republic of Croatia is not permitting the Republic of Slovenia to carry out controls in waters under its sovereignty and jurisdiction and is not respecting Slovenia's exclusive jurisdiction as a coastal State in its territorial sea*, thereby infringing Regulation (EC) No 1224/2009 and Regulation (EU) No 404/2011.

Fifth plea in law:

The Republic of *Croatia has infringed and continues to infringe* Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (*Schengen Borders Code*). Croatia does not recognise the boundaries established by the arbitration award as a common boundary with Slovenia, is not cooperating with Slovenia to protect that 'external border', and is not in a position to guarantee adequate protection of that border, so that it is infringing Articles 13 and 17 of that regulation, and Article 4 thereof, which requires borders to be established in accordance with international law.

Sixth plea in law:

The Republic of *Croatia has infringed and continues to infringe* Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 establishing a *framework for maritime spatial planning*, which is to apply to 'marine waters' of Member States, as defined in accordance with the relevant provisions of the United Nations Convention on the Law of the Sea of 1982 ('Unclos') (Article 2(4) of the Directive). The Republic of Croatia rejects the arbitration award which has

established that delimitation of the boundaries and - on the contrary - includes Slovenian waters in its own maritime spatial planning: consequently, it does not allow for harmonisation with the geographical maps of the Republic of Slovenia, thereby infringing that Directive, in particular Articles 8 and 11 thereof.”

#### VI.3.7.2 Croatia’s motion of inadmissibility

On 21 December 2018, Croatia filed a motion with the CJEU with regard to Slovenia’s Article 259 lawsuit. The Ministry of Foreign and European Affairs communication reads as follows:

“[...] Croatia is asking the ECJ to dismiss Slovenia’s lawsuit as inadmissible, since the ECJ is not competent to decide on Slovenia’s demands in proceedings envisaged under Article 259 of the Treaty on the Functioning of the European Union given that the dispute between Croatia and Slovenia should be settled by applying international law and that the settlement of the dispute does not depend on the application of the EU law or its interpretation.” (Press release Ministry of Foreign and European Affairs of the Republic of Croatia, 21 December 2018)

Croatia appears to uphold its position that the border issue is *not* settled under international law as Zagreb does not recognize the Final Award of the arbitral tribunal for the reasons outlined earlier (see e.g. VI.3.6.1). Following that logic, one could indeed take the view that the CJEU would not be competent since a (prospective) settlement of the border dispute as such under international law has *prima facie* nothing to do with the application of EU law.<sup>340</sup>

#### VI.3.7.3 Brief analysis of the Slovenian claims and the question of admissibility

It is indeed true, that the EU Court of Justice cannot rule on the bilateral border dispute as such. This was a matter for the Arbitral Tribunal entrusted by both Parties through the Arbitration Agreement under international law. However, as Cataldi (2013: 3) notes, the EU plays a significant role in the Arbitration Agreement: The European Commission’s role as facilitator is positively acknowledged in the Preamble, and the European Commission’s contribution to the appointment of the members of the Tribunal is also considerable.

The Arbitral Tribunal has handed down a binding Final Award (see VI.3.1. and VI.3.6.2), the preceding Partial Award had cleared the issue of continuation (see VI.3.4.3), the judicial procedure is finished, and therefore the border dispute may be seen as legally settled (*res judicata*) under international law. It is established that the EU must respect international law which the European Court of Justice has expressly confirmed previously.<sup>341</sup> It is the *prima facie* view of this author that it appears that the Slovenian lawsuit is admissible and that the CJEU will want to look at the claims *related to EU law*.

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<sup>340</sup> However, even if the Final Award did *not* constitute a binding settlement under international law, there is a pertinent provision of EU legislation in so far as the mutual access to the territorial sea for fisheries purposes stipulated in Art. 5(2) of Annex I of Regulation 1380/2013 expressly refers to the decision of the arbitration procedure (the proceedings of which were ongoing by the time the Regulation was adopted). It would appear, therefore, that the above provision in Annex I constitutes a link to EU law rendering the settlement of the border mandatory for the application of the EU Regulation (see also second bullet point in VI.3.7.3). This issue was broadly discussed at the CJEU hearing on inadmissibility on 08 July 2019 (author’s field notes, 08-07-2019).

<sup>341</sup> See e.g. C-286/90, judgement 24 November 1992, para 9: “It must be observed [...] that the European Community must respect international law in the exercise of its powers and that [EU law] must be interpreted, and its scope limited, in the light of the relevant rules of the international law of the sea.”

- Whilst Article 2 TEU on the rule of law is of a rather general nature, the provisions in Article 4(3) TEU clearly stipulate the need for co-operation to implement and carry out the obligations from EU primary or secondary law. As Slovenia is obliged to carry out its obligations in its territory (as is Croatia in its territory), Croatia must not prevent Slovenia from doing so. Yet, Croatia appears to prevent Slovenia from its territorial application of EU law through not recognizing and not implementing the provisions on the course of the boundary laid down in the Final Award.
- As for the mutual access to territorial waters stipulated in the Fisheries Regulation 1380/2013, the relevant footnote of Article 5(2) in Annex I holds that the implementation of that regime is subject to the delimitation determined by the Final Award. As Croatia does not implement the boundary in its domestic legislation, it deprives Slovenia from access to Croatian territorial waters for fishing purposes. The same, however, holds vice versa. Article 5(2) of Annex I renders implementation of the Final Award mandatory. Technically, however, implementation must be carried out by both parties and obviously cannot work unilaterally.
- The obligation to control fishing activities is attached to the coastal State for the waters under its territorial sovereignty. Croatian police boats patrolling north of the Final Award delimitation line inside Piran Bay and in the territorial sea inspecting and fining Slovenian vessels<sup>342</sup> prevent Slovenia from carrying out control duties (relating to Regulations 1224/2009 and 404/2011) in their own territory.
- With regard to the Schengen Borders Code, Slovenia needs to prove the alleged inability of Croatia to protect the border and Croatia's refusal to cooperate. This would require particular instances to substantiate the Slovenian claim, a task which may be difficult to accomplish.
- As to maritime spatial planning, if Croatia was to include in its maritime-spatial-planning maps areas under the territorial sovereignty of Slovenia (delimited according to the Final Award), an overlap of areas would occur which would contradict the co-operation obligation of Article 4(3) TEU.

This author submits that it appears that the CJEU has jurisdiction and should be in a position<sup>343</sup> to establish a violation of several of the above provisions of primary and secondary EU law on the part of Croatia, and therefore order Croatia to stop the infringements by implementing the arbitration award for the purposes of full implementation of EU law.

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<sup>342</sup> The Slovenian police dealt with 737 incidents in Slovenian waters in Piran Bay between 30 December 2017 (after the expiry of the implementation period; see Art. 7(1) Arbitration Agreement and e.g. V.3.6.1) and 30 August 2018 involving 1151 Croatian vessels (622 fishing boats and 529 police boats; STA News, 08 September 2018; no news from HINA or Croatian authorities available). The Croatian police also inspected and fined Slovenian vessels fishing in the area claimed by Croatia, but attributed to Slovenia by the arbitral award (information obtained from a civil servant involved in the 02 May 2018 European Commission hearing with the Parties). A graver incident happened on 24 March 2019 when a Croatian police boat went 1.3 km across the (theoretical) equidistance line in the Bay coming very close to the town of Piran. According to Croatian police authorities, there was a problem with the vessel's navigation device (HINA and STA News, 27 March 2019).

<sup>343</sup> Notably, admissibility is currently pending. At the hearing on the Croatian inadmissibility motion, the Advocate General announced 06 November 2019 as the date for his Opinion (author's field notes, 08-07-2019). The Court is expected to decide on admissibility in the spring of 2020. Presuming admissibility, the Court is most likely to hold a hearing on the merits, perhaps by the summer of 2020 in which case the final judgement would be handed down by the end of 2020 or the beginning of 2021.

## **Concluding considerations**

The concluding analysis of this core Chapter is going to sum-up developments within each of the three phases. Corresponding to the research questions this study is based on, the analysis of the developments employs the process-tracing toolbox of *conflict issues*, *conflict dynamics*, *conflict management*, *actors in the conflict*, and *EU power issues* (see II.3.2).

For a comprehensive feedback to the individual theory strands of the analytical framework see Chapter VII.

### ► I. **Bilateral phase**

*The early phase: post-independence bilateral stock-tacking*

The *conflict issues*: As to the origins of the conflict, the (conflictual) dismemberment of Yugoslavia created a new conflict. Fundamentally, the independence of both countries in 1991, i.e. the visible beginning of the territorial end of the Socialist Federal Republic of Yugoslavia (SFRY), is the new conflict's starting point. Internal SFRY republican borders were going to become international borders. All of a sudden, what used to be administrative or cadastral borders became distinct territorial and, thus, also political borders. Perhaps largely unnoticed, the location of the new Slovenian border-crossing at Sečovlje-Plovanija was the first territorial point of contention between the two countries as early as June 1991, on the eve of the declarations of independence. This is an example of the situation on land. At sea, no formal partition by Republics whatsoever existed in the Yugoslav maritime space. Still, it was only in the spring of 1993 when sovereignty over Piran Bay and access to the high seas became a salient issue in the Slovenian parliament. The response of the Croatian parliament followed six months later, a matter for which allowance must be made for the fact that the country was busy with the fully-blown Homeland War over territory in large parts of its hinterland where Croatian State-building was yet to be completed. Nevertheless, the issues at stake in the border conflict with Slovenia were now plain to see. By the autumn of 1993, the dispute over Piran Bay and the maritime border as regards access to the high seas for Slovenia was fully established. Furthermore, the interests of the parties had been put on the table, too, and there was no doubt about the competing sovereignty claims of either side.

With regard to *conflict dynamics*, one can clearly talk of a stable initial phase where positions evolved, and a low level of intensity as positions were exchanged below the political level. The *conflict management* mode was purely bilateral, and the main setting was the technical level. A rich body of bilateral expert groups, the *actors in the conflict*, was up and running by then and going through a screening phase. The expert groups were able to identify the strips and spots along the border where the cadastral limits were not aligned. As a result, there was a solid account of the disputed sections of the common State border outlined in the Expert Group Report from December 1996. One may therefore posit a pragmatic stance taken by both sides towards the border issue in the early phase. After all, cross-border life is what matters to citizens on the ground where relations had been very close for many decades during Yugoslav times. However, the maritime border was not yet part of the bilateral talks. Still, any progress in terms of clearing up the substantive dispute over the land border proved difficult. This is why the expert group talks stalled in mid-1998. Croatia and Slovenia subsequently launched an attempt at third-party mediation by a former senior U.S. politician in the early summer of 1999. That move proved fruitless, however.

*The Agreement that never was: a fully negotiated bilateral settlement*

A fresh start on the bilateral level was made in early 2001. In fact, it was an effort to find a comprehensive bilateral settlement at the highest political level. In terms of *actors in the conflict*, therefore, it was a clear shift from the technical to the political level accompanied by a novel behavioural conduct of good-neighbourly spirit and a sense of de-escalation on both sides. Likewise, there was a new momentum of *conflict dynamics*, as fully-fledged negotiations between the heads of government must be seen as a very real opportunity to resolve the dispute. Indeed, in a remarkable move, by-passing traditional diplomatic channels of communication, the two prime ministers Drnovšek and Račan were sitting together determined to arrive at a fully negotiated settlement. It must be noted that political will and a special level of mutual respect and trust were indispensable prerequisites for that to happen. It remains a ‘chicken and egg’ question, however, whether Račan should have taken the opposition and the law-of-the-sea establishment on board much earlier to secure domestic support in Croatia for a bilateral deal, or whether the secrecy of the talks was the only way to arrive at an agreement at all in the first place. As for *conflict issues*, the maritime border, however, became even more contentious in the end. One may argue that the sea-border solution foreseen in the Draft Agreement was perhaps too far away from what the political elite in Croatia considered or perceived as legitimate at the time (and certainly would today), a notion of great sensitivity only three years after the full re-integration of the territories in Slavonia and the Krajina. In any case, the fact that both a novel and contentious solution of the maritime border failed, hardened the positions and rendered the conflict an intractable one, also leading to a new dead-lock in terms of *conflict dynamics*.

*Too good to be true: the failed effort to submit the dispute to the ICJ*

Over the following years there were no resolution efforts whatsoever. Thus, the *conflict dynamics* were in cooling-off mode. Only in 2007, the *actors in the conflict* being the heads of government (i.e. the highest political level), was the new (bilateral) effort to submit the dispute to the International Court of Justice (ICJ) made. Somewhat ironically perhaps, after the *ex-post* burial of the Drnovšek-Račan Draft Agreement in Croatia, one could witness a similar turn of events in Slovenia after the Bled Agreement. The 2007 accord between Janša and Sanader at first appeared to be a pragmatic and workable agreement. After all, it would have been very difficult to go down the path of bilateral negotiations again, where there was hardly any room for face-saving manoeuvres keeping in mind the failure of the 2001 Draft Agreement. So, for a moment at least, the new *conflict management* mode was a bilaterally and voluntarily agreed submission to third-party resolution. However, the new *conflict issue* now was the terms of submission to third-party resolution. It turned out, during the technical-level drafting stage of the mandate for the Court, that a submission to the ICJ which - in its deliberations on the merits - would be restricted to international law rather than equitable principles, was apparently an untenable approach for the Slovenian government. This was because it seems Slovenia considered it necessary to have room for equity in order to achieve access to the high seas. At the end of the day, the task of agreeing on a mandate for a court does require bilateral agreement and that is where the process yet again stalled. As a result, the *conflict dynamics* mode yet again levelled up. It remains obscure, however, to what degree the focus of attention of the Slovenian side may have already shifted to the ‘golden opportunity’ of using the leverage of veto power (that decision being taken in June 2008) in Croatia’s EU accession negotiations, which were going on in parallel, a vital *EU power issue* indeed.

## ► II. Croatia's EU accession negotiations

*Now or never: forced delegation of conflict management in a hybrid line-up*

It was in the autumn of 2008 that Slovenia transferred the bilateral border dispute onto the EU stage through Ljubljana's veto during Croatia's accession negotiation. With regard to *conflict actors*, the technical level (the Council Working Group on Enlargement COELA) was in the driving seat. As for the new *conflict issue*, the prejudging maps in the Croatian accession negotiation documents were the official reason. The real interest of Slovenia, however, was to solve the border dispute ahead of Croatian EU accession. It appears fair to say that this is the first instance in the history of the border dispute that the official claims and the real interests of a party to the dispute diverge. In terms of *EU power issues*, also the first time that they appear, inserting a bilateral issue into EU accession negotiations amounted to nothing less than linking the border dispute to the EU *acquis* despite the fact that it had nothing to do with the *acquis*. As a result, a bilateral (territorial) issue with a Member State became an add-on to the (political) conditionality of EU accession for the first time ever. Such was the new *conflict issue* likewise. With regard to *conflict management*, the third-party role entered the scene. Within the remit of the intergovernmental level, the French EU Council Presidency was facing, at first hand, the unique circumstances of a Member State using its status as a Member State vis-à-vis a Candidate Country, i.e. blunt blackmailing, and this proved to be an unsurmountable task at the technical level. From a *conflict-dynamics* point of view, the level of escalation may be seen on a new all-time high as it was no longer a bilateral conflict, but also one that had directly affected the EU level.

The following phase marks a completely new line-up in terms of *conflict management*. The EU's Enlargement Commissioner Olli Rehn took over by the beginning of 2009, stepping into what was *terra incognita* in the history of EU accession negotiations: clearing the accession process of a bilateral issue by means of third-party dispute resolution. To be sure, it was a hybrid set-up of third-party mediation and bilateral negotiating. The Commission itself took on the role of mediating third party in the first place. After an unsuccessful attempt at soft mediation, Rehn and his legal team managed to produce drafts of the later Arbitration Agreement seeking to take on board the vital interests of both Slovenia and Croatia. The *conflict issue*, very much like in the post-Bled phase around 2008, was the terms of the mandate for the third-party judicial body. The first of two crucial issues, the *task of the arbitral tribunal*, i.e. to secure access for Slovenia to the high seas whilst preserving classical approaches of international law for the maritime border and for the land border, the Commission managed to hammer out with great expertise in the first half of 2009. To that end and in terms of *actors in the conflict*, one can say with some accuracy that it was the European Commission who was running the management of the conflict, and that it was running it at its own initiative. As for *conflict dynamics*, one may posit that the conflict was on a stable level whilst it was, by and large, being treated constructively also by Croatia and Slovenia over the first half of 2009.

After a brief stalling of the process at the beginning of July 2009, the finalising phase, with regard to *conflict management*, saw a re-bilateralisation of the negotiations skilfully facilitated by the Swedish EU Council Presidency. The second crucial development, widely perceived as a game-changer in terms of a great face-saving and de-escalating opportunity of *conflict dynamics*, was the *new sequencing* of (i) Croatian accession and (ii) the start of the arbitration procedure. It appears fair to say that it was the reversal of the original order, i.e. the lifting of the Slovenian veto and the idea to have the Croatian Accession Treaty signed first before starting the actual arbitration procedure, which rendered the finalisation of the Arbitration

Agreement possible. In other words, the new sequence solved the *conflict issue* (delaying Croatian EU accession until the end of a future arbitration procedure) of the second drafting stage of the Arbitration Agreement. It is important to note that this was predominantly achieved in a bilateral manner, so the *conflict actors* were the two parties to the conflict. Indispensable prerequisites were the high level of mutual trust both between Kosor and Pahor and between the prime ministers' negotiator-advisors. Nevertheless, one must recall that the unilateral declaration upon Croatian ratification of the Arbitration Agreement was a sign of the asymmetry in the power relationship between Croatia as a Candidate Country and Slovenia as a Member State at the time, in particular in the context of the great unease with and enormous conflictual potential of territorial issues in Croatia. *EU power issues*, on their part, were successfully dampened, and it seemed that the conflict was finally going to be contained by the conclusion of the Arbitration Agreement.

► **III. Arbitration procedure and follow-up**

*To hell and back: the arbitration procedure heavily bruised but alive*

With regard to *conflict dynamics*, it is easily forgotten that the arbitration procedure had a smooth start indeed. The arbitral tribunal was formed in a constructive and timely manner on the bilateral political level at the beginning of 2012. The subsequent written submissions for the judicial procedure were comprehensive also containing replies to the counter-memorials. Equally, an extensive two-week hearing provided the parties with ample opportunity to raise any point that they wished to raise. In terms of *conflict issues* and as a result, not only the Tribunal but also the parties themselves were fully in the picture of all arguments and real interests of the parties presented for the Tribunal's deliberations on the merits. One can say with some accuracy, too, that the *conflict management* was firmly in the hands of the Arbitral Tribunal as the third-party judicial body with the parties submitting their claims in written form and during an extensive hearing.

The summer of disruption saw the arbitration procedure implode at the end of July 2015, which left the actual proceedings heavily tainted politically and moved the *conflict dynamics* to yet another peak. As collateral damage, the events affected the reputation of international arbitration as such, still a major and successful dispute settlement tool, at least temporarily. To be sure, it may be morally questionable and perhaps unethical, and certainly unlawful vis-à-vis domestic Slovenian law, to tap into the communication of government actors, all the more so from a State that one is supposed to enjoy good-neighbourly relations with. Then again, it simply goes against the express confidentiality provisions of the arbitration procedure, and is therefore unlawful, to engage in *ex-parte* communication (the new *conflict issue*) with a Tribunal member in the first place. This piece of illegal communication resulted in unprecedented outrage among the political elite in Croatia, leading to the unanimously adopted Sabor resolution asking the government to leave the arbitration procedure, which it did. As regards *actors in the conflict*, the entire political level in Croatia was one dominating player (the government being in the driving seat, of course) in late July 2015, another one being the arbitrator appointed by Slovenia and the Slovenian Agent and their revealed pieces of communication from November 2014 and January 2015 (*ex ante*, as it were). The third actor was the Arbitral Tribunal which had to assess the implications of the Croatian *de-facto* withdrawal for the arbitral proceedings.

The legal arguments of the Croatian side, however, were not very strong. The weakest of them was to challenge the jurisdiction of the Arbitral Tribunal to look into the termination

request. It is a well-established fact that international courts and tribunals do possess the *compétence de la compétence* to decide themselves not only about the merits of a case, but also on procedural matters. The fact that Croatia no longer participated in the arbitral proceedings followed the political logic - and indeed the express request - of the Sabor vote, but not the legal reality. In addition, the reconstituted Tribunal, which no longer had party-appointed arbitrators but five neutral members, had increased the Tribunal's independence and legitimacy. In terms of *conflict issues*, the new point of contention now was the gravity of Slovenia's violation of the Arbitration Agreement. Croatia (notwithstanding its legal argumentaire) considered the violation as fundamental and absolute thus legitimising Zagreb to terminate the Arbitration Agreement and the arbitral proceedings, whereas the Tribunal, in its Partial Award in June 2016, had to assess and did assess the impact of Slovenia's *ex-parte* communication from a strictly legal-procedural point of view for which it had jurisdiction.<sup>344</sup> From a *conflict-dynamics* point of view, the stance had hardened further by the time the Final Award was handed down in June 2017. Croatia had boxed itself into a corner where no face-saving move was possible despite the fact that the substantive contents of the Award was not unfavourable to Croatia. The military installation at Sveta Gera was going to 'come home', the status of the Dragonja strip on the left bank of the river was confirmed to be Croatian, and the maritime border departure from the equidistance line in favour of Slovenia must be seen as modest. The partition inside Piran Bay appears to properly reflect its use in 1991, and even the corridor regime inside the Croatian territorial waters for the purposes of providing unhindered communication between the high seas and the Slovenian territorial sea can be regarded as very close to the Croatian position set out in the written submission of the arbitration proceedings. Yet, the sobering news was that, after the arbitration procedure that was supposed to settle the matter, the border conflict was more intractable than ever before.

#### *Lifting it up: bilateral conflict hits EU implementation*

It is difficult to say whether any of the parties seriously believed that efforts to achieve bilateral implementation of the Final Award would bear fruit. In terms of *conflict issues*, the largely contradicting real interests of the parties were as follows: the Slovenian government had an internationally binding Final Award at hand, which in its substantive points was not much more than the access to the high seas which had been *de-facto* secured by the Arbitration Agreement in the first place. The Croatian government, for its part, needed to avoid at all costs any one-to-one implementation of the (not so unfavourable) Award for the principle reason that it could not recognise the arbitral award as such due to the unanimous 2015 Sabor vote. In the period between July 2017 and March 2018, the *actors-in-the-conflict* line-up was bilateral again searching for implementation of different kinds. The parties were in touch, although the road was rather rocky. Nevertheless, it is fair to say that the *conflict dynamics* were somewhat dampened during that period.

Fundamentally and further to the real interests of the parties, the consideration of the political costs of direct implementation apparently carried more weight in Zagreb than the benefits of a once-and-for-all settlement of the border with the EU neighbour Slovenia. Somewhat remarkably, this decision must yet be seen against the background of Croatia's upcoming application to join the Schengen area and the Eurozone for both of which Slovenia's support is needed due to the unanimity requirement in Council for those areas. In a similar vein, the

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<sup>344</sup> As the President of Croatia very recently stated with regard to the Partial Award of the re-constituted Arbitral Tribunal: "We could not accept that." (interview Frankfurter Allgemeine Zeitung, 27-02-2019). For a comprehensive analysis of the role of legitimacy or normative considerations on the part of Croatia see VII.2.2.1 and VII.2.2.2.

political costs for any Slovenian government to sustain bilateral talks with Croatia on implementation that were likely to lead nowhere seem to have been calculated as too high. It does not take a deterministic view, therefore, to suggest that there was no alternative for Slovenia other than going to the European Court of Justice to seek implementation of the arbitration award. That decision, however, rendered the matter a fully-fledged *EU power issue*. In fact, the Slovenia-Croatia border dispute had now become a question of application of EU law, an issue perhaps unthinkable when it first appeared on the EU stage in autumn 2008. With regard to *conflict management*, the CJEU got involved at the request of one of the parties. It is crucial to note, however, that the European Court of Justice cannot look into the substantive decision of the Arbitral Tribunal (which, in the view of this author, is a definite settlement of the case under international law), but will assess the Slovenian claims of failure to fulfil obligations of EU law on the part of Croatia.<sup>345</sup> To that end, the *conflict issue* here (between Croatia and Slovenia) is whether the implementation of the Final Award is mandatory to fulfil the obligations of applying EU law.

Whilst it is difficult to forecast the timetable of the Court, it appears reasonable (presuming admissibility) to expect the CJEU to hand down its judgement by the end of 2020 or the beginning of 2021. The Court held a hearing on the Croatian inadmissibility motion at the beginning of July 2019, and should it decide that the Slovenian claim is at least partly admissible, there will be another hearing on the merits, presumably by mid-2020. This author takes the view that the outcome of the arbitration procedure constitutes a final determination of the border between Croatia and Slovenia. Nevertheless, commonplace minor adjustments at the implementation/demarcation stage will be required. However, to what extent the EU Fisheries Regulation on mutual access to territorial waters and the EU Regulations on control rules, or, more generally the territorial application of EU law, are issues where the Court would see Croatia in violation of EU law as it prevents Slovenia from fulfilling its obligations on its own respective territory, remains to be seen.

How all this feeds into the need for action will be addressed in the policy recommendations in the concluding Chapter VIII preceded by the theory findings in Chapter VII.

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<sup>345</sup> Looking at the merits of the case would entail the Court dismissing fully or partly the Croatian inadmissibility motion in the first place. The hearing on inadmissibility took place on 08 July 2019 and the decision is pending as this thesis went to publication.

**VII. Conclusive theory findings**

This Chapter draws on the empirical findings and the implications on existing strands of conflict theory picking up on the developments of the border conflict discussed in the previous Chapter.

**VII.1 Conflict analysis and management**

The following sections discuss the preceding Chapter’s key findings from the process of managing the border dispute between Slovenia and Croatia. The aim is to allow for some feedback to existing theory approaches. It must be noted, however, that the matter under scrutiny is a *qualitative within-case* or *single-case* study (see III.1). Any analysis, therefore, is *hypothesis-generating* in terms of theory-building within the remit of a single-case study, and cannot be seen as theory-testing.

As posited in many theory strands, the role of third parties is crucial in the management of a conflict (Azar, 1990; Bercovitch and Houston, 1996; Burton, 1990; Fisher et al, 2012; Galtung, 1996; Keohane et al, 2000; Zartman and de Soto, 2010). We shall look at the individual frameworks in turn.

**VII.1.1 Participation and communication aspects of third-party involvement**

Recalling John Burton’s three-component model

- *participation* by the parties,
- *communication* between the parties, and
- *third-party involvement* in terms of decision-making power (Burton, 1990: 188-9),

there are three quasi-default types of relevance here.

First, the *bilateral* approach of direct *negotiations* (1990: 191-2) is categorized as follows: Full participation of the parties and a high level of interaction with third-party involvement being close to zero.

Participation: -----  
 Communication: -----  
 Third Party: -

Second, for *mediation* Burton (1990: 191) posits some substantial participation of the parties and a leading role for the third-party. Communication can be assumed to take place more between the parties and the third-party, but also between the parties:

Participation: -----  
 Communication: ----  
 Third Party: -----

Third, quasi-judicial *arbitration* Burton (1990: 190-1) defines as communication between the parties being very low, and participation being substantial through involvement in the nomination of the panel members. The third-party role is “decisive”.

Participation: -----  
Communication: -  
Third Party: -----

For the purposes of third-party conflict management of the Croatia-Slovenia border dispute, we must distinguish between three phases: (i) the drafting of the Arbitration Agreement; (ii) the arbitral proceedings as such, and (iii) the post-arbitration phase, at times all of the periods intersected by direct bilateral negotiations.

#### VII.1.1.1 Genesis of Arbitration Agreement

When Croatia's EU accessions negotiations were held hostage by the Slovenian veto as from October 2008, the French EU Council Presidency took on the third-party role of a mediator (VI.2.2.2). They were trying to defuse the conflict at ambassador level which is to say there was no externalisation of the conflict management. The participation of the parties can be assumed as being solid, and the same can be said of the level of communication, whilst it is worth noting that the communication was mostly trilateral, i.e. meetings of the two conflicting parties Slovenia and Croatia with the French Presidency who would subsequently draft an exchange of letters. The Presidency would explore possibilities with each of the parties in turn, come back with a new draft in a trilateral meeting, discuss it there, then contacting the parties again in turn.

The Burton model may thus be differentiated one step further in so far as the feature "communication" must distinguish between communication (i) *between the parties* to the conflict themselves and (ii) *between the parties and the third-party*, whilst communication between the parties bilaterally was virtually at zero.

Participation: -----  
Communication between conflicting parties: -  
Communication with third party: -----  
Third Party: -----

This observation largely holds also for the drafting stage of the Arbitration Agreement. In the first phase after the European Commission had taken over in January 2009, Rehn explored his initial idea of mediation by an Expert Group (see VI.2.2.3). His role was that of a classical mediator talking to the parties in turn before presenting a (new) proposal. When Rehn, after two more drafts, learnt that an Expert Group the first core elements of which he had proposed by the end of January 2009 was not far-reaching enough to solve the dispute compared to a judicial procedure, he presented his first proposal for an arbitration procedure proper at the end of March 2009.

The role of the European Commission as a third party intensified with the drafts for a full Arbitration Agreement aiming at establishing a judicial ad-hoc arbitral tribunal ("Rehn I" April 2009, "Rehn II" June 2009). The Commission, drawing on the expertise of its Legal Service, was in the driving seat. The parties came back with replies to the Commission but were not in touch directly with each other bilaterally. The feedback to the Commission drafts was side-lined by trilateral meetings (VI.2.3-VI.2.4).

After the temporary deadlock in July 2009, the line-up changed. The Commission had largely withdrawn from the mediating third-party role, and the *travaux préparatoires* on the finalisation of the Arbitration Agreement were actively carried on by the parties to the conflict bilaterally with the Swedish EU Council Presidency skilfully facilitating in the background. The Commission was constantly kept in the loop by the Presidency, however. There were a number of bilateral meetings, two on the level of the prime ministers and many at expert level (see VI.2.5). The revised component model for the phase between July and early November 2009, when the Arbitration Agreement was signed, may therefore be seen as follows:

Participation: -----  
 Communication between conflicting parties: -----  
 Communication with third party: -----  
 Third Party: -----

VII.1.1.2 Arbitration procedure

The Commission continued its role of a third party for a little while when the timelines for the arbitration procedure started triggered by the signing of the Croatian EU Accession Treaty in December 2011. The Commission, entrusted with establishing a list of candidates for the three jointly appointed members of the arbitral tribunal, hosted a meeting with the two foreign ministers in January 2012. Whilst two of the candidates were appointed by identical preferences of the parties right away, the parties agreed on the third tribunal member purely bilaterally (see VI.2.6) and subsequently notified their choice to the Commission. This is what the modified Burton model for that stage would look like:

Participation: -----  
 Communication between conflicting parties: -----  
 Communication with third party: -  
 Third Party: --

With regard to the arbitral proceedings proper in the first phase between April 2012 and July 2015, it can be observed that the parties not only jointly appointed three members and one party-appointed member each, a factor perhaps somewhat overrated by Burton in his determination of participation of the parties, but actively engaged in the written submissions and the oral hearing. In fact, the parties submitted their memorials, counter-memorials, and replies, followed by oral pleadings in an enormous two-week hearing (see VI.3.2). It is suggested here that the two-fold opportunity of replying to the other party’s arguments may be seen as both communication between the parties and communication with the third party. It is not difficult, therefore, to adjust Burton’s model on arbitration as follows:

Participation: -----  
 Communication: -----  
 Third Party: -----

The phase between the major perturbation of the arbitration procedure through the *ex-parte* communication by Slovenia (see VI.3.3) and the Final Award took on a notably different shape, however. Croatia left the arbitral proceedings, and the Tribunal arranged for a new round of submissions and an additional hearing in March 2016 to assess the legal consequences of the Croatian termination request. Only Slovenia took part in that hearing

(VI.3.4). The Tribunal issued its Partial Award establishing that Slovenia had violated the Arbitration Agreement, but not to the extent that a termination of the proceedings was justified, and that the reconstituted Tribunal would look at the merits of the case *de novo*. The Final Award was issued in June 2017 (see VI.3.5). Therefore, this is what an amended Burton model for the second phase of the arbitration procedure would look like:

Participation Slovenia: -----  
 Participation Croatia : -----  
 Communication Slovenia : -----  
 Communication Croatia : -----  
 Third Party: -----

### VII.1.1.3 Post arbitration

From the immediate aftermath of the Final Award (July 2017) until the end of that year, the parties were in touch again bilaterally exploring ways of implementing the gist of the Final Award (VI.3.6.1) which translates into the following model:

Participation: -----  
 Communication between conflicting parties: -----  
 Third Party: -

The subsequent filing of the lawsuit considerably changed the constellation. After it had become apparent that any further bilateral attempts would hardly be successful, the Slovenian government took the decision to initiate Article 259 proceedings against Croatia. In procedural terms, the complaint had to be filed with the Commission first who held a hearing on the legal aspects of the Slovenian claim. It is worth noting that Slovenia *and* Croatia took part in the hearing which related to EU aspects only. As the Commission stayed neutral in not issuing an opinion itself, Slovenia filed the lawsuit before the CJEU directly. This leads to the below ‘Burton plus’ model:

Participation: -----  
 Communication between conflicting parties: -  
 Communication with third party (Commission): -----  
 Third Party (Commission): ---

For the court proceedings before the CJEU, written submissions were filed and a presumed hearing on the merits (a hearing on admissibility was already held; decision pending) is going to outline the parties’ positions. The modified Burton model looks as follows:

Participation: -----  
 Communication between conflicting parties: --  
 Communication with third party (CJEU): -----  
 Third Party (CJEU): -----

In summary, there are some new or more fine-grained elements as to the communication and participation aspects which merit an adjustment of the Burton (1990) model (see above). Whilst the classical three-component model as such is an appropriate toolkit for any conflict

line-up as it neatly catches the vital elements of conflict management, it appears that the following considerations for the present case-study need to be taken into account:

(i) The Slovenia-Croatia case goes beyond a classical bilateral issue and can thus not be seen in an isolated fashion. The two parties to the conflict are presently both members in the same international organisation (in this case the regional organisation EU). However, at the time the Arbitration Agreement was drafted (see VII.1.1.1), one of the parties was already a member, whilst the other party aspired to the club. That context made for a hybrid conflict-management environment: the classical nation State line-up plus the international/regional organisation (which in itself is a blend of inter-governmental and supranational elements<sup>346</sup>) with its particular customs and social norms. This is to say that the circumstances in 2008/2009 considerably differ from the Croatian-Slovenian bilateral constellation between 1991 and 2007. The third-party from the regional organisation renders the line-up trilateral, a completely new experience for any of the parties. As a result, a more multi-faceted pattern of communication develops, bilateral (Croatia/Slovenia amongst themselves, or one of them respectively with the third party European Commission or Council Presidency), or trilateral (all three parties are in touch), and there are no fixed rules as to who communicates with whom at what time. Both communication and participation develop and flow organically, and are at the same time very volatile.

(ii) The level and types of communication during a judicial procedure (see VII.1.1.2) tend to be underrated in the original Burton model. In an arbitration procedure, there is a robust level of formal and informal communication during the appointment phase for the tribunal members. The Croatian-Slovenian bilateral approach during that (short) phase appears to have been very positive with agreements reached in a good-neighbourly spirit and in a timely fashion. During the phase of the written submissions, communication was substantial. If every allowance is made for the formal nature of the channels of communication during judicial proceedings, the parties' memorials were not only sent to the judicial third party, but also to the other party to the conflict, and they produced counter-memorials and replies to the counter-memorials. Those documents usually are confidential in arbitral proceedings, and so it was in the Slovenia-Croatia case. Yet, in a judicial procedure before the International Court of Justice (ICJ), the memorials and replies are made public after the final judgement, so one could posit an additional layer of communication vis-à-vis the public domain. During a hearing - the Croatia-Slovenia one before the Arbitral Tribunal lasted for two weeks - the level of communication and also participation is very high and comprehensive, particularly with regard to the third-party at which the pleadings are directed and which can ask questions to the conflicting parties.

In the framework of conflict management, both the communication aspect in its type or intensity and the role of the third party, are closely related to another aspect of the processing of conflict, the issue of conflict dynamics.

## VII.1.2 Conflict dynamics

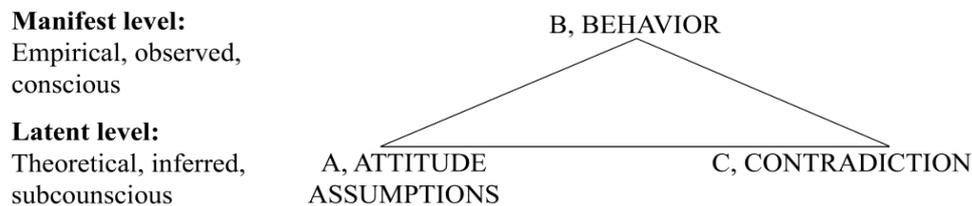
Johan Galtung (1978; 1996; 2000) as the main proponent of the *dynamic* aspect of conflict posits that every conflict has its own life-cycle and that "solutions' are not final resolutions or dissolutions, only a more or less stable equilibrium in the life-cycle of a conflict" (Galtung,

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<sup>346</sup> This holds not only holds for the EU, but also for other regional organizations, such as the OAU or ASEAN, or for multilateral organizations such as the WTO or ICAO.

1996: 99). According to his *conflict triangle*, dynamic flows can be traced in all of the possible six directions (see II.1.3; fig. 22 below):

Figure 22: The Conflict Triangle (modelled after Galtung, 1996: 72)



### VII.1.2.1 Latent versus manifest stages (protraction/relaxation)

The border dispute between Croatia and Slovenia can be assessed against the background of the notion of the potential dynamics with regard to protraction or relaxation. The distinction between the *latent* and *manifest* level of conflict may serve as a further criterion.

#### VII.1.2.1.1 Bilateral

An early stage of the conflict back in 1993 was the Memorandum on Piran Bay by the Foreign Affairs Committee of the Slovenian parliament, when it asserted the maritime claims for the first time. It expressed the claim of full sovereignty over the Bay plus access to the high seas. Together with the response of the Croatian parliament renouncing the Slovenian claim and advancing the equidistance line in the Bay and in the territorial sea instead, this was a moment when the contradiction of goals became apparent for the first time. However, the declaratory nature did have no practical effect for the time being. Clearly, contradiction and attitude were present, but not behaviour which would have made for a *manifest* or full conflict in Galtung's terms.

It may be argued that the major undertaking of negotiating a bilateral agreement in 2001 ("Drnovšek-Račan" Draft Agreement; see VI.1.4) has shifted the conflict from the *latent* to the *manifest* level. The two parties were ready to face non-attainment of their mutual goals. At such point, according to Galtung, the parties can either go for anger, hatred, or "verbal or physical violence" (2000: 13) or, positively, resort to dialogue and cooperation (1996: 71). The parties chose the latter option, and in a spirit of collaboration and good-neighbourly relations arrived at a fully negotiated solution which, however, failed due to unsurmountable opposition in Croatia. As a result, one may upgrade the conflict from 'solved' to "manifest".

From a general point of view, as there was never any use of force, let alone warfare, it appears fair to say that in the border dispute between Slovenia and Croatia every time there were direct negotiations between the parties, the conflict became a manifest conflict in its positive fashion, i.e. a real problem-solving phase emerged. This can be said of the 2007 Bled Agreement with the principle aim of referring the dispute to third-party dispute resolution, the International Court of Justice (ICJ). That exercise failed a little later when the task was to negotiate the terms of the mandate. Slovenia put alternative options for third-party resolution

on the table (see VI.1.5), that move itself being a matter of shifting the conflict from a latent to a manifest level.

As for the second half of 2009 the parties were back in the bilateral mode (with soft facilitation by the Swedish EU Presidency) finalising the drafting of the Arbitration Agreement. It is observed that the conflict level shifted down to perhaps ‘latent minus’ after the implosion of “Rehn II” in early July when everything had been on fully manifest (see below).

A certain degree of cooling-off can also be pinpointed for the phase between July and December 2017 when the two parties were in bilateral touch on whether and how to implement the Final Award (see VI.3.6.1). When every allowance is made for the apparent non-feasibility of reconciling the positions of ‘full implementation is what it takes’ (Slovenia) and ‘no recognition of the Award, but let’s explore ways of agreeing on something’ (Croatia), that phase may qualify for shifting from manifest to close to latent. It appears useful in this regard to coin a new sub-category “*manifest relaxed*”.

#### VII.1.2.1.2 Third-party involvement

Looking at the drafting stage of the Arbitration Agreement 2009, the third-party role of the Commission was strong in the first half of the year when, after a first phase of exploring the possibility of ‘soft mediation’, the Rehn I and Rehn II drafts were developed and discussed with the parties. Although the Commission had a firm grip on the management of the conflict as such, one may still opt for “manifest” when describing it in terms of the Galtung levels. Whilst there was a fierce battle over the terms of the Arbitration Agreement in the spheres of diplomacy, it would still appear that there was a half-stable “equilibrium” in Galtung’s terms except for the situation in July 2009 when there was a stalemate after the presentation of Rehn II, and the Commission suspended its efforts for the time being (see VI.2.4) resulting in a high degree of protraction. In terms of another new sub-category, “*manifest protracted*” appears to be a workable term here.

The subsequent phase (from the Kosor-Pahor meeting at the end of July to the signing of the Agreement in early November 2009) may qualify as “*manifest relaxed*” as a sense of relaxation was coming back to the scene due to the bilateral political will to resolve the crisis and a build-up of mutual trust, not least skilfully supported by the Swedish EU Council Presidency (see VI.2.5.1 and VI.2.5.2).

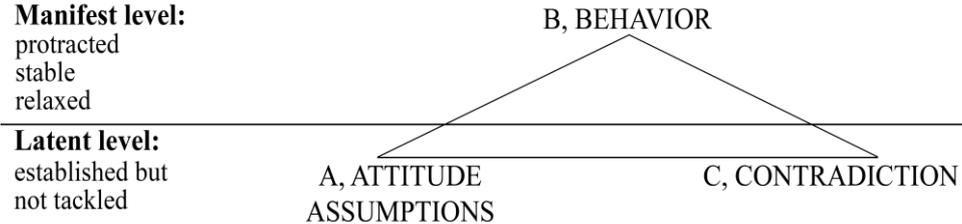
In retrospect, it is worth noting that towards the beginning of the arbitral proceedings when the parties had agreed on the three neutral members of the Tribunal members in a remarkably smooth manner in mid-January 2012 (see VI.2.6), the degree of relaxation seems to have been the most advanced ever in the conflict at the time of writing. The subsequent phase of the written submissions and the hearing may have increased the parties’ awareness that there is quite some gap to bridge with regard to their positions, and the arbitration environment provided for a civilized conduct using the power of the argument. That level may be newly termed “*manifest stable*”.

It will not be difficult to posit that the implosion of the arbitration procedure in the summer of 2015 (see VI.3.3) may be designated “manifest protracted”. The same holds for the entire second phase of the arbitration procedure including the March 2016 hearing on the implications of the Croatian termination request (Croatia did not take part in the hearing), the

Partial Award in June 2016 (see VI.3.4), and the Final Award in June 2017 which Croatia did not recognize (see VI.3.5).

In light of the above deliberations, Galtung’s Conflict Triangle, whilst still exemplary (i) in its assumptions on *contradiction*, *attitude* and *behaviour*, and (ii) through the distinction between *latent* and *manifest* conflict, requires adaptation for the purposes of what could be termed “diplomacy conflict management”, i.e. in a context where there is *no* armed conflict, but where the conflict at issue has been long-standing. Such model would look like as follows:

Figure 23: Diplomacy conflict management (Conflict Triangle *revisited*; based on Galtung, 1996: 72)



**VII.1.3 Voluntary versus coercive dispute settlement**

Burton (1990) who developed the useful three-component model as for communication, participation and the role of the third party (see VII.1.1), also takes issue of the distinction between *coercive* and *voluntary* problem-solving approaches (for his original idea on “analytical problem-solving” see II.1.1).

To illustrate the differences between coercive and voluntary elements: segment A contains imposed settlements supposed to be favourable to the parties to the conflict (historically the Dayton Peace Accord for Bosnia-Herzegovina in 1995 may be mentioned<sup>347</sup>). Segment D diagonally across represents a win-lose scenario, where the rules are accepted (for example a change of government after elections). Segment C stands for ‘classical’ authoritative-power settlements (e.g. the Berlin Congress of 1878), and segment B is the prototype result of a voluntary problem-solving approach (see Burton, 1990; 192-7), for which, to the best knowledge of this author, no successful examples that meet Burton’s conditions exist yet.

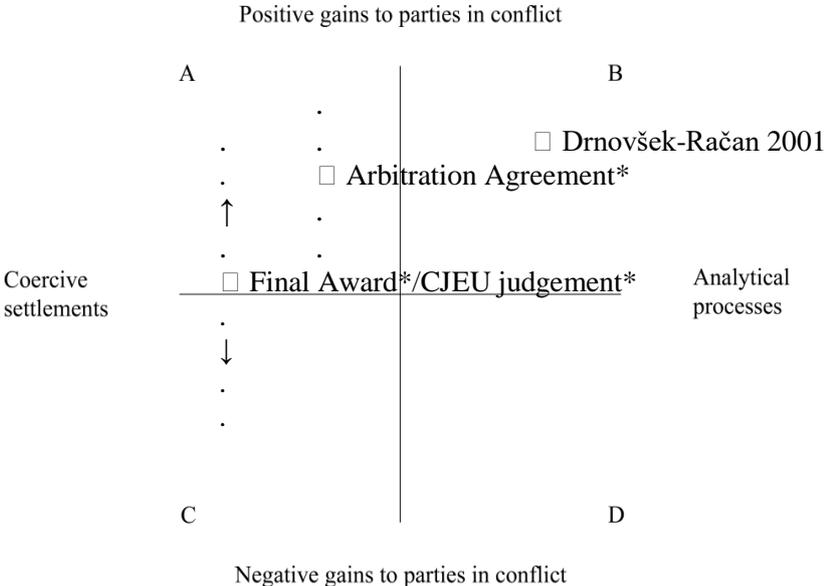
As analysed in Chapter VI, there have been a number of resolution attempts to the border conflict between Slovenia and Croatia thus far: on a bilateral basis (the 2001 Draft Agreement), involving a mediating third party (the Arbitration Agreement 2009), or involving a judicial third party (the Final Award 2017 and the prospective judgement of the CJEU estimated for late 2019).

These attempts can be neatly pointed out along Burton’s terms of coercion or voluntariness and the gains related to the parties; see fig. 24 overleaf. It must be noted, however, that the overleaf model does *not* address the question of implementation or enforcement (such as ratification and subsequent amendment of national legislation).

<sup>347</sup> One would obviously have had to agree that Dayton was indeed “favourable” to the parties.

The Initialled Draft Agreement from 2001 (“Drnovšek-Račan“) was negotiated bilaterally in a non-coercive environment. Both Croatia and Slovenia were not yet EU members. The positive gains to both parties would have been a full settlement of the border dispute as such, an agreed maritime and land border, and the removal of the major bilateral conflict ahead of EU accession. Negative gains can only be stipulated vis-à-vis an interpretation of the respective *claims* and can thus not be measured since there was no agreed border in the first place which was being re-negotiated. This is why this author holds that the solution of the border issue is a gain as such, the degree of which may of course be debatable.

Figure 24: Croatia-Slovenia border resolution attempts relating to coercive and problem-solving approaches. Modelled after Burton (1990: 197). \*= positive or negative depending on parties’ and observers’ individual perceptions



The Arbitration Agreement from 2009 was negotiated in an asymmetric bilateral relationship. Slovenia as an EU member had vetoed Croatia as a Candidate Country on the single issue of forcing a solution to the border problem. Still, the terms of the Arbitration Agreement were negotiated bilaterally, but under (hard) mediation of the Commission and (soft) facilitation by the Swedish Presidency, so one has to acknowledge some degree of coercion. The immediate gain for Croatia was the lifting of the Slovenian veto and thus the very real prospect of EU accession. The medium-term gain for Slovenia was the very real prospect of access to the high seas it would perhaps not have achieved in a settlement *after* Croatia’s EU accession.

The Final Award from 2017 was delivered in a context where Croatia had *de-facto* withdrawn from the arbitration procedure notwithstanding the fact that the award is a binding decision under international law. Therefore, the coercive nature is fairly clear. The gain for Slovenia is access to the high seas, albeit at the cost of some sobering decisions (from Ljubljana’s point of view) here and there along the land border, and the reputational damage caused by the *ex-parte* communication. The gain for Croatia may (from Zagreb’s point of view) be perceived as negative since the political costs of and the reputational damage to its legal standing for upholding the non-recognition of an internationally binding award cannot be dismissed.

CJEU judgement (tentative<sup>348</sup>): The proceedings were triggered by Slovenia. The Court is the ultimate EU judicial authority for Croatia and Slovenia as Member States and it is not difficult to recognize the coercive nature of the judgement. The gains may be seen as manifold: the EU will be stripped off a major bilateral territorial dispute between two Member States, the judgement will, *inter alia*, ensure the full implementation of EU law (e.g. the Fisheries Regulation 1380/2013), and indirectly define the Schengen border between Slovenia and Croatia (subject to demarcation on the ground). The gain for Croatia is a face-saving solution bypassing the Sabor vote from July 2015 and enabling the country to join the Schengen Area and the Euro (as soon as the conditions are met), the government's two major EU goals.<sup>349</sup>

#### **VII.1.4 Timing of conflict management initiatives**

Drawing on Zartman and de Soto (2010), the timing of third-party involvement in dispute resolution is essential:

“If it is to succeed, a mediation initiative cannot be launched at just any time; the conflict must be ripe for the initiation of negotiation. Parties resolve their conflict only when they have to do so - when each party's efforts to achieve a unilaterally satisfactory result are blocked and the parties feel trapped in an uncomfortable and costly predicament.” (Zartman and de Soto, 2010: 5)

Further, ripeness can be traced, and there are two conditions: First, the parties to a conflict must perceive a situation as a stalemate, and second, there must be a sense that a solution through negotiations is possible (Zartman and de Soto, 2010: 6). The following observations can be made in that context:

When the Slovenian blockade surfaced in October 2008, the French Presidency was in a difficult position. One could argue, that intra-Council mediating efforts should have started a bit earlier, but the benefit of hindsight suggests that no solution by means of an exchange of letters to renounce the allegedly prejudging nature of the Croatian accession would have been enough to accommodate the Slovenian concerns (see VI.2.2.1 and VI.2.2.2), and perhaps a sense of urgency for the need of third-party mediation was not there yet. It must be acknowledged, too, that the French Presidency was facing a completely new situation of a Member State veto, and having to unblock the situation in a trilateral line-up with the affected Candidate Country was, in reality, more serious than Ljubljana's reservations on paper. It is not difficult to posit, therefore, that there was nothing ‘wrong’ with the timing of the French Presidency, but the underlying conflict (Slovenia actually wanted an arbitration procedure on the border issue before accepting Croatia's EU accession), simply was not solvable with an exchange of letters on the diplomatic level.

The first moves by EU Enlargement Commissioner Rehn in January 2009 (see VI.2.2.3) did probably meet the preconditions outlined by Zartman and de Soto. It is difficult, however, to assess parties' real sense of a need for negotiations, as such attitudes tend to include sensitive political-tactical deliberations which are not disclosed. The timing of the Commission's further steps and its quick adaptation to the apparent need for a third-party judicial procedure

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<sup>348</sup> Presuming admissibility and with all uncertainty of a timetable forecast, it appears fair to expect the CJEU to hand down its judgement by the end of 2020 or the beginning of 2021. The Court held a hearing on the Croatian inadmissibility motion at the beginning of July 2019, and should it decide that the Slovenian claim is at least partly admissible, there will be another hearing on the merits, presumably by mid-2020.

<sup>349</sup> Interview Andrej Plenković, 14-02-2018; see also speech before the European Parliament, 06 February 2018.

must be acknowledged. Early efforts of Rehn who proposed mediation to the parties at the beginning of 2009 did not bear fruit as there was probably not a sufficient enough grasp of procedural certainty for the parties, and their perception perhaps was that they would not have enough control of the process under mediation. Rehn and his legal team were fast in drafting and discussing a first proposal for an arbitration agreement (Rehn I; see VI.2.3) with the parties, and discussed and developed it further (Rehn II; see VI.2.4) accommodating what where truly tricky legal and political issues.

In the same vein, the soft mediation by the Swedish Presidency in the second half of 2009 can be seen as carefully timed. After the process had stalled in July (see VI.2.5), the Swedes took over the mediating role from the Commission. Whilst the lion share of the finalisation of the Arbitration Agreement had shifted to the bilateral level, i.e. there was no drafting input by the mediating third party, the Swedish Presidency had a tuned ear and eye and was of great assistance to the parties checking their perception and the need for assistance, and delivered soft mediation in an impeccable manner when behind-the-scenes evidence suggests that it was indeed hanging by a thread whether the conflicting parties would arrive at an agreement at all (see VI.2.5.2).

On balance, it appears that in the absence of hostilities and war - the classical context most of the mediation concepts were developed for - the perfect timing for mediation initiatives on the level of diplomacy in a non-violent environment is not easy to determine. It seems that many of the circumstances are *sui generis* and therefore difficult to grasp, let alone categorise. Only fuzzy assumptions can be made of what makes for successful timing. One such assumption perhaps is a sound knowledge of the parties and the issue in question, another one is a genuine interest of the mediator to actually solve the crisis. In the Croatia-Slovenia case, it is fair to say that both mediating parties in the pre-arbitration phase, the Commission and the Swedish Council Presidency, were in favour of EU enlargement: the Commission *ex officio* (the Commission is the institutional driver of EU accession negotiations and thus interested in successful accession of Candidates Countries; see VI.2.1), and the Swedish Presidency with a long-standing pro-enlargement policy commitment. As a result, it is not difficult to contend that anything that would help getting the process of the Croatian EU accession process back on track was an intrinsic motivation for both mediating third parties.

### **VII.1.5 Positions and real interests**

A major assumption in the theory of conflict resolution originates from the concept of *principled* or *collaborative negotiation* (Fisher et al, 2012). The hypothesis is that in many instances the real obstacle to a solution is *positional bargaining*. Fisher et al contend that arguing over positions “produces unwise outcomes” the main difficulty being that “the more you clarify your position and defend it against attack, the more committed you become to it [...]. Your ego becomes identified with your position. You now have an interest in ‘saving face’ [...] making it less and less likely that any agreement will wisely reconcile the parties’ original interests” (Fisher et al, 2012: xxvi).

An enlightening example is the breakdown of the talks about a ban on nuclear testing from 1961. One of the issues was how many on-site inspections per year should the U.S. and the USSR be allowed to carry out on the other party’s territory. Whilst the Soviet Union favoured three, the U.S. insisted on no less than ten. The talks actually broke down over this disagreement whilst the nature of the ‘inspection’ had never been discussed, so that it was not

at all clear whether there would be “one person looking around for one day, or hundred people [...] for a month”. In fact, little attempt had been made to reconcile verification with the mutual aim of minimal intrusion (Fisher et al, 2012: 5).

In relation to the 2001 Draft Agreement between Croatia and Slovenia on the maritime and land border, not a great deal can be said about whether there was positional bargaining or not during the negotiations as, sadly, both former prime ministers who had conducted most of the negotiations face to face passed away well before the research of this study commenced, so no personal account from them could be had regrettably. However, there are several empirical findings on the circumstances back then. First, the border issue was mentioned as an outstanding bilateral issue for Slovenia in the 2000 European Commission Progress Report for the country, so one can assume a sense of urgency on the part of Drnovšek. Second, also Račan apparently knew that EU and NATO accession was only possible for Croatia with the support of Slovenia. And third, there was a link with two other bilateral issues, Ljubljanska Banka (where Croatia had an interest that foreign currency depositors of the former Ljubljanska Banka in Yugoslav times, of which there were many in Croatia, will be reimbursed) and Krško (the joint nuclear power station where Slovenia had temporarily cut-off Croatia from electricity supply for some time); see VI.1.4. So, there must have been a mutual interest in good-neighbourly relations and a spirit of collaboration between Drnovšek and Račan, and thus a genuine interest in solving the border issue as such rather than defending particular positions and underlying interests.

As for the negotiations on the Arbitration Agreement 2009, it is worth tracing what positions were taken to defend what interest. It is established here that some substantial positional bargaining took place, mainly on the two issues of (i) the maritime border in Piran Bay, and (ii) the link between the Slovenian territorial sea and the high seas. Whilst the main interest of Slovenia was the access to the high seas, Croatia’s main interest was to have the blockade lifted and become EU member, but ideally without any territorial concessions neither in the Croatian territorial sea nor in Piran Bay. It is useful to note that there is a reference to “vital interests” in the preamble to the Arbitration Agreement (see VI.2.4). It turned out that, during the hearing, Croatia emphasised its *territorial integrity* as the main interest apart from EU membership in suggesting that there was actually no need to devise a corridor through the Croatian territorial sea. According to Croatia, the existing law-of-the-sea concept of innocent passage secured navigation from Slovenia to the high seas and vice versa. Further, the agreed sea-lanes to and from the Slovenian port of Koper proved that a link between Slovenia and the high seas was sufficiently in place already (see VI.3.2.2.1). Slovenia, on its part, did make it clear that the access to the high seas was the *quid pro quo* for accepting the Arbitration Agreement. The vital issue for Ljubljana was not to depend on the good-will of Croatia in relation to innocent passage through their territorial waters and to secure full and unrestricted freedom of navigation between the Slovenian territorial sea and the high seas (see VI.3.2.2.2).

To avoid territorial concessions, Croatia aimed at insisting on *international law* as the applicable law wherever possible since international law is bound to the codified law such as UNCLOS where the principle “the land dominates the sea” leaves little room for compensating for coastal configurations of geographically disadvantaged States such as Slovenia, for example. With its tiny coastline and the huge coastlines of Italy and Croatia, Slovenia has very little maritime space under its full sovereignty as the Croatian and Italian waters meet in the proximity of the Slovenian coast. In addition, the concave coast in the Gulf of Trieste geographically aggravates the boxed-in situation of the Slovenian maritime entitlements under UNCLOS (see VI.2.3.1). Slovenia, on its part, aimed at widening the

discretionary powers of the Tribunal to a maximum extent to exactly trigger the infringements on the Croatian territorial sea to enable the creation of a corridor link. The corridor, or junction, would have to entail the right to absolute (rather than innocent) passage, so that any stopping of vessels (which is possible under innocent passage, albeit in very particular and rare circumstances) would be impossible. Thus, Ljubljana insisted on factors other than international law to be taken into account, such as *equity* and a “fair and just result” drawing on considerations beyond the Law of the Sea (*ex aequo et bono*). The aim was to have some sort of sophisticated bargain to make up for the fact that Slovenia is a geographically disadvantaged State and that a solution for legally unhindered access to the high seas could be found that took into account a spirit of good-neighbourly relations with Croatia (see VI.2.3.2; see also V.2.1).

It is not easy to make an assessment of the Croatian withdrawal from the arbitral proceedings in mid-2015 in terms of real interest, as the circumstances of both the intercepted telephone conversations (*ex-parte* communication) and its making into the media are highly obscure. Nevertheless, assuming that the Croatian foremost interest still was to ensure its territorial integrity, a termination of the arbitration procedure would certainly have met that goal for the time being. Slovenia, on its part, had to insist on the continuation of the proceedings as this was the only way to achieve legally guaranteed uninterrupted access to the high seas given that the Arbitration Agreement had actually mandated the Tribunal to find a solution for that very access.

The aftermath of the Final Award is also subject to some obscurity in terms of interest. This is mainly due to the fact that the Croatian government was still locked in by the unanimous Sabor vote from July 2015 which had called on the then government to leave the arbitration procedure (see VI.3.3.3). On the other hand, the contents of the Final Award Croatia refused to recognise appears to be rather positive for Zagreb, a fact that cannot have been lost on the government, and was indeed not. The Tribunal’s decisions on the land border were predominantly in favour of Croatia’s claims (e.g. the military installation at Sveta Gera would ‘come home’, and the contested Dragonja strip on the left bank of the river was confirmed to be Croatian), the equidistance line in the territorial sea was only modestly deflected in favour of Slovenia (the Tribunal did in fact not take into account the very short coastline of Slovenia), and even the delimitation inside Piran Bay, from Zagreb’s point of view, must have seemed to half-fairly reflect the *effectivités* invoked by both parties (the Bay was predominantly used by Slovenia, and there was no active fishing management in the Bay nor was there any other considerable economic activity by Croatia).

Besides, the Tribunal’s determination of the high-seas corridor through Croatian territorial waters may be seen as in line with the actual predetermination in the Arbitration Agreement, so one cannot say that the Tribunal’s decision exceeded the mandate of the Arbitration Agreement (see VI.2). To that end, Croatia, on the one hand, had to continue distancing itself from the arbitration award *per se* as it regarded the arbitration procedure contaminated because of Slovenia’s earlier illegal communication, and was bound by the 2015 Sabor resolution. On the other hand, Zagreb had some interest in implementing at least the gist of the Tribunal’s decisions perhaps with some additional, mainly symbolic, fine-tuning inside the Bay. It appears that Croatia’s stance that *all* open bilateral issues should be discussed, may be seen as an effort to deflect public attention somewhat away from the arbitration award as the latter included some territorial infringements on the maritime front (see also VI.3.6.1). Slovenia’s interest was to quickly implement the Final Award as it provided for the sought-after direct access to the high seas. To achieve that it was bound to go down the path of bilateral meetings discussing implementation with Croatia for some time. The assumption

here is that showing one's own good-neighbourly credentials and perhaps developing some de-escalating and face-saving momentum would make it easier for Croatia to agree on implementation. It was clear, however, that the fall-back position for any Slovenian government was the road to the CJEU in Luxemburg, and that preparations for the lawsuit had to go in parallel. Yet, it is an open question whether to take at face-value the official position of the (outgoing) government at the time of filing the lawsuit, that it would withdraw it as soon as bilateral implementation would be agreed on (see VI.3.7), i.e. its commitment to believe in and continue with bilateral talks.

To wind up, distinguishing between the interests of the parties to a conflict and their positions, and to work with the former, is a worthwhile point in successful conflict resolution. It avoids unnecessary prolongations and debates over superficial issues. With regard to the Croatia-Slovenia case, it appears fair to say that it is established that the interests of the parties have been long-standing, not least due to the joint history of the border dispute, and therefore as good as fully transparent to the opposite party. If a third-party mediator is involved, however, it is crucial for the mediator to be fully acquainted with these interests and its historic foundations.

#### **VII.1.6 Judicial dispute resolution**

There are two issues with relevant findings from the Croatia-Slovenia border dispute, (i) legal discretion, i.e. the contents of the mandate submitted to the judicial body by the parties to the dispute (see II.1.4.1.1), and (ii) legal embeddedness, i.e. the enforcement of judgements and whether the judicial body depends on international or domestic actors (see II.1.4.1.3).

With regard to (i) legal discretion, Keohane, Moravcsik and Slaughter (2000: 470) posit that the fiercest negotiating between the parties to a conflict takes place over the terms of the mandate for third-party judicial dispute resolution. The empirical findings from the Slovenia-Croatia border issue appear to confirm the above proposition in two instances:

At their meeting in Bled in August 2007, Prime Ministers Janša and Sanader agreed to submit the border dispute to the International Court of Justice (ICJ). That apparently was the easy part of the agreement. What was supposed to be a matter of a few months, however, turned out to be a lengthy process. The joint Croatian-Slovenian team of legal experts tasked with drafting the mandate for the Court could not reach agreement. Whilst a Croatian draft from September 2008 was based on the ICJ as the judicial third party, a Slovenian draft mentioned three options, one of them the ICJ, and the other two the Permanent Court of Arbitration (PCA) and Ad-hoc Arbitration. The process stalled, as the ICJ had been a *sine qua non* for Croatia, and Slovenia withdrew its members from the joint expert group in March 2009, so that the agreement of submitting the dispute to the ICJ was as a matter of fact extinct. Despite the principle agreement to submit the dispute it proved impossible to agree on the mandate in three meetings over a period of 18 months (see VI.1.5), not least because of the 'golden opportunity' to solve the border issue through a veto in the ongoing EU accession negotiations with Croatia.

The negotiations on the actual Arbitration Agreement in 2009 are another case in point. They did prove successful in the end, but it is submitted here that this was only possible because of the pressure exerted by the vital interests of both parties: Croatia wanted to secure EU accession, and Slovenia was keen to secure unhindered access to the high seas and feeling increasingly uncomfortable with blocking the accession negotiations of Croatia. Still, the

drafting of the Arbitration Agreement required the firm mediation and drafting input from a mediating third party (European Commission) and some skilful soft mediation at the final negotiating stage (Swedish Presidency). That intense process with many meetings (bilateral and trilateral), which even stalled for a moment, lasted from the beginning of January to the beginning of November 2009 (see VI.2.2.3 to VI.2.5).

In respect of (ii) legal embeddedness, Keohane et al (2000: 466-7) contend that in cases where a judgement is not enforceable, such as State-to-State arbitration, governments may face pressure from the domestic opposition or from the public domain since non-implementation damaged the legitimacy of a government.

Yet, the non-implementation of the 2017 Final Award by the Croatian government (for the reason of its own prior withdrawal from the arbitration process altogether due to the Slovenian *ex-parte* communication) appears to disconfirm the above proposition. In fact, there was no blaming of the Croatian government by the domestic opposition at all. Rather, such a move would be surprising in view of the unanimous Sabor vote from July 2015 calling on the government to leave the arbitration process (see VI.3.3.3). When a (real or perceived) nationalist interest is at stake, it is naturally very difficult for any opposition to accuse the government of putting at stake the international reputation of the country. All the more so, when the government did not show any readiness to ‘give in’ to widespread calls for implementation on the part of the European Commission and some Member States (see VI.3.6.2). Also, the Arbitral Tribunal’s 2016 Partial Award stipulating that the Slovenian illegal communication was not as grave as to give rise to the cancellation of the Arbitration Agreement, and that the arbitral proceedings as such were going to continue (see VI.3.4.3), had not caused a split between the government and the opposition.

It unquestionably remains a shortcoming of State-to-State arbitration, however, when compared to a judicial procedure at the ICJ, that a judgement cannot be enforced, irrespective of a prior commitment of the parties to that end (as was the case in Article 7(2) of the Arbitration Agreement between Croatia and Slovenia; see Appendix 2). There are two instances of non-compliance with an arbitration award in the recent history of State-to-State arbitration: the first one was China in 2016 (when it refused to acknowledge the arbitral tribunal’s jurisdiction; see table 3 in V.2.2.3), and Croatia 2017 (refusing to recognise the Final Award after dropping out of the proceedings due to illegal communication on the part of Slovenia; see VI.3.3.2 and VI.3.3.3). Whilst the China case constitutes a blatant repudiation of the UNCLOS provisions on dispute settlement altogether (the Philippines had initiated proceedings unilaterally; for the UNCLOS provisions see V.2.1.1), the Croatia case is a refusal of recognition of the Final (and Partial) Award. Yet, Croatia is a party to the original Arbitration Agreement with Slovenia (for the legal aspects see VI.3.4.1 to VI.3.4.3; for the EU enlargement explanatory mode see VII.2).

Still, arbitration has its particular strengths, especially with regard to bilateral disputes in a *sui generis* line-up of conflictual heritage in the context of State succession and EU accession. The flexibility to accommodate those historical and political circumstances are of utmost value (see VIII.3 which includes recommendations on reform of State-to-State arbitration).

## VII.2 EU enlargement approaches

The issue here is under which circumstances Candidate Countries for EU membership are able or ready to meet the EU's political or *acquis* requirements, and how the interplay between domestic actors and the EU unfolds from both a rationalist and constructivist angle (for the analytical framework see II.2).

### VII.2.1 **Conditionality (rationalist approach)**

Starting out on Schimmelfenning and Sedelmeier's general proposition that the constituent logic of EU conditionality is "a bargaining strategy of reinforcement by reward, under which the EU provides external incentives for a target government to comply with [the EU's] conditions" (2004: 661), Candidate Countries are assumed to comply with conditionality if EU membership is seen by the domestic actors as a credible incentive which, as a minimum, compensates the compliance costs for the domestic government (see II.2.1).

In light of the findings from the Slovenia-Croatia border dispute, this calls for three comments:

First, regardless of the distinction between political and legal-technical (EU legislation) criteria (*acquis*), it can be observed that the issue of Slovenia's reservations vis-à-vis the alleged prejudging nature of the Croatian EU accession negotiations documents on the border made the solution of the border dispute imperative. In other words, the solution of the boundary issue became a political criterion on top of the existing criteria. Each Candidate Country is supposed to fulfil the *acquis* criteria laid down in the 35 negotiating Chapters. Bilateral issues are not part of the *acquis*. As any opening of negotiating Chapters is subject to unanimity, this gives any of the Member States a right of veto. Slovenia framed the unresolved border with Croatia in terms of maps from the Croatian accession documents as an obstacle for several Chapters (such as transport or environment, see VI.2.2.1). This may be defined as an *add-on* of political conditionality, as it had nothing to do with EU legislation (*acquis*). As a result, the compliance costs or the price for EU membership for Croatia went up considerably. The solution of the border issue came on top of the domestic political costs and, at first sight, also meant a potential delay of EU accession. In any case, it may be seen as additional political costs.

Second, not only is it an additional criterion. In the Croatian-Slovenian border dispute, the add-on conditionality originated 'on the spot', as it were, when the accession negotiations were in midstream. As a result, such *ad-hoc* add-on of (political) conditionality during the accession negotiations has raised the compliance costs without prior notice. In other words, the price for membership has gone up *unexpectedly*. After a rocky start of the Croatian EU accession negotiations (the beginning of the negotiations was postponed from March 2005 to the end of the same year as General Gotovina had not been extradited to the ICTY yet, a delay which Croatia could see coming and for which it was responsible itself), Zagreb was now facing a potential delay as the preparations for opening Chapters were frozen for several months (see VI.2.2.2).

Third, the additional political criterion or condition is not related to an agreed EU set of rules, let alone through joint decision-making, whatever short-term it may be. Notably, the add-on conditionality was induced unilaterally by one Member State as a bilateral issue. In conditionality terms, therefore, it may be referred to as *ad-hoc* add-on political conditionality *induced by national veto*. This is an entirely new type of conditionality which *stricto sensu*

has nothing to do with either political or *acquis* aspects of EU conditionality. However, it is (ab)used in the very EU institutional line-up it does not belong to. To that end, it is not lost on the observer that this model has, regrettably, already been imitated by other parties, ironically by Croatia itself in the EU accession negotiations with Serbia in the first half of 2016 where Zagreb vetoed the opening of Chapters 23 and 24 on the grounds that the Serbian regional war-crime jurisdiction infringed the sovereignty of other States (i.e. Croatia), the question of minority seats for ethnic Croats in the Serbian parliament, and insufficient collaboration with the ICTY (see VIII.2.2).

All in all, it is suggested here that there is a need to introduce a new type of conditionality: *ad-hoc add-on* political conditionality.

The implications of the empirical findings from the Croatia-Slovenia border dispute on the conditionality model are such that *ad-hoc* and *off-acquis* add-on political conditionality may considerably affect the domestic costs of complying with EU conditionality. If a Candidate Country does not know what to expect around the corner other than the scheduled EU criteria, and if that add-on conditionality is from a neighbouring State irresponsibly loading the accession process by black-mailing on purely bilateral issues, the motivation for EU accession and thus the motivation for domestic reform, is heavily affected. In cost-benefit considerations, the price for membership becomes somewhat incalculable, and the domestic weighing-up between costs and benefits less predictable. In addition, the level of credibility of the EU incentive is lowered when there is an unexpected (political) price-increase of EU membership. Taking everything into consideration, the abuse of the national veto in the accession process has hugely detrimental effects on EU conditionality vis-à-vis Candidate Countries in many respects.

## **VII.2.2 National-identity and legitimacy considerations (constructivist approach)**

With regard to the *effectiveness* of conditionality, both the identity-filter model and the compliance-behaviour model play a role here.

### **VII.2.2.1 National-identity filter**

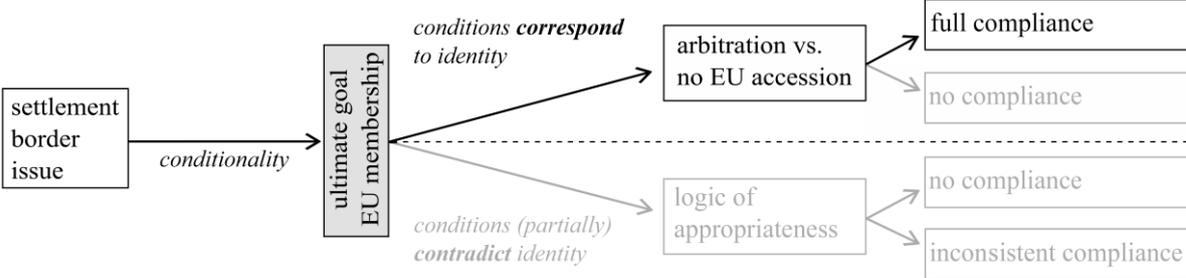
Freyburg and Richter's (2010: 265-6) assumption is that government decisions about external incentives, such as EU membership conditionality, have to pass the "identity test" first of all. If an EU incentive turns out, to some degree or fully, as at odds with what is perceived as the national identity, the appropriateness reasoning may lead to non-compliance. In turn, if a requirement is filtered as non-problematic, its further consideration can go down the consequentialist cost-benefit path. In essence, the *identity filter* comes ahead of the compliance-costs deliberations (see II.2.2).

In terms of the border dispute with Slovenia, the additional requirement of having to accept a binding third-party settlement of the border issue was facing the identity test in Croatia. It appears fair to say that given the high level of sensitivity in Croatia with regard to territorial issues, mainly due to the traumatic experience during the Homeland War 1991-95 with a huge death-toll, the political cost of having to agree to a real or perceived loss of territory by means of an arbitration procedure was, at least at some point, considered too high. As a result, (i) the EU Commission, in its role as third-party mediator, saw no way out of suspending the negotiations on the Arbitration Agreement at least temporarily, and (ii) the impasse also

appears to have forwarded a change in the leadership of the Croatian government (see VI.2.4 and VI.2.5).

In the same vein, when every allowance is made for the fact that EU membership was seen in the Croatian political elite as indeed a very desirable incentive despite the black-mailing on the part of Slovenia, the sense of loss of territory was so strong that the Croatian parliament adopted a declaration stating that no provision in the Arbitration Agreement could be regarded as Croatia’s consent to Slovenia’s demand for territorial contact to the high seas at the expense of the Croatian territorial sea. The Croatian side had even aimed at annexing such declaration to the Arbitration Agreement itself in the first place (see VI.2.5.2). Still, the Arbitration Agreement was ratified along with the down-toning declaration, as the crucial cost-benefit calculation at the time was that EU membership as the ultimate policy goal outweighed a certain (foreseeable) degree of infringement of Croatia’s territorial sea (see fig. 25 below).

Figure 25: Croatian national-identity filter (EU membership) for acceptance of Arbitration Agreement



On a different note, that declaration may also be seen as a face-saving move in order to highlight that any decision on the territorial integrity of Croatia, notably the country’s foremost vital interest above EU membership, at least officially (see VI.3.2.2.1), was a solution imposed on the country rather than freely arrived at. In other words, the commitment to a foreseeable infringement of the Croatian territorial sea had to be down-toned. In addition, the responsibility for such infringement had to be assigned to actors outside the domestic political domain.

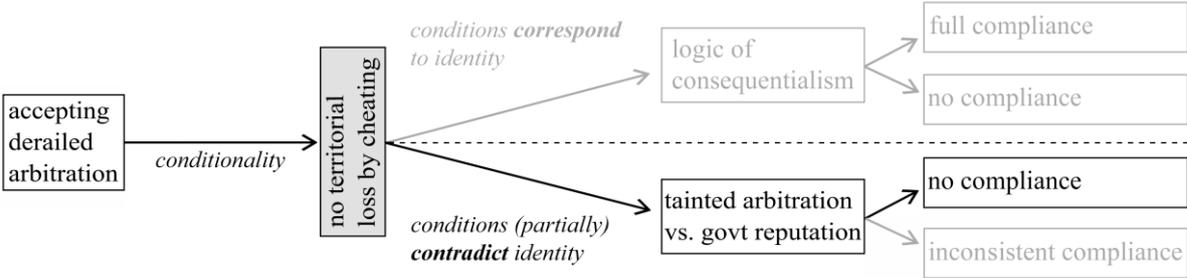
The preservation of Croatia’s territorial integrity as a distinctive national-identity feature also surfaced at the arbitral proceeding’s 2013 written submissions and the 2014 hearing. Regardless of the fact that a corridor solution inside the Croatian territorial sea was very much predictable due to the agreed provisions in the Arbitration Agreement (see VI.2.4), Croatia’s position was that existing law-of-the-sea provisions (innocent passage or passage through international straits) and the IMO Traffic Separation Scheme in the Northern Adriatic were sufficient to secure access between the Slovenian territorial sea and the high seas (see VI.3.2.1.1).

In retrospect, it may be argued that the border issue is on a comparable level of national identity in relation to the Croatian government’s decision back in 2005 to arrest and extradite General Gotovina to the ICTY, an express conditionality item on the part of the EU, in return for finally opening Croatia’s accession negotiations. The two conflicting identities back then were Croatia as the innocent, heroic nation on the one hand (see IV.5.2), and the desire to join

the EU. The face-saving solution at the time was to have Gotovina arrested abroad in Spain which avoided a humiliating extradition from Croatia (see II.2.2).

Croatia’s exiting of the arbitration procedure following the Slovenian *ex-parte* communication marks a turn of compliance events. The Croatian Parliament (Sabor) unanimously called on the government to leave the arbitration proceedings. The notification of the Croatian withdrawal contains express reference to fairness and legitimacy considerations<sup>350</sup> (see VI.3.3.3).<sup>351</sup> It appears that Croatia left the arbitration procedure on the grounds that illegal communication was morally unacceptable, destructive to the trustworthiness of the arbitral proceedings, and fundamentally disqualifying the proceedings altogether (regardless of whether the legal-procedural conditions for withdrawal were met). The calculations appear to have been whether leaving a politically (not legally) tainted arbitration is less costly than accepting a potential reputational damage of the government and the country (caused by the disrespect for the jurisdiction of the Tribunal); see fig. 26.

Figure 26: Croatian national-identity filter (no unfounded loss of territory) for withdrawal from arbitration



VII.2.2.2 Compliance behaviour

Similarly, the basic assumption on the compliance behaviour in Candidate Countries is that compliance depends on “rational calculations and/or normative considerations of political leaders in power” which drive the compliance behaviour of candidate countries’ governments vis-à vis EU conditionality (Noutcheva, 2012: 17).

First, there is *non-compliance* if both the costs outweigh the benefits and the legitimacy is low. Second, if an actor complies in a case which is against their interests, i.e. costs exceed benefits, but the perceived level of legitimacy is high, the result is *legitimacy-based* compliance. Third, if an actor sees their interests in line with the EU demands for reform, e.g. benefits exceed costs, but are not convinced of its legitimacy, what follows is *rationality-based* compliance. Fourth, when the benefits exceed the costs and the EU conditionality is perceived as appropriate and high, there is *genuine compliance*. However, if the rational cost-benefit ratio is very positive whilst at the same time the level of legitimacy is very low, we will see *non-compliance*, very well a possibility with intensely popular issues of national identity (see II.2.3). It is defined here that the conclusion of the Arbitration Agreement and

<sup>350</sup> “The principles of fairness and integrity have been violated, irreparable harm has been done to the legitimacy and prospects of the process [...]” (*Note verbale* from the Ministry of Foreign and European Affairs of Croatia to the Ministry of Foreign Affairs of Slovenia, No. 3303/2015, 30 July 2015).

<sup>351</sup> Apart from the legal arguments which not least neglected the Tribunal’s factual and firmly established jurisdiction to decide whether a withdrawal is possible at all; see VI.3.4.2 and VI.3.4.3.1.

the following arbitration procedure constitutes EU conditionality (for the particular type of conditionality see VII.2.1).

By the time it became clear, in the spring of 2009, that an arbitration agreement was to be concluded (see VI.2.2.3), it may be said that (i) for Slovenia we can assume the benefits of arbitration (the prospective access to the high seas) considerably outweighed the costs (duration of arbitration process, no immediate result), so that the result is genuine compliance. On the part of (ii) Croatia, it appears fair to say that the political costs of accepting an arbitration procedure were considerable, but weighed up against the huge benefit of EU membership in political, economic and reputational terms, the behaviour was rationality-based compliance (see fig. 27).

Figure 27: Compliance behaviour when arbitration procedure was in sight (spring of 2009)

		Legitimacy	
		High	Low
Rationality	Benefits > Costs	Slovenia <b>Genuine compliance</b>	Croatia <b>Rationality-based compliance</b>
	Costs > Benefits	Legitimacy-based compliance	Non-compliance

The deadlock in June 2009, when Croatia rejected Rehn II as the Sabor had already approved of Rehn I (see VI.2.4), may be seen as a temporary non-compliance on the part of Croatia, as the political costs of accepting a revised draft after having obtained the support of the domestic Parliament would have been too high. For Slovenia, the continuation of the drafting stage was of utmost importance, notwithstanding the fact that Rehn II constituted a step back in terms of territorial contact to the high seas and represents substantial costs. As a result, one can posit legitimacy-based compliance for Slovenia.

A rare phase of a compliance quasi-equilibrium can be assumed for the phase between the end of July 2009 and the signature of the Arbitration Agreement in early November of that year. Two issues are of relevance here: (i) the reversal of the order in which the main items were tackled, i.e. unblocking the accession negotiations first before finalising the Arbitration Agreement (see VI.2.5.1), and (ii) postponing the start of the arbitration procedure to the date of signing of the Croatian Treaty of Accession (VI.2.5.2). Whilst Croatia gained the assurance of becoming an EU member, Slovenia had to rely both on the continuation of the drafting stage and the finalising of the Arbitration Agreement plus the fact that the arbitration procedure would only start once Croatian membership was already a safe pair of hands. Therefore, the compliance behaviour of Slovenia is downgraded from genuine compliance to rationality-based compliance equalling the level of Croatia’s compliance behaviour.

The quasi-equilibrium phase of compliance can be said to have continued into 2012 when, at the beginning of the year, the selection procedure for the members of the Arbitral Tribunal unfolded. For a start, it went relatively quickly and in a collaborative spirit (there was agreement on two of the three jointly appointed members straight away, and it took only one bilateral meeting to agree on the third member; see VI.2.6), so one can perhaps assume a level of compliance between rationality-based and genuine for both parties. Slovenia was pleased that the timelines were finally running, and Croatia was keen to start (and get done) a process it had not been able to avoid anyway; see fig. 28.

Figure 28: Compliance behaviour in the quasi-equilibrium phase between July 2009 and July 2015

		<b>Legitimacy</b>	
		High	Low
<b>Rationality</b>	Benefits > Costs	Slovenia <b>Genuine compliance</b>	Croatia <b>Rationality-based compliance</b>
	Costs > Benefits	<b>Legitimacy-based compliance</b>	<b>Non-compliance</b>

For the first phase of the arbitration procedure, the submissions and the hearing, one may posit genuine compliance for Slovenia and rationality-based compliance for Croatia. The solution of the border dispute including the creation of a legally binding access to the high seas was what Slovenia had always considered a legitimate national interest, whereas Croatia knew that the arbitration procedure was the price to pay for EU membership, and one could argue that the provisions of the Arbitration Agreement amount to ‘damage limitation’ for Croatia, and that the real or perceived ‘territorial loss’ was neatly defined and restricted to a minimum in the Arbitration Agreement.

The publication of the intercepted *ex-parte* communication changed that quasi-equilibrium of compliance drastically, however. Although it has never become transparent what the real interest of Croatia behind the withdrawal from the arbitration procedure was apart from the legal arguments, one can make the general assumption that the domestic political costs of withdrawal must have been reckoned lower than those of a continuation of the procedure (see VI.3.3.3). Further, EU membership, one of Croatia’s vital interests, had already been achieved. Territorial integrity as the other genuine if not paramount national interest (see VI.3.2.2.1), however, was to some degree questioned with regard to the high-seas-access provisions in the Arbitration Agreement (see VI.2.4). As legitimacy remained low, the result therefore was non-compliance *ex post* (see fig. 29 overleaf). Such remained the default compliance level of Croatia for the rest of the arbitration procedure and during the follow-up phase. Slovenia, conversely, retained the level of genuine compliance as it had a vital interest

in a Final Award and its implementation to accomplish its aim of guaranteed access to the high seas.

Figure 29: Compliance behaviour as from August 2015 (after Croatia exiting the arbitration procedure)

		Legitimacy	
		High	Low
Rationality	Benefits > Costs	Slovenia <b>Genuine compliance</b>	Rationality-based compliance
	Costs > Benefits	Legitimacy-based compliance	Croatia <b>Non-compliance (ex post)</b>

After the implementation deadline of the Final Award expired on 29 December 2017, domestic compliance costs in Croatia for implementation continued to be reckoned higher than non-recognition of the Award. Whilst it remains obscure whether an effort to have a bilateral agreement on implementation of *all* delimitation decisions from the Award was ever on the cards for Zagreb, the approach did not change after Slovenia had launched the infringement complaint before the European Commission on 16 March 2018 and before the CJEU on 12 July 2018 (see VI.3.7). Slovenia’s compliance mode remained at genuine as the lawsuit is seen as the most promising avenue of securing implementation of the Award’s provisions on the high-seas corridor (see VI.3.7.1. and VI.3.7.2).

**Concluding considerations**

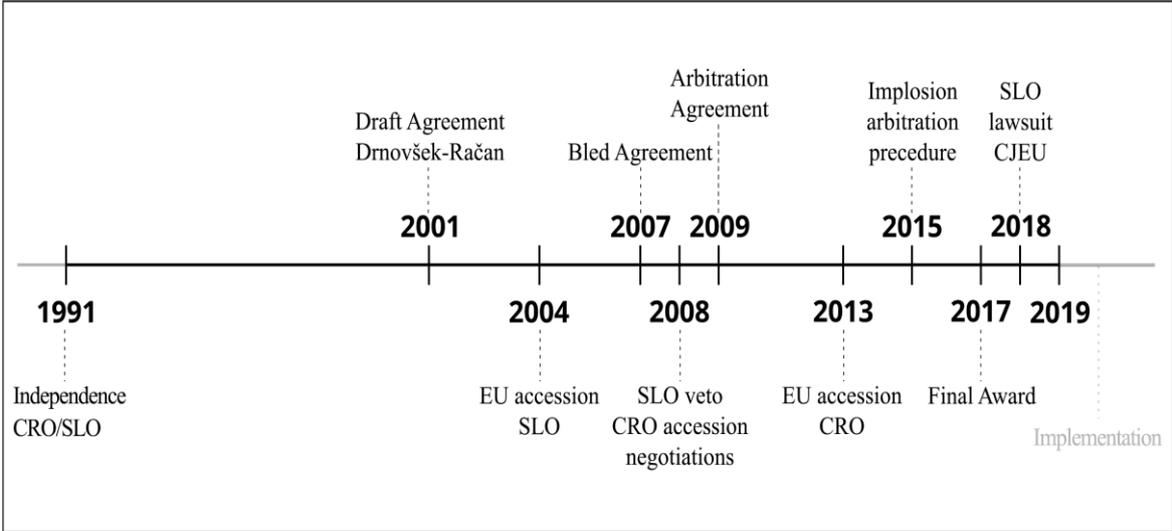
For an overall assessment of the three phases of the border dispute dynamics between Croatia and Slovenia it is useful to look for *critical junctures* in the process. Relevant landmark events in that context can be found in the time-line in table 4 overleaf.

► The bilateral *Draft Agreement from 2001*, to start with, was an agreement reached at the highest political level and without any third-party impact. Building on the negotiations at expert level in the 1990s, the two prime ministers sat together negotiating face to face in what appeared to be a true spirit of good-neighbourly relations, mutual trust, and a European perspective. It was a unique line-up in many ways and perhaps a laboratory experiment in post-Yugoslav bilateral dispute resolution.<sup>352</sup> What went wrong apparently was that Račan had

<sup>352</sup> The recent Prespa Agreement between Greece and (North) Macedonia from June 2018 also counts as bilateral. It must be noted, however, that there has been strong third-party mediation on the part of Matthew Nimetz, Personal Envoy of the United Nations Secretary-General since 1999 (see

not kept the domestic opposition in the loop, and even within his multi-party coalition, the first one in post-independence Croatia, there was not enough support for his deal with Drnovšek. At a time when Croatia’s territories in Eastern Slavonia had only been reintegrated three years ago after the painful and traumatic Homeland War, the sensitivity towards territorial issues was very solid. The fact that virtually the entire Croatian law-of-the-sea establishment was not consulted, catered for a maximum reach of their criticism in the public domain and the media, and the fat was in the fire. As a result, ratification in Sabor did not even reach the voting stage in Committee.

Table 4: Time-line of the Croatia-Slovenia border conflict



One is always wiser after the event, and some might say the deal on the table was too far-reaching and even adventurous for the Croatian political elite anyway. Still, if one does believe in the power of leadership and persuasion, it is indeed vital to keep high-level talks on a sensitive issue secret until a relatively late stage. However, the critical moment to secure domestic support *ahead* of concluding the negotiations must not be missed. Drumming up support for an agreement which includes territorial concessions is not a walk in the park. After all, the lack of support in Croatia is why the agreement with Slovenia on the resolution of the border dispute collapsed. As a result of the stalling virtually at the beginning of the Croatian ratification process, the bilateral avenue was scorched earth.

► The 2001 experience must be borne in mind when drawing conclusions from the *Bled Agreement 2007 and its aftermath*. ‘Bilateralism 2.0’ it was only at first sight. In fact, the talks took place under very different circumstances. Slovenia had joined the EU in the meantime, and Croatia’s EU accession negotiations were already in full swing. The submission of the bilateral dispute to the International Court of Justice (ICJ) looked like a common-sense move and an easy task. And it perhaps could have been just that. Yet, the critical juncture here was *Slovenia jumping ship from the bilateral negotiations on the mandate for the ICJ to blocking the EU accession negotiations with Croatia*. It was before the

<https://dppa.un.org/en/mission/personal-envoy-greece-former-yugoslav-republic-of-macedonia>; for the Prespa Agreement see VIII.2.3).

summer break of 2008 when the government in Ljubljana took the decision to raise the veto in the accession negotiations with Croatia to secure a solution of the border dispute. The bilateral expert group with Croatia on the ICJ mandate was still up and running at the time, and Slovenia withdrew its members from that group in the spring of 2009 when the negotiations on the later Arbitration Agreement had already started. Notwithstanding the fact that the border with Croatia was a bilateral issue and had nothing to do with the EU acquis, Slovenia changed course from the ‘soft’ voluntary submission-to-ICJ approach to a ‘hard’ blackmailing strategy using its veto as EU member vis-à-vis Croatia as an EU applicant. The collateral damage was the holding hostage of the EU as a whole and the damaging of Ljubljana’s own reputation as a young EU Member State. What is more, the Slovenian move marked a precedent of a Member State (ab)using its position vis-à-vis a Candidate Country to enforce a bilateral policy goal during EU accession negotiations.

► The constructive role of the European Commission must be mentioned. Had Olli Rehn not started to assume a mediating role at the beginning of 2009, immediately after the attempt of the French EU Council Presidency in December 2008 had failed, the blockade situation could have persisted for much longer. The *process of drafting an agreement to submit the dispute to international arbitration* already started in the spring of 2009. It was by no means a given to be able to level off the vital interests of Slovenia and Croatia and to accommodate tricky legal issues in a highly political context. What is more, the *sui generis* situation was *terra incognita* for everyone, and so was the communication during the drafting stage. The firm grip of the European Commission on the Arbitration Agreement paid off, as Rehn II proved solid enough to survive the temporary disruption at the beginning of July 2009.

► In a rare moment of mutual bilateral face-saving, with the help of the skilful soft mediation by the Swedish EU Council Presidency, a compromise could be found in the *final phase of the negotiations on the Arbitration Agreement* in the summer of 2009. The (procedural) decoupling of (i) the lifting of the Slovenian blockade of Zagreb’s EU accession negotiations and (ii) the beginning of the arbitration procedure for the resolution of the border dispute as such did do the trick: Slovenia was no longer the bad guy who vetoed Croatia, and Croatia could secure EU membership without any delay caused by a lengthy dispute resolution procedure for a start. Both parties were stripped off the escalating conflict dynamics there had been since the beginning of the Slovenian veto in the autumn of 2008. An intense phase of drafting the mandate for third-party judicial dispute resolution was finally on the right track after a very critical phase in June and July 2009.

► The most visible critical juncture is the *Slovenian ex-parte communication and Croatia’s withdrawal from the arbitration procedure*. The illegal pieces of communication were revealed in the summer of 2015, at a moment following the announcement by the Arbitral Tribunal that the Final Award was going to be handed down by the end of the year. The publication of the intercepted communication (in a Serbian and a Croatian newspaper) caused sheer outrage amongst the political elite in Croatia, and led to an unanimous Sabor resolution calling on the government to leave the arbitration procedure. There was full unity across the political spectrum which is rare not only in Croatia. Yet, the critical aspect here is that regardless of the fact that *ex-parte* communication constitutes a violation of both the Arbitration Agreement and the terms of appointment for the members of an arbitral tribunal, only the Tribunal itself, like it or not, has the jurisdiction to assess the implications of a violation and whether the arbitration procedure must be terminated or continue. In retrospect,

the political answer from Zagreb, however, was virtually immediate and predominantly based on legitimacy considerations irrespective of the (not entirely convincing) legal arguments put forward. It did not come as a surprise, therefore, that the Croatian governments disregarded both the Tribunal's Partial Award (assessing the implications of the Slovenian violation and the legality of the Croatian termination request) in June 2016 and the Final Award in June 2017.

It is suggested here, that the *legitimacy perceptions in Croatia were so strong that no turning back from leaving the arbitration procedure regardless of any legality considerations was even thinkable*. In other words, legitimacy and appropriateness consideration outweighed a full rule-of-law approach. It appears that a strong sense of injustice due to the Slovenian black-mailing in 2008/09 in the first place was heavily amplified by the pieces of *ex-parte* communication, undoubtedly an unlawful act and a violation of the Arbitration Agreement as the Tribunal emphasised, which was seen in Zagreb as a fundamental breach of the fairness and impartiality rules of the game. For reasons of principle and consistency, the continuation of the arbitral proceedings and even a prior assessment of events by the Tribunal (which has the well-established jurisdiction to do so) had to be ignored. An escape from recognising the Final Award must have seemed a feasible way forward in Zagreb, all the more so as the terms of the arbitration decision were quite favourable to Croatia, so that the prospects of a bilateral implementation of the gist of the Final Award seemed not entirely unrealistic. Yet, the readiness of Ljubljana to consider departures from the provisions in the Final Award was apparently overestimated in Zagreb. In fact, as the contents of the arbitration decision, from a Slovenian point of view, were not a great deal more than the vital national interest in terms of a special regime for the access to the high seas, there was no room for manoeuvre in Ljubljana to embark on bilateralism again having in mind the painful experience from 2001. Nor was there any room for manoeuvre in Zagreb to depart from the unanimous Sabor vote from July 2015. As full implementation of the Final Award was the only way forward for Slovenia, the lawsuit before the European Court of Justice was in fact the only option.

Where does all that leave us?

- A bilateral conflict the management of which is undertaken in an environment of coercion and power asymmetry generally has a hard life. In an EU context in particular, (i) using the Member State veto vis-à-vis a Candidate Country is a sledgehammer approach, even if there may be a 'legitimate' national interest to do so, and (ii) the veto approach constitutes an abuse of the EU institutional line-up and the accession process as a whole if the matter has nothing to do with the EU *acquis*. That course of action by Slovenia poisoned the good-neighbourly relations with Croatia (that do indeed exist safe for the border issue) and damaged the country's international standing.

- The *ex-parte* communication tainted the arbitration procedure politically and questioned the rule of law. Notwithstanding legitimacy considerations, the Final Award is nevertheless a lawful and binding settlement of the border between Slovenia and Croatia under international law. The unilateral withdrawal of Croatia from the arbitration process poisoned the otherwise good-neighbourly relations with Slovenia, too, and likewise put into question the rule of law and damaged the country's international reputation. In essence, the result is a lose-lose situation with regard to the arbitral proceedings. It is important to note, however, that this finding does *not* disqualify arbitration from being a valuable and efficient means of third-party dispute settlement (see VIII.3).

○ Looking ahead, implementation of the CJEU judgement - which in the view of this author is going to establish a link between the implementation of the arbitration award and the territorial application of EU law (see also VI.3.7.3 and footnote 348) – is bound to happen. Yet, it will be anything but face-saving. As for Croatia, the political elite must find a narrative that the CJEU judgement must and will be adhered to for the general sake of being a (respected) member of the European club, EU membership being a long-standing policy objective since statehood was completed. In particular, to embed the implementation of the arbitration award in Zagreb's aspiration to join both the Euro and Schengen (which Slovenia as a member of both clubs could veto) should definitely help. Any reference to the original implementation obligation by the arbitration award which has bilateral roots, however, will want to be avoided. As for Slovenia, it is going to be difficult to put aside the perception that the solution of the border issue was, to some degree, achieved by questionable means, both in terms of the veto approach as such and the violation of the Arbitration Agreement. The most likely narrative for Ljubljana quarters is that the rule of law (in terms of the binding Final Award and the CJEU judgement) must have the upper hand if the rule of law as an indispensable pillar of the EU is not to fade away. In relation to Croatia, reference to the fact will want to be had that any new bilateralism after 2001 would be doomed to failure and postpone a settlement of bilateral conflict *sine diem*.

○ At the end of the day, the treatment of the Croatia-Slovenia border dispute is not a role-model for the resolution of bilateral disputes in an EU context. It was crisis management all over, but especially the third-party roles of the European Commission and the Swedish Presidency were played professionally and successfully. Also the bilateral collaboration between Ljubljana and Zagreb was, during some phases, pragmatic and constructive. Somewhat ironically for the bilateral border dispute, it now looks as if the conflict's solution was going to be implemented in the very EU environment it had nothing to do with in the first place. In any event, the forced implementation of a decision that was politically tainted and arrived at not free of controversy in other ways, either, leaves a bad taste in the mouth of EU Member States and Candidate Countries alike. And yet, there are lessons to be learnt from that case, and they will be discussed in Chapter VIII.

## VIII. Conclusive policy recommendations

The conclusive policy recommendations presented below are four-fold:

- First, they will pinpoint *matters of urgency with regard to implementation* issues of the Croatian-Slovenian border;
- Second, the recommendations address several *pressing bilateral issues* of immediate relevance to the prospective EU enlargement with a clear risk of blockade vis-à-vis the Candidates Countries from the former Yugoslavia;
- Third, recommendations include a *strengthening of dispute settlement*, both in an EU context and with regard to reform of international arbitration;
- Fourth, with regard to alarming findings from both Serbia and Montenegro on the *rule-of-law track record*, it is suggested to *align EU funding* not only to the record of existing Member States, but also of Candidate Countries.

Much has been written and recommended on what the EU and the countries from the former Yugoslavia and Albania could or should (not) do to make EU enlargement for the so-called Western Balkans work. Most of it is either grand design or confined to the technicalities of existing EU-institutional accession-process structures.

This set of recommendations ventures to go down a different avenue. The undertaking is, first, to try to think out of the box, and, second, to present suggestions that have not been elaborated in an ivory tower, but are precise steps that are practitioner-proof and feasible without any institutional or treaty reform whatsoever. To be sure, as far as feasibility and implementation goes, however, there is one prerequisite common to them all: political will.

### VIII.1 Immediate challenges for Final Award implementation

As set out in the Final Award, the implementation of the Croatian-Slovenian sea border and the regime for the use of the maritime areas is not an isolated undertaking and must respect existing agreements (PCA Final Award, 2017: 362, para 1134). With regard to Croatia, another border issue in a similar line-up arises in the south with Montenegro. In this context of border bays, an alternative approach to tiny border bays is going to be presented.

#### VIII.1.1 **Implementation needs to consider existing agreements**

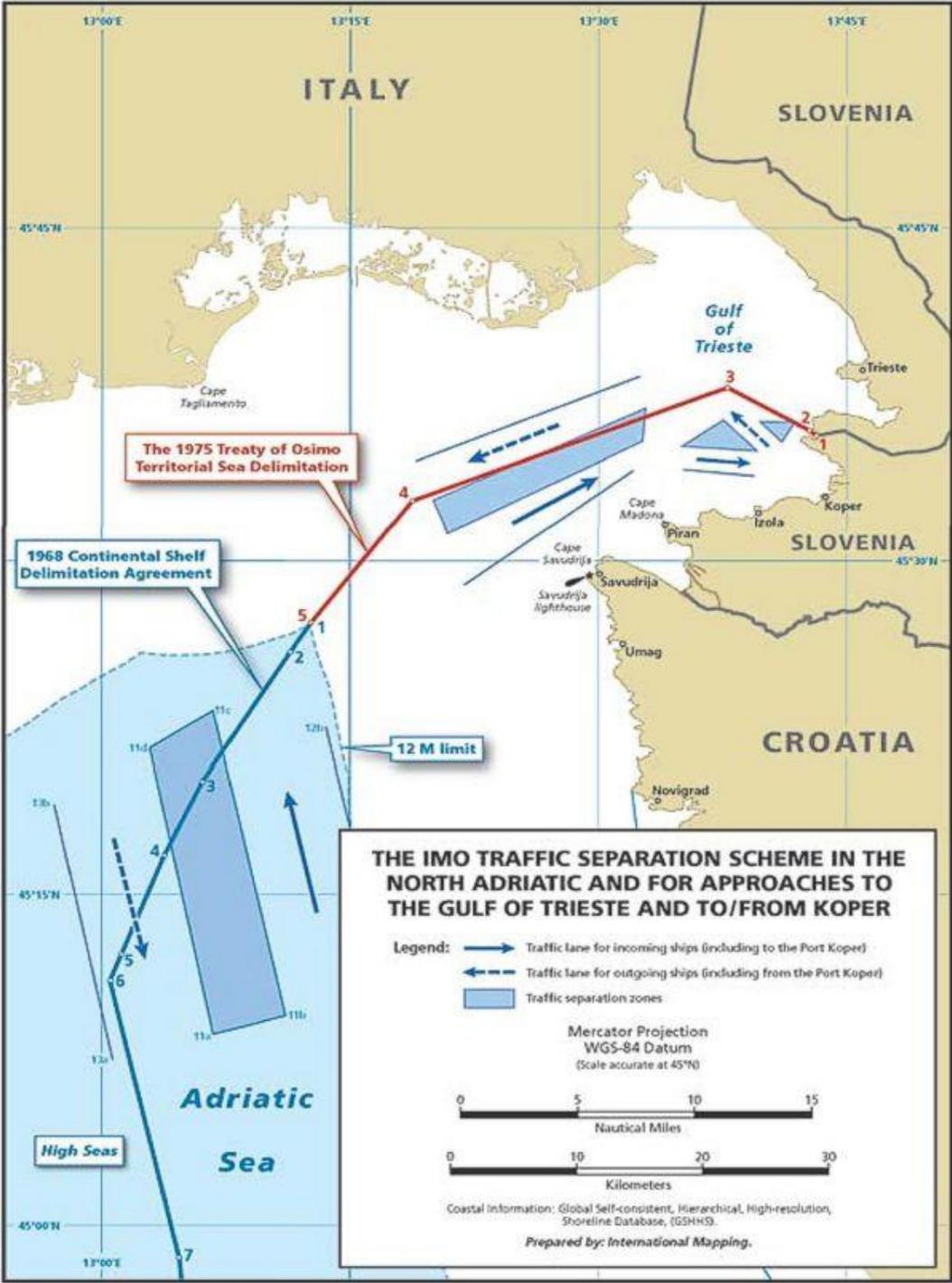
Two agreements are of particular salience here, (i) the IMO Traffic Separation Scheme in the Northern Adriatic from 2004, and (ii) the 1983 Fisheries Zone Italy-Yugoslavia.

##### VIII.1.1.1 IMO Traffic Separation Scheme in the Northern Adriatic

The Traffic Separation Scheme (TSS) in the Northern Adriatic confirmed by the International Maritime Organisation (IMO) on 28 May 2004 has been in force since 01 December 2004. The TSS regulates navigation for maritime vessels to and from the ports of Trieste and Monfalcone (Italy) and Koper (Slovenia). There are designated sea-lanes for both directions crossing the respective territorial sea of Croatia, Italy and Slovenia. The separation scheme

originates from a trilateral Memorandum of Understanding concluded by Croatia, Italy and Slovenia on 19 October 2000 (see also VI.3.2.1.1 (iii); fig. 30 below).

Figure 30: IMO Traffic Separation Scheme 2004 with designated sea-lanes to and from Koper (PCA Final Award 2017: 334, para 1040)



There is a clear need to bring the foreseen high-seas corridor (Junction Area) in the Croatian territorial sea from the Final Award (see VI.3.5.2.5) in line with the designated sea-lanes of the Traffic Separation Scheme. First and generally, the Junction Area may overlap with one or more of the TSS sea-lanes. Second and more specifically as for the navigation to and from

Koper, the current outbound lane goes through the Italian territorial sea, whilst the current inbound lane goes through the Croatian territorial sea.

Presuming that the Junction Area (see VI.3.5.2.3) is to accommodate both inbound and outbound traffic to secure the foreseen high-seas freedoms of navigation (and not just innocent passage), the existing outbound TSS sea-lane obviously has to be brought within the Junction Area, i.e. within the Croatian territorial sea. However, the width of the overall inbound/outbound lanes including the separation buffer would decrease from currently 5 nm or more to the 2.5 nm of the Junction Area bringing the inbound/outbound vessels very close to one another with only a very tight buffer zone. Yet, the parties are of course free to negotiate a departure from the width stipulated in the Final Award.

In view of the above, it is vital to note, that the implementation of the arbitration award is no longer a bilateral affair between Slovenia and Croatia, but a trilateral one also including Italy. Safety of navigation not least in terms of the environmental impact is of utmost importance in the Upper Adriatic with its vulnerable eco-system and shallow waters.

► *It is a matter of urgency, therefore, to amend the 2000 Memorandum of Understanding between Croatia, Italy and Slovenia with regard to traffic separation and sea-lanes taking into account the Junction Area (high-seas corridor) from the Final Award. Only in this framework is the implementation/adaptation of a corridor to and from the Slovenian territorial sea feasible. Notwithstanding the positions of the three riparian States, it is suggested here that some flexibility from all sides is required to arrive at a workable solution to meet both navigational and environmental concerns.*

#### VIII.1.1.2 Fisheries Zone Italy-Yugoslavia

In February 1983, Italy and Yugoslavia signed an agreement on a joint cross-border Fishing Zone in the Gulf of Trieste.<sup>353</sup> The Zone is located in the territorial sea of Italy and Slovenia and appears also to touch on the territorial sea of Croatia (see fig. 31 overleaf).

The Fishing Zone has neither been renounced nor confirmed - unlike the Italian-Yugoslav sea border the succession to which was declared by Croatia and Slovenia and not objected to by Italy (see e.g. Klemenčić and Topalović, 2009: 313-4). Legally, it is established that successor States, by the time they become independent, inherit existing international borders (see IV.5.1.2.2). As for the status of bilateral treaties (such as the one on the Fishing Zone) the situation is governed by the 1978 Vienna Convention on succession of States in respect of treaties (UNTS).<sup>354</sup> The Convention indeed stipulates that in the event of secession or dissolution, there is automatic continuity to the effect that the successor State is bound *ipso*

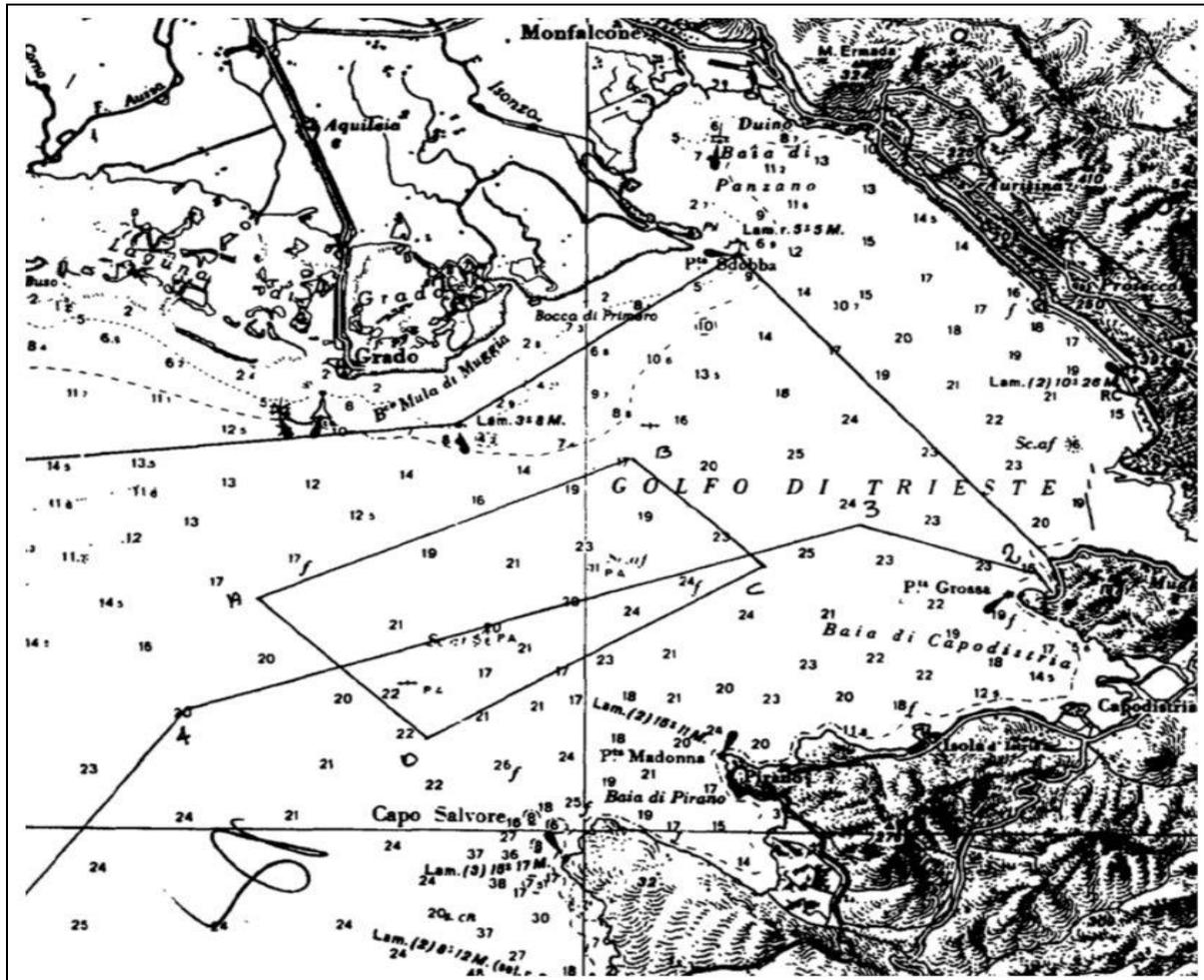
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<sup>353</sup> Exchange of letters signed by the Foreign Ministers Emilio Colombo (Italy) and Lazar Mojsov (Yugoslavia) in Rome on 18 February 1983. The Fishing Zone entered into force in February 1987. The letters are reprinted in the Parliamentary Act of Italy's *Camera dei Deputati* No. 3289 from 18 November 1985.

<sup>354</sup> The Convention entered into force on 06 November 1996 and only 37 States currently participate; see [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XXIII-2&chapter=23&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXIII-2&chapter=23&clang=en). Strikingly, the Convention applies different rules for Newly Independent States emerging in the context of decolonisation. For those States, the concept of *tabula rasa* holds, i.e. the new States are not bound by the treaties entered into by the predecessor (colonial) State (Article 16). Dumberry (2015) argues that the *tabula-rasa* principle should apply to all new States as it is unjustifiable why a new State should not be able to decide whether or not they want to continue the relationship governed by the original treaty.

*facto* by bilateral (and multilateral) treaties entered into by the predecessor State (Art. 34 UNTS).<sup>355</sup> Croatia and Slovenia are Parties to UNTS. Italy, however, is not. It follows that it is unclear whether the Fishing Zone is still in force since, to the best knowledge of this author, there has been no agreement or declaration in that regard by Italy, Croatia or Slovenia.

Figure 31: Fisheries Zone Italy-Yugoslavia (taken from the 18 February 1983 letters; see above footnote 353). The equidistance line through the Zone marks the Italian-Yugoslav sea border (Treaty of Osimo 1975). The lines along the Italian coast constitute the straight baselines of Italy.



As for the implementation of the Final Award, a contradiction arises between the Fishing Zone and the Junction Area. With regard to the actual fishing aspect, the arbitration decision's regime for the high-seas corridor stipulates that there be no fishing or other exploration or exploitation activities in the Junction Area (PCA Final Award 2017: 361, para 1126). As a result, in view of the considerable overlap between the Fishing Zone and the Junction Area, an amendment to the Italian-Yugoslav Fishing Zone with regard to its territorial application is definitely necessary. Alternatively, the Zone could be declared extinct. As with the Traffic Separation Scheme above (VIII.1.1.1), any decision would require trilateral agreement between Croatia, Italy, and Slovenia.

<sup>355</sup> With regard to the UNTS Convention, Slovenia and Croatia are successor States in two ways: (i) succession to any bilateral (and multilateral) treaties entered into by the SFRY, and (ii) succession to the SFRY as a signatory State of the UNTS as such (Slovenia declared succession on 06 July 1992, Croatia did so on 22 October 1992).

► *Therefore, the Fishing Zone issue must be tackled together with the trilateral exercise of implementing the Final Award and adapting the Traffic Separation Scheme sea-lanes accordingly (see above). Data on marine casualties in relation to traffic monitoring systems provided from maritime authorities from Italy, Slovenia, Croatia, and Montenegro for the period 2006-2015 strongly suggests that collisions between freight vessels and fishing boats are by far the most common type of accident.*<sup>356</sup>

### **VIII.1.2 Croatia needs a sea-border package deal**

The border dispute between Croatia and Slovenia has gone a pretty long way since 1991. As this study has demonstrated, there have been several efforts to resolve the conflict, bilaterally and by different types of third-party management. With every failure, however, the room for a *face-saving* solution at the subsequent stage diminishes.

Yet, after the EU Court of Justice will have delivered its judgement, presumably by the end of 2020 or the beginning of 2021 (presuming admissibility; see footnote 348), there will be no more next stage other than actual implementation and demarcation. With regard to saving face, the fact that the settlement of the border dispute in terms of the arbitration award will be confirmed by the CJEU is good news for Croatia. Provocative as this may sound, an obligation with regard to a sensitive matter, such as a territorial issue, originating from the EU is of a different nature than an obligation stemming from a bilateral agreement or directly from a forced third-party ruling, let alone from a (politically) tainted arbitration procedure. However, domestic opposition to implementation of the arbitration award continues to be robust. The unanimous Sabor vote from 2015 to leave the arbitration procedure is a rock-solid benchmark against which any prospect of ratification must be measured, regardless of the fact that it was the previous Croatian parliament that adopted the resolution, not the current one.

It appears fair to see the level of salience of the arbitration award's implementation on equal footing with the one of General Gotovina's extradition to the ICTY back in 2005. Both issues are highly sensitive and greatly touch upon Croatia's national identity and legitimacy considerations. Looking at both matters in a purely domestic context, no Croatian government would ever find a majority in Sabor to endorse them. If, however, a measure was going to serve 'the greater good' of the EU, the prestigious club confirming Croatia's return to Europe (the extradition of Gotovina marked the beginning of the accession negotiations for Croatia in October 2005), or the country's solid situatedness in the EU (implementing a CJEU judgement also has reputational implications for a Member State), the country would stick to the narrative of the political elite: to belong to Central Europe rather than the 'Balkans'.

Still, when every allowance is made for the positive contents of the Final Award for Croatia in respect of the land border, the high-seas corridor may be seen as an infringement of Croatian territorial waters, and therefore of Croatian territory. Such notion is very difficult to swallow for historical reasons (see IV.5.2), even for the sake of being a respected EU Member State.

► *To ratify the Croatian-Slovenian border in Sabor along the terms of the arbitration award would come at very high if not unsurmountable domestic political costs. Here, the golden opportunity of a bilateral-borders package-deal arises. Parallel ratification of a permanent*

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<sup>356</sup> See Guardia Costiera, Analysis of Traffic Monitoring Systems - the marine casualties; available at [http://www.guardiacostiera.gov.it/mezzi-e-tecnologie/Documents/MRS%20Adriatic%20Traffic/Easyconnecting\\_4.4\\_Marine%20casualties%20v1.1.pdf](http://www.guardiacostiera.gov.it/mezzi-e-tecnologie/Documents/MRS%20Adriatic%20Traffic/Easyconnecting_4.4_Marine%20casualties%20v1.1.pdf)

*border agreement with Montenegro would kill two flies with one stone: the bilateral open issue between Croatia and Montenegro would be cleared well ahead of EU accession and provide stability in the region, and Croatia could level off its overall border balance sheet.*

#### VIII.1.2.1 Sea border Croatia-Montenegro

The provisional sea-border arrangement of Croatia with Montenegro, the 2002 Protocol, was concluded soon after Yugoslav troops had withdrawn from the (Croatian) peninsula of Prevlaka (from where Dubrovnik was shelled in November/December 1991).<sup>357</sup> As the Yugoslav Navy was stationed in Kotor back then, unhindered access to Kotor Bay was of utmost importance for Montenegro. The Protocol, which is still being applied to date (interview Vladimir Radulović<sup>358</sup>, 20-04-2018; interview senior Croatian civil servant, 25-01-2017; see also Friedrich Ebert Foundation, 2016: 9), deprives Croatia of full sovereignty along its inner shores at Prevlaka and stipulates joint Croatian-Montenegrin policing in the Zone (condominium) west of the line between Cape Konfin and a point near Cape Oštro (Article 7). At the same time, naval activity on the Montenegrin side is restricted including the provision for submarines to navigate on the surface (Article 15; see fig. 32 overleaf).

EU accession negotiations with Montenegro have been ongoing for a number of years, and it is time to prioritise the finalisation of a permanent border agreement with Croatia. There were no meetings of the bilateral commission in 2016 and 2017 to agree on the mandate for submission to the ICJ. Leaving the matter to a late stage would make it vulnerable to domestic pressure in Croatia potentially triggering a veto situation in the accession negotiations.

A transformation of the Protocol into a final agreement would entail the opportunity to reflect the current situation of fundamentally different security interests (the Montenegrin Navy is no longer stationed in Kotor, and both Croatia and Montenegro are now NATO members). The outer Bay could be delimitedated with an equidistance line apportioning full sovereignty for either side accordingly. Alternatively, the condominium regime in the Zone could be extended to the whole area east of the Zone perhaps except for a corridor securing unhindered access from the internal waters of Herceg Novi/Kotor Bay to the Montenegrin territorial sea south of the line Cape Oštro to Cape Veslo and vice versa. Yet, the territorial sea would appear to be in more urgent need of final delimitation not least due to presumed natural resources in the seabed, where exploratory drillings have affected the bilateral Croatia-Montenegro relations.<sup>359</sup>

► *There is a clear need to transform and amend the 2002 Protocol into a bilateral treaty soon. The Protocol is a “temporary [agreement] which will be valid until the conclusion of the border agreement” (Article 1)<sup>360</sup> anyway, so the next European Commission should*

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<sup>357</sup> The Protocol contains provisions on the de-militarization of the Prevlaka peninsula and a strip along the Croatian-Montenegrin land border in the proximity of Prevlaka (Article 7).

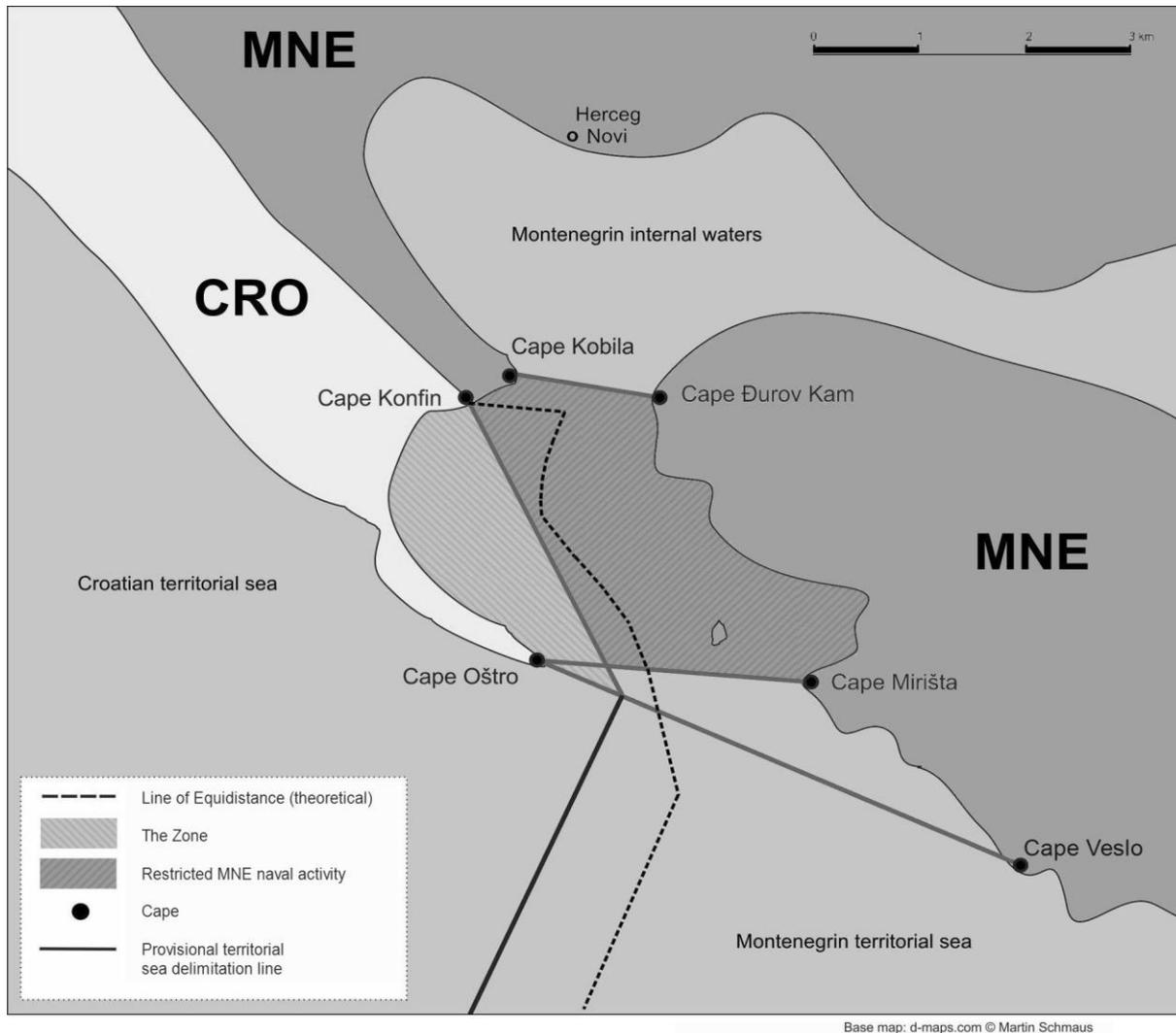
<sup>358</sup> Vladimir Radulović is the Ambassador of Montenegro to the Benelux countries. He used to be involved in the 2002 Protocol in the Ministry for Foreign Affairs of Montenegro.

<sup>359</sup> Montenegro protested exploratory drillings off the Croatian coast south of Prevlaka in 2013 on the grounds that Croatia did not consult prior to contracting drillings in an area where no final delimitation existed (see *note verbale* 09/16-167/35 of the Ministry of Foreign Affairs of Montenegro from 02 July 2014 to the UN Secretary General; *note verbale* 09/16-167/121 of the Ministry of Foreign Affairs of Montenegro from 01 December 2014 to the UN Division for Ocean Affairs and the Law of the Sea).

<sup>360</sup> Protocol on the interim regime along the southern border between the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro), signed on 10 December 2002. The Preamble suggests that “the provisional regime established by this Protocol will make it easier to find a final solution [...]”.

*prioritise the issue as early as in their 2020 country report on Montenegro by including a clear timetable for the resolution of the dispute (see also VIII.3.1.1).*

Figure 32: Delimitation around Prevlaka and outer Herceg Novi Bay according to the 2022 Protocol



With regard to the timing of the implementation of both the Croatian-Slovenian border and the amended Croatian-Montenegrin border treaty, there is a small feasibility slot between the CJEU judgement (presumably at the end of 2020 or the beginning of 2021; see footnote 348) and 01 July 2021, when Slovenia takes over the Presidency from Finland. A perhaps more relaxed phase opens up after the Slovenian EU Presidency, i.e. as from the beginning of 2022.

On a different note, one must also take into account two major European policy goals of any Croatian government: to become member of both the Schengen area and the Eurozone. According to the rules of the game, it takes the unanimous consent of the current members of the Schengen area and the Eurozone to take in new members. As Slovenia has already introduced the Euro and is a Schengen member, Croatia obviously is best served in securing a barrier-free, i.e. veto-free, path to membership in both areas.

### VIII.1.2.2 New approach for delimitation and management of tiny border bays

Sovereignty over territory is a distinctive feature of States. And it also touches on notions of independence, autonomy, identity, and being an equal member of the community of States. In addition, territorial sovereignty over land or maritime areas matters most when there has been a dispute over the respective territory - at the negotiating table or through an armed conflict. All of that renders territorial issues remarkably salient irrespective of economic or environmental considerations.

The fight over Piran Bay between Slovenia and Croatia is an impressive case in point in many ways. Where there are 'red lines' delimitation-wise and in terms of the national narrative, it becomes very difficult to look at a dispute for what it often is: a symbolic issue over real, perceived or alleged identity with very little real-world impact. The political elites become (self-)boxed into a corner of patriotic (and nationalist) sentiments where there are only winners and losers, and where saving face becomes unthinkable, let alone possible. Under such circumstances, it is very difficult to take a step back and consider alternative options.

They do exist, however, and are even being applied in the region. The Protocol in operation as for the Croatian-Montenegrin sea-border at Prevlaka, provisional as it may be and reflecting the historic demilitarization background of 2002, provides for a condominium approach in one maritime area in which there is joint policing by mixed-crew vessels. Further, there is no equidistance line of demarcation in Prevlaka Bay, but special regimes for different maritime areas (see VIII.1.2.1).

#### Joint management instead of focus on sovereignty

In tiny maritime areas along the Adriatic, irrespective of the question whether they constitute border bays or single-State bays, the main issues on the ground usually are tourism, fishing, and the preservation of the environment. A strong sense of sustainability and environmental protection tends to be linked to the economic well-being. For border bays, therefore, and provided there is (i) no economic activity in terms of natural resources in the sea-bed, and (ii) no security or defence concern in the bay as such, shared sovereignty could be the key to an amicable and good-neighbourly solution for the management of bays.

The more focus there is on sustainable tourism and the protection of the marine environment to the mutual benefit of both riparian States, the less important becomes the sovereignty issue.<sup>361</sup> However, in the territorial sea outside of bays, condominium approaches are unrealistic as fishing is more relevant there, and, what is more, existing or potential offshore or sea-bed exploitation activities require clear jurisdictions not least to attract and secure investment.

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<sup>361</sup> A long-standing example in this regard is the bilateral treaty between the Netherlands and Germany on the Dollard-Ems border bay on the North Sea (concluded in 1960 and amended in 2014) contains no provisions on the delimitation line inside the bay. Instead it provides for jurisdiction for the safety of navigation, the maintenance and demarcation of the navigation channel (affected by a substantial tidal range), and environmental issues. The territorial delimitation only starts at the outer edge of the Bay which is subject to the continental shelf agreement of both States from 1973. For the bi-lingual 2014 Treaty see Official Journal of the Federal Republic of Germany (Bundesgesetzblatt) 2016/II No. 15.

► *With regard to Piran Bay, to focus on the delimitation line in the Bay seems increasingly flawed. Slovenia wanted sovereignty over the entire Bay, Croatia wanted a partition by the median line. Neither party will ever be satisfied with the 80-20 division set out by the Final Award and the initialled 2001 Draft Agreement. The proposal submitted here is to bilaterally agree on making the entire Bay a joint fishing zone and to include it in the wider Croatian-Slovenian SOPS zone referred to in EU Regulation 1380/2013 (see VI.1.3 and VI.3.2.1.2 (iv)).*

After all, Piran Bay is internal waters, there is no major economic activity in the Bay save for the Sečovlje salt pans which are land-based anyway, and the fish stock outside the Bay is far more substantial than inside the Bay. Recreational activities such as diving, swimming and yachting constitute the main activities during the holiday season, the most profitable business along the Slovenian and Croatian shores of the Bay. In addition, patrolling and policing of the Bay could be carried out by mixed-crew vessels. This would not only foster the solid collaborative cross-border spirit on the ground, but it would help bring that spirit back to the political level of the border issue where it is badly needed. The delimitation line could still be maintained legally, and it would certainly help for the ratification of the Final Award, but practically its salience could gradually fade away.

## **VIII.2 Pressing bilateral issues to be solved ahead of EU accession**

It has been a mantra of the EU hemisphere for quite a while that Candidate Countries from Southeast Europe, the so-called Western Balkans Six (Serbia, Montenegro, Bosnia-Herzegovina, Macedonia, Kosovo, and Albania), must resolve bilateral disputes with one another or with neighbouring States before they can join the EU.

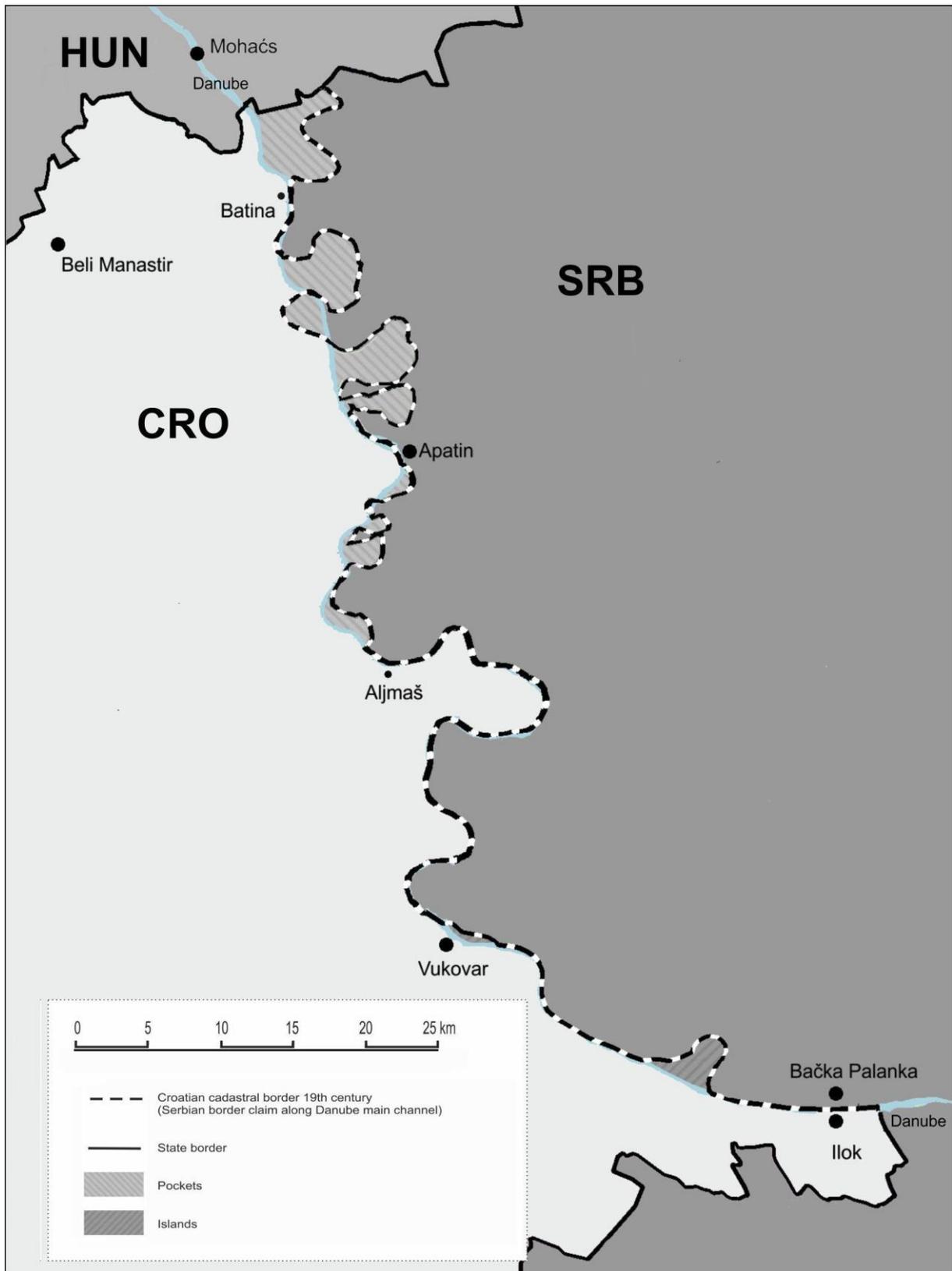
It is worth illustrating, therefore, what the major bilateral disputes are and how they could be tackled. The sea-border Croatia-Montenegro is referred to in VIII.1.2.1 above. The remaining major disputes for the moment are (in the order of disruption potential during accession negotiations): (i) the border between Croatia and Serbia along the Danube, (ii) war crime jurisdiction between Serbia and Croatia, (iii) the newly resolved dispute over the State name between North Macedonia and Greece, (iv) the normalisation of relations between Serbia and Kosovo, and (v) maritime access for Bosnia-Herzegovina through Croatian territorial waters.

### **VIII.2.1 Land border Croatia-Serbia along the Danube**

A long-standing territorial dispute is the land border between Croatia and Serbia along the Danube. It concerns several areas of land in the Baranja section between the border with Hungary and the town of Aljmaš, the so-called pockets, and a few spots between the Danube main channel and the river's tributaries or branches further downstream, the so-called river islands, in the Bačka section between the towns of Vukovar and Bačka Palanka/Ilok.

Notably, the dispute has not arisen out of the blue. Rather, the course of the river has changed due to natural meandering and regulation works where channels were cut out between 1890 and 1894 in the Baranja section, and in 1922 in the Bačka section. As a result, the river course is no longer aligned with the cadastral limit of the commune of Beli Manastir (Croatia). That cadastre dates back to the Austrian-Hungarian administration in the 19th century. Some sections of the cadastral border run along tributaries/branches of the Danube's present-day main channel (see fig. 33 overleaf).

Figure 33: Disputed spots of the State border between Croatia and Serbia along the Danube (schematic view)



Base map: Openstreetmaps.org © Martin Schmaus

In fact, the old cadastral border, the cutting out of channels, and the natural river meandering over time created the pockets, six on the left bank and two on the right bank of the river.

Further downstream in the Bačka section between Vukovar and Ilok/Bačka Palanka, there are a few river islands on the left bank of the main river course. The dispute actually centres around the following argumentaires: Croatia claims the pockets on the left bank and the river islands based on the cadastral limits of Beli Manastir. Serbia holds that the navigable channel of the river (Thalweg) constitutes the border all along the Danube as this is not least the international standard on navigable rivers (Dimitrijević, 2012: 13-19; Klemenčić and Schofield, 2001: 16-25). The dispute covers roughly 110 km<sup>2</sup> of land on the left bank and around 10km<sup>2</sup> of land on the right bank of the Danube (Friedrich Ebert Foundation, 2016: 10).

Unlike the land border dispute between Croatia and Slovenia along the Dragonja, Sava or Mura, the Danube border dispute between Croatia and Serbia is *not* a post-1991 one. It goes back to the time right after the re-establishment of Yugoslavia at the end of World War II. Back then, the Đilas Commission was looking at the boundary between the Yugoslav Republics of Croatia and Serbia. Several decisions were taken as to which places belonged to what Republic (see Đilas, 1985: 99-100). However, the exact course of the border along the Danube was not determined. The dispute resurfaced here and there between the two Republics, at least in the period between 1947 and 1965. Yet, it was not given much attention elsewhere at the time as it was a domestic Yugoslav affair (Reba, 1999: 27-32; cited in Klemenčić and Schofield, 2001: 22-24).

Today, however, the relationship between Croatia and Serbia is one between independent States with an international border. More importantly, it is an asymmetric relationship between an EU Member State (Croatia) and a Candidate Country (Serbia) *de facto* giving Croatia, and any other Member State, veto power on any bilateral dispute with Serbia (and all other Candidate Countries).

Marrying cadastral claims with the current course of the river in bilateral negotiations will be difficult. However, there seems to be no sense of urgency on either side. Croatia sees no pressing need for the moment (“we have to wait for the right moment to agree”) and favours the ICJ as the third-party judicial body to resolve the conflict (interview senior Croatian civil servant, 25-01-2017). Serbia contemplates both the ICJ or international arbitration and expects “a Croatian veto at some point” in the actual EU accession negotiations, potentially in the Fisheries Chapter (interview Tanja Mišćević, 28-11-2016).

It takes no fortune telling that an arbitration agreement or a mandate for the Court could be drafted within a few months if there was a mutual determination and an EU commitment (see VIII.3.1) to solve the issue. After all, the determination of a land boundary would presumably be subject mainly to international law (and not to equity or wider considerations as in some provisions of the maritime issues of the Arbitration Agreement between Croatia and Slovenia; see VI.2.3-VI.2.5).

► *It is suggested here that the matter cannot wait for too long. The later the stage a Member State submits ‘reservations’ vis-à-vis a Candidate Country, the more difficult it usually is to clear them. An arbitral tribunal or the International Court of Justice should indeed be able to tackle the issue successfully. The arbitrators/judges would have to look at both the cadastral record and claims of factual control (effectivités). The court or tribunal would examine whether the disputed pockets and islands are inhabited, whether there is any infrastructure, the land is used for farming, or whether there is any kind of economic or other activity. Negotiations on the mandate for international arbitration or the ICJ should start any time soon after the end of the Croatian EU Presidency, i.e. in the second half of 2020.*

## VIII.2.2 Universal/regional jurisdiction war crimes (Serbia-Croatia)

In the EU accession negotiation with Serbia, a major point of contention appeared in the first half of 2016 when Croatia took issue with the Serbian Law on Organization and Competences of State Authorities in War Crime Proceedings (ZORZ)<sup>362</sup>. Croatia raised its reservations in the context of opening Chapters 23 (Judiciary and fundamental rights) and 24 (Justice, freedom and security), in particular with regard to the opening benchmarks (for procedural aspects see VI.2.1.1 and VI.2.1.2).<sup>363</sup>

It is useful to recall that the jurisdiction of national courts is usually confined to the national territory and to domestic legislation. *Universal jurisdiction*, however, “an essential tool of international justice, is the ability of the court of any State to try persons for crimes committed *outside its territory* that are not linked to the State by the nationality of the suspect or the victims [...]”. Universal jurisdiction plays a crucial role in “the need to punish perpetrators of [...] *war crimes*” (Amnesty International, 2012: 1; emphasis added). It is understood that “universal jurisdiction, by its nature, does not operate within the parameters of an existing, bounded or defined jurisdictional community” (Hovell, 2018: 3).

The Serbian ZORZ contains provisions on the material and territorial scope of war crime jurisdiction. Article 2(2) has the following definition on the scope of the legislation:

“[S]erious violations of international humanitarian law *committed in the territory of the former Yugoslavia since 1 January 1991* specified in the Statute of the International Criminal Tribunal for the Former Yugoslavia.” (emphasis added)

Article 3 reads:

“The government authorities of the Republic of Serbia specified in this Law shall have the competent jurisdiction for conducting the proceedings for criminal offences referred to in Article 2 of the present Law which were *committed in the territory of the former Socialist Federal Republic of Yugoslavia, regardless of the nationality of the perpetrator or victim.*” (emphasis added)

Serbia contends that jurisdiction “over the whole territory of the former Yugoslavia” regardless of the citizenship of the perpetrators or victims was necessary because “Serbia was not the scene of the armed conflict 1991-1995” and that amongst the refugees looking for shelter in Serbia “there were a number of those who had perpetrated [...] war crimes”. Further, the ICTY had appreciated that kind of universal jurisdiction of the Serbian judiciary, and Croatia had not objected to the 2003 ZORZ until the beginning of 2015 (Comments on the request for abolition of universal jurisdiction of Serbian authorities with regard to war crimes, note of the Government of Serbia, March 2015: 2).

Conversely, Croatia held that ZORZ interfered with the sovereignty of other States as “such territorially limited ‘universal jurisdiction’ [was] without any basis in international law, precisely because of this limitation [implying the] inability or unwillingness of strictly defined States to undertake such prosecution” which amounted to “legal aggression” (The problems of

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<sup>362</sup> See Official Gazette of the Republic of Serbia, No. 67/2003; available at [https://www.mpravde.gov.rs/files/Law%20on%20the%20Organisation%20and%20Competences%20of%20the%20Government%20Authorities%20in%20War%20Crimes%20Proceedings\\_180411.doc](https://www.mpravde.gov.rs/files/Law%20on%20the%20Organisation%20and%20Competences%20of%20the%20Government%20Authorities%20in%20War%20Crimes%20Proceedings_180411.doc)

<sup>363</sup> Zagreb also had reservations vis-à-vis the non-implementation of a guaranteed seat for the Croatian minority in the Serbian Parliament and with regard to Serbia’s co-operation with the ICTY. In addition, Croatia introduced a reservation with regard to victims’ rights/compensation from the dissolution wars as a last-minute add-on in June 2016 (interview Member State E COELA civil servant, 21-10-2016; interview Member State D COELA civil servant, 15-11-2016).

Serbia's regional jurisdiction, note of the Ministry of Foreign and European Affairs of Croatia, April 2016: 1). As a result, Article 3 of ZORZ was "incompatible with the political criteria related to individual chapters [...] and in particular Chapter 23" (note MFA Croatia: 3). Even if universal jurisdiction was not part of the EU *acquis*, Serbia's approach was "an attempt to turn [universal jurisdiction] into a regional criminal law dictatorship" and was thus "by no means a bilateral issue between Croatia and Serbia, but a matter of defence and full respect for the values and fundamental legal principles [of] the EU". Consequently, ZORZ was going to have to be amended including a deletion of Article 3 "as an important prerequisite for the Chapter 23 within the accession negotiations between the EU and Serbia" (note MFA Croatia: 4).

The European Commission noted that the assertion of universal jurisdiction over war crimes is rooted in treaty law and customary international law<sup>364</sup>, and that many EU Member States had actually implemented universal jurisdiction over war crimes.<sup>365</sup> The ZORZ provisions, therefore, "could not be considered as a violation of the principle of non-intervention and of sovereignty of the Croatian State" (Non-paper on Croatian argumentaire for repealing relevant articles of the Serbian ZORZ, European Commission, February 2016: 6). Further, even if Article 3 of ZORZ was deleted, it would have no effect on the (post-Yugoslavia) regional jurisdiction issue as the undisputed universal jurisdiction principle would still apply (Non-paper, European Commission, February 2016: 7). The Commission had already made it clear in 2015, that it "cannot take issue as such with the principle of Serbia claiming universal jurisdiction" (letter European Commission to Marijana Petir MEP, 29-01-2015). However, the Commission took the view that exchange of information and views between the Prosecutor's Offices of Croatia and Serbia had to be intensified (Non-paper, European Commission, February 2016: 8).<sup>366</sup>

The Croatian blockade lasted from April to the beginning of July 2016 and could only be resolved through high-level talks involving the EU Commissioner for Enlargement, the Foreign Minister of Croatia, and the Dutch Foreign Minister representing the EU Council Presidency (interview Member State E COELA civil servant, 21-10-2016; interview Member State F COELA civil servant, 15-11-2016). No other Member State shared Croatia's reservations on the war-crime jurisdiction issue (interview senior European Commission civil servant 29-11-2018). In the European Parliament, many perceived Zagreb's blockade as a "blatant example of irresponsibility" (interview Eduard Kukan<sup>367</sup>, 27-09-2017). In the view of the European Commission, the Croatian position proved untenable not least due to Zagreb's principle view that war-crime prosecution should be repatriated. That position ran counter to the universal jurisdiction approach not least supported by the ICTY (interview senior European Commission civil servant, 29-11-2018). The issue with Serbia's regional jurisdiction approach appears to be that "Croatia has legitimate fears of Serbia judging Croats.

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<sup>364</sup> The Geneva Conventions of 1949, the 1984 UN Convention against torture and other cruel, inhuman or degrading treatment or punishment, and the Preamble of the Statute of the International Criminal Court (ICC) from 1998.

<sup>365</sup> Such as Belgium, the Czech Republic, Denmark, Finland, France, Germany, Luxemburg, the Netherlands, Spain, Sweden, and the UK. Amnesty International (2012: 12) hold that 136 (approximately 70.5 percent) UN Member States have universal jurisdiction over war crimes in place.

<sup>366</sup> As of 2016, Serbia had conducted 347 exchanges of information and evidence related to domestic war crime trials. 173 exchanges were with Croatia, 56 with Bosnia and Herzegovina, 14 with Montenegro, and 104 with EULEX and UNMIK in Kosovo (Negotiating position of the Republic of Serbia for Inter-Governmental Conference on accession of the Republic of Serbia to the European Union for Chapter 23 Judiciary and Fundamental Rights, 2016: 20).

<sup>367</sup> Eduard Kukan MEP is chairperson of the European Parliament Delegation with Serbia and was Foreign Minister of Slovakia 1998-2009.

And fundamentally, both Croatia and Serbia had always regarded the ICTY as biased and have never accepted the Criminal Tribunal's legitimacy" (interview war-crime prosecution expert at the ICTY, 31-03-2017). One likely reason for Belgrade and Zagreb's position may be the issue of infringed sovereignty. Croatia and Serbia were or have been subject to the EU conditionality issue of collaboration with the ICTY for a long time considerably reducing the countries' *de-facto* sovereignty (interview Dejan Jović, 02-11-2017).<sup>368</sup>

Coming back to the operational level of EU accession negotiations, Chapters 23 and 24 with Serbia were eventually opened at the EU-Serbia IGC on 18 July 2016. The final wording in the EU Common Position (CP) on Chapter 23 for Serbia with regard to the domestic handling of war crimes reads:

"The EU underlines the need for *meaningful regional cooperation and good-neighbourly relations in the handling of war crimes*, including the aim to *avoid conflicts in jurisdiction*. Accordingly, as called for by the relevant February 2016 European Parliament Resolution<sup>369</sup>, all outstanding issues in that regard must be fully resolved. War crimes must be prosecuted without any discrimination." (EU Common Position on Serbia for Chapter 23, 05 July 2016: 8; emphasis added; the wording of the respective *interim benchmark* is virtually identical.)

There was no subsequent deletion of Article 3 of ZORZ (interview senior European Commission civil servant, 29-11-2018). Nevertheless, the above wording as a compromise formula is open to different interpretations, so that the issue of war crime jurisdiction in Serbia does retain considerable potential for bilateral conflict for the next steps in the EU accession process of Serbia.

There are at least three further stages where Croatia (or other Member States) may be tempted to use the veto: the assessment of the interim benchmark attainment, the drafting of the closing benchmarks, and the closing of Chapter 23 altogether.

► *Thus, irrespective of the fact that it is a matter of years before the rule-of-law Chapters can be closed, it is an urgent issue to clear the dispute between Croatia and Serbia on war crime jurisdiction once and for all. It must not be left to the final stages of the accession negotiations, as the political risk of blockade is incalculable. The next European Commission should prioritise the issue as early as in their 2020 country report on Serbia by including a clear timetable for the resolution of the dispute (see also VIII.3.1.1). A bilateral approach should naturally take precedence, but options must include facilitation by the European Commission, another third party, or judicial dispute settlement (arbitration or ICJ).*

### **VIII.2.3 Name dispute between Macedonia and Greece**

Macedonia and Greece have been at odds over the former Yugoslav Republic of Macedonia's State name since Skopje's independence in 1992 in the process of the dissolution of Yugoslavia. Essentially, the dispute is about ownership of Macedonia's 'historic' cultural

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<sup>368</sup> "The conditionality of collaboration with the ICTY was tough for us. Our negotiations on Chapter 23 were held hostage by the Homeland War." (Jadranka Kosor at the ALDE Group event "Five years of Croatian EU membership", European Parliament, 28-06-2018)

<sup>369</sup> "[The European Parliament] reiterates its call on Serbia to re-examine its legislation on jurisdiction in war crime proceedings in the spirit of reconciliation and good-neighbourly relations together with the Commission and with its neighbours." (European Parliament Resolution on the 2015 [European Commission] report on Serbia, 04 February 2016, para 26)

heritage, the land of Alexander the Great, and to what geographical extent the term 'historic' Macedonia can be accurately applied (see e.g. Messineo, 2012: 170-2). Greece, suspecting that the State name "Macedonia" implicitly carried a territorial claim to the northern Greek province of Macedonia, vetoed the newly independent State's tentative name, so that Skopje could only join the UN under its provisional name Former Yugoslav Republic of Macedonia (FYROM) in 1993 (see IV.5.1.2.3).

25 years of blockade included vetoing the start of EU accession negotiations with FYR Macedonia on the part of Greece since October 2009 when the European Commission had recommended the opening of accession negotiations for the first time (see e.g. European Commission, Former Yugoslav Republic of Macedonia 2018 Report, 17 April 2018: 4).<sup>370</sup> In early 2018, however, rumours were spreading that bilateral talks had gathered fresh momentum and that the hitherto unthinkable, a bilateral agreement on Macedonia's State name, was within reach. On 17 June 2018, prime ministers Zaev (Macedonia) and Tsipras (Greece) indeed signed a bilateral agreement (New York Times, 17 June 2018).

In the Preamble, there is talk of "underlining [the] strong will for mutual friendship, good neighbourliness and co-operative partnership", and also of "strengthening an atmosphere of trust and good-neighbourly relations [...] to put to rest permanently [...] irredentism and revisionism in any form."

With regard to the future State name of FYR Macedonia, it was agreed to be "Republic of North Macedonia"<sup>371</sup> (Art. 1(3)(a)). The nationality is referred to as "Macedonian/citizen of the Republic of North Macedonia" in all travel documents (Art. 1(3)(b)). Macedonia will ratify the Agreement and may decide to hold a referendum (Art. 4(a) and (c)).

The consultative referendum on 30 September 2018 did bring a very high percentage of approval. Yet, the quorum of 50 percent was clearly missed. During the referendum campaign, Prime Minister Zaev was strongly in favour, whereas President Ivanov had called the State name change "historical suicide" and campaigned for non-participation (Washington Post, 02 October 2018). Still, the government announced to go ahead with ratification of the referendum result regardless of the fact that at least 12 opposition MPs would be needed to reach the required two-thirds majority as the main opposition party VMRO abstained. At the end of a number of simple-majority votes on the contents, the final implementation vote on the amendments to the constitution again required a two-third majority. Ratification did take place and was successfully concluded on 10 January 2019 (New York Times, 11 January 2019). On 25 January 2019, the Greek parliament adopted the Prespa Agreement by 153 to 146 votes with the main opposition party ND voting against (ekathimerini.com, 25 January 2019). On 06 February 2019, North Macedonia signed the Accession Protocol to NATO.<sup>372</sup>

North Macedonia's President Ivanov refused to sign the legal act adopted by Parliament ratifying the Prespa Agreement. He personally opposes the name change which he had made

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<sup>370</sup> Final Agreement for the settlement of the differences as described in the United Nations Security Council Resolutions 817 (1993) and 845 (1993), the termination of the Interim Accord of 1995, and the establishment of a strategic partnership between the parties; draft version, 12 June 2018.

<sup>371</sup> The name "North Macedonia" was already in the pipeline in 2008. Then Prime Minister Nikola Gruevski (VRMO) had offered that solution, but it was rejected by the Greek government on the grounds it still entailed 'Macedonia'. At present, VRMO opposes exactly that very name deal with Greece for reasons of principle which many find disappointing and irresponsible (interview Doris Pack, 03-12-2018).

<sup>372</sup> Subject to ratification by all 29 NATO Member States (see NATO topic file "Relations with the Republic of North Macedonia". Available at: [https://www.nato.int/cps/en/natohq/topics\\_48830.htm](https://www.nato.int/cps/en/natohq/topics_48830.htm)).

clear in a speech before Parliament on 28 December 2018 (Beta news, 28 December 2018). The legal act was signed instead by the Speaker of the Parliament, Talat Xhaferi, a precedent in the country's history since 1992 (Republika, 11 March 2019).

The final break-through of a 25-year deadlock of the name issue undoubtedly is a landmark event and a huge success for the region. It renders EU (and NATO) accession of Skopje a very tangible and immediate prospect. However, once EU accession negotiations with North Macedonia are officially opened, tentatively at the European Council on 20/21 June 2019<sup>373</sup>, a long journey through 35 negotiating Chapters with the fundamentals-first approach (see VI.2.1) lies ahead. On top of that, one must not forget the many locks on the door in terms of the unanimity requirement in Council. There are numerous opportunities for 'reservations' on the part of individual Member States when it comes to the opening let alone closing of Chapters. To that end, it is useful to recall the statement of the ND leader, Kyriakos Mitsotakis, during the debate in the Greek parliament on 24 January 2019:

“The EU accession process of North Macedonia does not depend on the Prespa Agreement. Greece retains all rights [of an] EU Member State. This means to negotiate over any Chapter in the accession process, their opening or closure. The interests of the EU and the Member States need to be taken into account. Simply put, Greece can raise its veto against the accession of Skopje [...] at any time.”

Thus, it appears that one must be ready to face a more critical attitude in Athens towards Skopje now that ND won the early general election of 07 July 2019.

► *It is a pressing issue for both the Council Presidency and the European Commission to closely monitor the (prospective) EU accession negotiations with North Macedonia. It is vital to anticipate a national veto and defuse bilateral conflict by facilitating a bilateral agreement or third-party dispute resolution. See VIII.3.1.1 and VIII.3.1.2 on how that can be achieved.*

#### **VIII.2.4 Normalisation of relations Serbia-Kosovo**

A major EU conditionality issue vis-à-vis Serbia (and Kosovo) is what is diplomatically termed “the normalisation of relations with Kosovo”. This entails a “legally binding [bilateral] agreement”. Bilateral talks have been facilitated by the EU High Representative for Foreign Affairs and External Relations Commissioner, who has hosted numerous meetings between the Presidents of Serbia and Kosovo, Vučić and Taçi, to that end (European Commission Serbia 2018 report, 17 April 2018: 51-2).

It is understood that EU accession of Serbia and (potentially) Kosovo would hardly be possible without mutual recognition of the two countries, although such precondition is not expressly mentioned. It must be noted in that context, that there are five EU Member States (Cyprus, Greece, Romania, Slovakia, Spain) who have not recognised Kosovo. This is to do mainly with reservations towards domestic separatist trends (in the case of Spain and Catalonia), the principle position that unilateral independence is not in accordance with international law (Romania), or with a territorial issue in relation to disputed statehood (Cyprus and the Turkish-Cypriot entity; interview Member State H COELA member, 16-07-2018; interview Member State I COELA member, 12-07-2018).

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<sup>373</sup> In fact, the EU General Affairs Council (foreign ministers) of 17 June 2019 postponed the decision to October 2019 (see <https://www.consilium.europa.eu/en/meetings/gac/2019/06/18/>).

Towards the end of the summer of 2018, high-level relations between Vučić and Thaçi appeared to be relaxing, and there was even talk of a limited and mutually agreed land swap of areas in South Serbia and North Kosovo. At the end of the day, a tête-à-tête between the two scheduled for a regular meeting on 07 September 2018 in Brussels did not take place, however. A few days later, when Vučić visited Northern Kosovo, he called Slobodan Milošević a great leader of Serbia. As a result, relations appeared to be back in conflict mode (Washington Post, 10 September 2018). A subsequent meeting in Brussels in October 2018 produced no result. On the contrary, Kosovo raising the tariff for imports of goods from Serbia from 10 to 100 percent as a retaliation for Serbia blocking Kosovo's accession to Interpol seemed to aggravate the situation (Reuters news, 21 November 2018).

It appears fair to argue that the EU bears some responsibility, too, for the state of no progress. Denying Kosovo visa liberalisation may be a decisive factor. In fact, Kosovo has fulfilled all EU conditionality items (such as ratification of the border demarcation agreement with neighbouring Montenegro). Instead, hesitant EU Member States are “not honouring their own pledges and thus running the risk of further destabilising a fragile region” (interview Tanja Fajon, 10-01-2019).

As for the eventual prospect of EU accession for Serbia, the recognition question is indeed a thorny issue, both for Serbia and the five critical EU Member States. This author submits to consider a solution short of full recognition, but subject to special relations which would be established in a bilateral treaty. A similar treaty established the relations between the Federal Republic of Germany (FRG) and the German Democratic Republic (GDR) between 1973 and 1990, albeit under very different circumstances admittedly. The FRG belonged to NATO and the GDR to the Warsaw Pact, two opposite military and political blocks in the Cold War era. What is pertinent, however, is the recognition issue: The then FRG and GDR had so-called permanent representations instead of embassies in the respective territory. The two Germanies had proper diplomatic relations in place without full recognition. However, the bilateral treaty enabled both countries to become full members of the United Nations in September 1973. It goes without saying that that no model, wherever it originates, is a one-to-one blueprint for a transplant into a different environment. The political leaders in Belgrade and Pristina, the European Commission, and the Member States ought to take the historic peculiarities in Serbia and Kosovo into account and strive for a pragmatic solution to achieve the sought-after “normalisation of relations”.

Strikingly, a draft version of a future bilateral “Comprehensive Agreement between the Republic of Kosovo and the Republic of Serbia” (hereafter “Draft Comprehensive Agreement”) emerged to that end from non-EU quarters in late December 2018 (see Appendix 6). It contains several elements worth quoting:

The Preamble *inter alia* stipulates that “newly formed sovereign States should have the same borders as the preceding dependent area before independence” (*uti possidetis*), and the recognition of the fact that “the Agreement on Succession Issues<sup>374</sup> [...] provides a framework for assisting in the resolution of [...] analogous issues for the Parties”.

Chapter 1 (“The Political Agreement”) stipulates that “the normalisation of relations between the Republic of Kosovo and the Republic of Serbia requires a *sui generis* approach and structures that reflect their shared interests as well as the cultural identities of their citizens” (Art. I.1.1). Further, there is talk of both Parties supporting each other in aspiring international

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<sup>374</sup> For the Agreement on Succession Issues see IV.5.3.

and supranational organisations, “including in the case of *Kosovo in the United Nations*” (Art. I.1.4; emphasis added). In addition, “the Parties commit to [...] the resolution of all outstanding issues deriving from the war of 1998-1999 including [...] reparations [...] and war-crimes” (Art. I.1.9). Lastly, “the Parties agree that the principle of *Parity of Esteem* shall govern their future relations” (Art. I.1.10; emphasis added).

With regard to diplomatic relations, the “Parties agree to establish permanent diplomatic missions in the other Parties’ State [...] ensuring compliance with international norms establishing diplomatic missions” (Chapter 11, Establishment of Permanent Diplomatic Missions, Art. 1). Further, the Parties are going to “accept that the Republic of Kosovo will become member of the International Telecommunications Union (ITU)” which would include an international country code for Kosovo (Chapter 11, Telecommunications, Art. 1), and that Kosovo “will become member of the Universal Postal Union (UPU)” which would include an internationally recognised postcode for Kosovo (Chapter 11, Telecommunications, Art. 2).

In Chapter 2 (“Confidence Building Measures”), the Parties engage in establishing “joint university degree programs” (Art. 2.3), “cross-border cooperation programs within the framework of existing Western Balkans programs supported by the European Union” (Art. 2.6), and “inter-municipal cooperation programs and twinning projects” (Art. 2.7). There are fairly detailed provisions under the heading “Participation of the Serb community in the public life of Kosovo” in Chapter 3, such as “the right of the Serbian community to have personal names registered in their original form and script of their language [...]” (Participation in [...] public life, Art. 1.), and “the right to maintain and use its own media, including [...] in its language” (Participation in [...] public life, Art. 5), and provisions on the participation of the Kosovo Serb Community in government and in courts (Participation [...] at central level, Arts. 1-12).

The provisions on economic matters (Chapter 4) include reciprocal access to the labour market, the “free movement of goods, services, people and capital” (Trade, Art. 3). As for foreign debts, a “Joint Commission to negotiate Kosovo’s share of the international debt inherited from the former [SFRY]” (Foreign Debts, Art. 1)<sup>375</sup> is foreseen, as well as “Compensation of Kosovo Citizens’ Foreign Currency Damages in the Banking System of the Former [SFRY]” (Outstanding Financial Damages, Art. 1.3).<sup>376</sup>

Chapter 5 addresses “Transitional Justice and Reconciliation” issues, *inter alia* through facilitating “exchange of information on suspects of war crimes” (War crimes, Art. 3), agreeing “in good faith to take all measures necessary to determine and exchange information regarding identities, whereabouts, and fates of missing persons from each Party” (Missing Persons, Art. 1). Further, “Parties undertake to establish a joint commission for assessing the material damage and establishing criteria and procedures for financial compensation schemes” (War reparations, Art. 2).

The Draft Comprehensive Agreement foresees as “Guarantors for the implementation of this Agreement [...] The United States of America, The United Kingdom, Germany, France and Italy and the European Union” (Chapter 12, Art. 12.1).

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<sup>375</sup> There is express reference to the Agreement on Succession Issues and the allocation of foreign debt between the SFRY successor States (see also IV.5.3). The provisions in the Draft Comprehensive Agreement actually suggest an opt-in of Kosovo to Serbia’s share of the SFRY’s foreign debt based on the result of bilateral negotiations.

<sup>376</sup> See also footnote 235.

There are dispute resolution provisions in Chapter 14 stipulating that any dispute arising between the Parties “as to the interpretation, application or performance of this Agreement, either Party may submit the dispute to final and binding arbitration” aligned to the Permanent Court of Arbitration (PCA) Optional Rules for Arbitrating Disputes between Two States (Art. 14.1). The Tribunal is to comprise five arbitrators (Art. 14.2), and the appointing authority is to be the Secretary-General of the PCA (Art. 14.4).

The recognition issue is addressed in Chapter 15 stating that with the entry into force of the Comprehensive Agreement, the “*Parties and Guarantors agree to initiate the procedure for adoption of a United Nations Security Council Resolution recognizing this Agreement and admitting Kosovo to be a full member of the United Nations*” (Art. 15.1; emphasis added). There are also provisions on ruling out blocking Kosovo in international organisations, such as the EU, the Council of Europe and the OSCE (Art. 15.2).

A brief analysis of the above Draft Comprehensive Agreement (see Appendix 6) must start out on the fact that it is a draft on which Serbia’s and Kosovo’s position is unknown at the time of writing. One must also bear in mind that the normalization of the relations between Serbia and Kosovo is the *sine qua non* for the EU accession of Serbia:

“If progress in the normalisation of relations with Kosovo significantly lags behind progress in the negotiations overall, due to Serbia failing to act in good faith, in particular in the implementation of agreements reached between Serbia and Kosovo, the [European] Commission will on its own initiative or on the request of one third of the Member States [...] propose to withhold its recommendations to open and/or close other negotiating chapters, and adapt the associated preparatory work, as appropriate, until this imbalance is addressed.” (EU Common Position on Serbia, Chapter 35, item 1, Normalisation of Relations between Serbia and Kosovo, 25 November 2015: 3)

In this regard, the Draft Comprehensive Agreement provides an opportunity to solve the sensitive issue of enabling the membership of Kosovo in international organisations, first and foremost the United Nations, whilst at the same time enabling Serbia to avoid direct recognition of Kosovo. The mutual agreement on both States being “sovereign and lawfully constituted States” (Art. 1.1.3) is a way of achieving indirect recognition, and the provision of not blocking each other with the express mention of the UN (Art. 1.1.4) is one part of securing UN membership of Kosovo. The much bigger part, however, is initiating the process of UN accession by means of the UN Security Council. To this end, the provisions in Article 15.1 on initiating the procedure of Kosovo’s accession to the UN upon entry into force of the Comprehensive Agreement appear convincing *prima facie*. Yet, the shortcoming is that Russia (which traditionally enjoys friendly relations with Serbia) is also a member of the UN Security Council, but not a Guarantor of the Comprehensive Agreement. The same holds for China which has manifest economic and political interests in the region. Thus, unanimity in the Security Council to go ahead with Kosovo’s membership would by no means be guaranteed. And even if it was, the initiating of the procedure to UN accession “upon *entry into force*” (Art. 15.1) of the Comprehensive Agreement bears some considerable uncertainty for Kosovo. To that end, “upon *signature*” would be more promising, as reciprocity of concluding the agreement and UN membership would want to be achieved.

From the point of view of EU diplomacy and the EU facilitated dialogue for the normalisation of relations between Belgrade and Pristina hosted by the EU High Representative<sup>377</sup>, the above

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<sup>377</sup> For the EU facilitated dialogue between Serbia and Kosovo see the European External Action Service (EEAS) at [https://eeas.europa.eu/diplomatic-network/eu-facilitated-dialogue-belgrade-pristina-relations\\_en](https://eeas.europa.eu/diplomatic-network/eu-facilitated-dialogue-belgrade-pristina-relations_en).

Draft Comprehensive Agreement must be bad news since the active input does not originate from the EU. A letter from US President Trump to Vučić and Thaçi from 14 December 2018 confirms the commitment of the United States in explicitly stating and confirming US facilitation and inviting President Vučić of Serbia and Thaçi of Kosovo to a prospective celebration of a bilateral Serbia-Kosovo settlement (see Appendices 5a and 5b).

It is (very) early days still and nobody can say at this point whether a bilateral settlement between Serbia and Kosovo actually is within reach in the foreseeable future. There may be an early general election in Serbia triggered by President Vučić at some point, and election campaigns tend to include nationalist rhetoric. Besides, the President, the Foreign Minister, the opposition and the Orthodox Church of Serbia have indicated already that there will be no solution of the Kosovo issue in the course of 2019, so the odds perhaps are that the matter will be frozen “*ad calendas graecas*” for the time being (interview Thomas Brey, 11-01-2019). In any case, as to the essentials of a Serbia-Kosovo settlement, one needs to consider that any bilateral treaty establishing diplomatic relations with Kosovo requires amending the Serbian constitution accordingly. On the whole, it appears that there are no simple solutions. “An agreement is possible, but only under circumstances where there are clear gains for either side, such as special assurances from the European Union for Serbia, and UN membership for Kosovo” (interview David McAllister<sup>378</sup>, 15-01-2019). Perhaps the stakes are still too high historically and emotionally - the atrocious Kosovo War (March to June 1999) raged only twenty years ago - so that it takes time to prepare the ground for an agreement supplemented by a spirit of reconciliation. It may also be true that “it takes genuinely future-oriented leaders who will be able to solve the issue and who are ready to take the risk of not being re-elected” (interview Tanja Fajon<sup>379</sup>, 10-01-2019). Yet, it is very difficult to make any prediction.

► *A Serbia-Kosovo Agreement only stands a chance of implementation/ratification, if it represents (i) the final hurdle for Serbia before completing the accession negotiations and therefore securing EU accession, and if it equals (ii) a guarantee of UN membership for Kosovo, perhaps topped up by a (merits-based) start of EU accession negotiations. Although there is a lot to gain, both sides will have to make what is going to be perceived as ‘concessions’ from a legitimacy point of view (see II.2.2 and II.2.3). It is submitted here, therefore, that it is worth considering, in the case of Serbia, to have a combined referendum on an agreement with Kosovo and on EU accession, and, in the case of Kosovo, to link ratification of the treaty with Serbia to a perspective of EU accession.*

Yet, it must be a worrying signal for the EU that the first draft of a bilateral Serbia-Kosovo treaty has materialized with active support from the United States. It is suggested here, therefore, that the EU lift its efforts up from facilitation to mediation. The simple hosting of meetings between the two parties is insufficient. Rather, it appears that it takes some robust drafting input also from the EU to arrive at a settlement any time soon. However, it is perhaps already too late given the draft agreement prepared by the U.S. Administration. Still, it would be a good idea for the EU to stand ready to skilfully assist with expertise and input, and not to leave the actual negotiating of the details solely to Serbia, Kosovo, and the United States.

After all, it would be a humiliation for the EU foreign policy, if the U.S. alone rather than in collaboration with the EU managed to strike a bilateral deal in a region that is aspiring to EU

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<sup>378</sup> David McAllister MEP is the European Parliament Rapporteur on Serbia.

<sup>379</sup> Tanja Fajon MEP is the European Parliament Rapporteur on visa liberalisation with Kosovo.

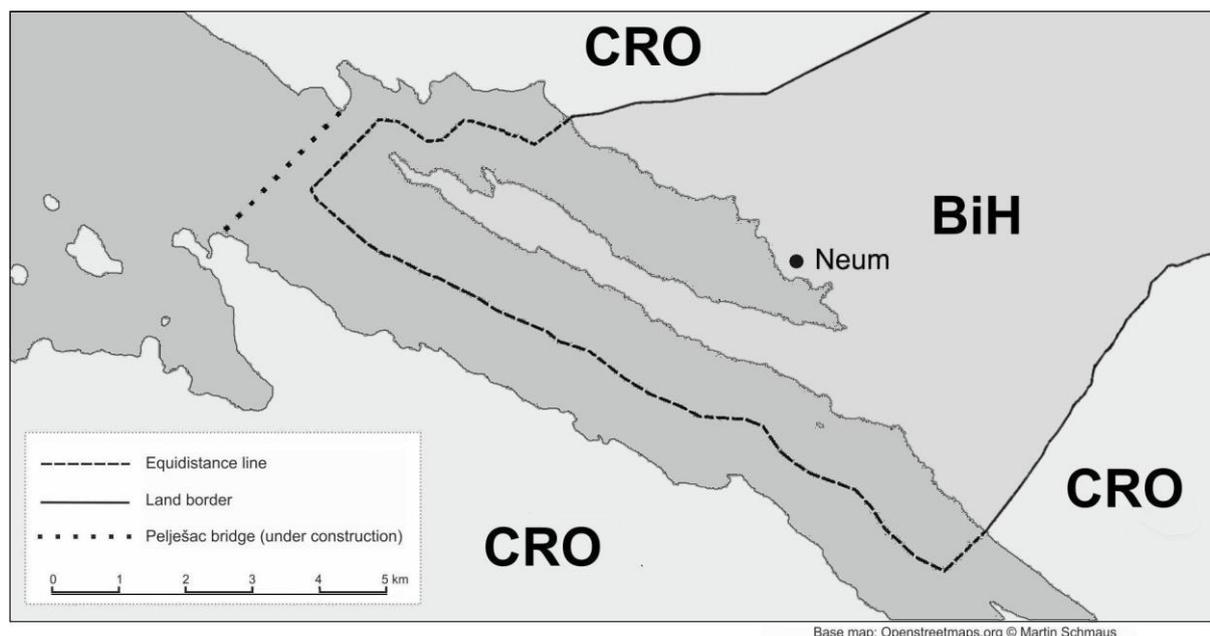
membership in its immediate vicinity. All the more so in a context where the U.S. Administration has recently downgraded the EU's diplomatic status.<sup>380</sup>

### VIII.2.5 Freedom of navigation between Bosnia-Herzegovina and the high seas

The boundary at land and at sea between Croatia and Bosnia-Herzegovina was settled at a relatively early stage through a bilateral treaty in 1999.<sup>381</sup> It must be noted, however, that it is being applied, but has not been ratified yet (interview Damir Arnaut<sup>382</sup>, 25-01-2018; interview senior Croatian civil servant, 25-01-2017). In fact, the territorial sea border around Neum and Klek peninsula is delimited by way of an equidistance line (see fig. 34 below) in remarkable brevity. Article 4(3) states:

“The State border on the sea stretches along the central line of the sea between the territories of the Republic of Croatia and Bosnia and Herzegovina [...]”.

Figure 34: Territorial sea delimitation between Croatia and Bosnia-Herzegovina according to the 1999 Border Treaty (schematic view)



Yet, there appears to be a point of contention as to the maritime areas for vessels going from Bosnia-Herzegovina to the high seas in the Adriatic and vice versa. As it happens, the straight baselines of Croatia run across the outer ends of the Dalmatian islands thus creating internal waters (of Croatia) landwards of the straight baselines. As a result, vessels going from the

<sup>380</sup> The U.S. changed the EU's diplomatic status from that of a State to one of an international organisation without prior notice at the end of 2018; see “Trump administration downgrades EU mission to US” <https://www.dw.com/en/trump-administration-downgrades-eu-mission-to-us/a-46990608>.

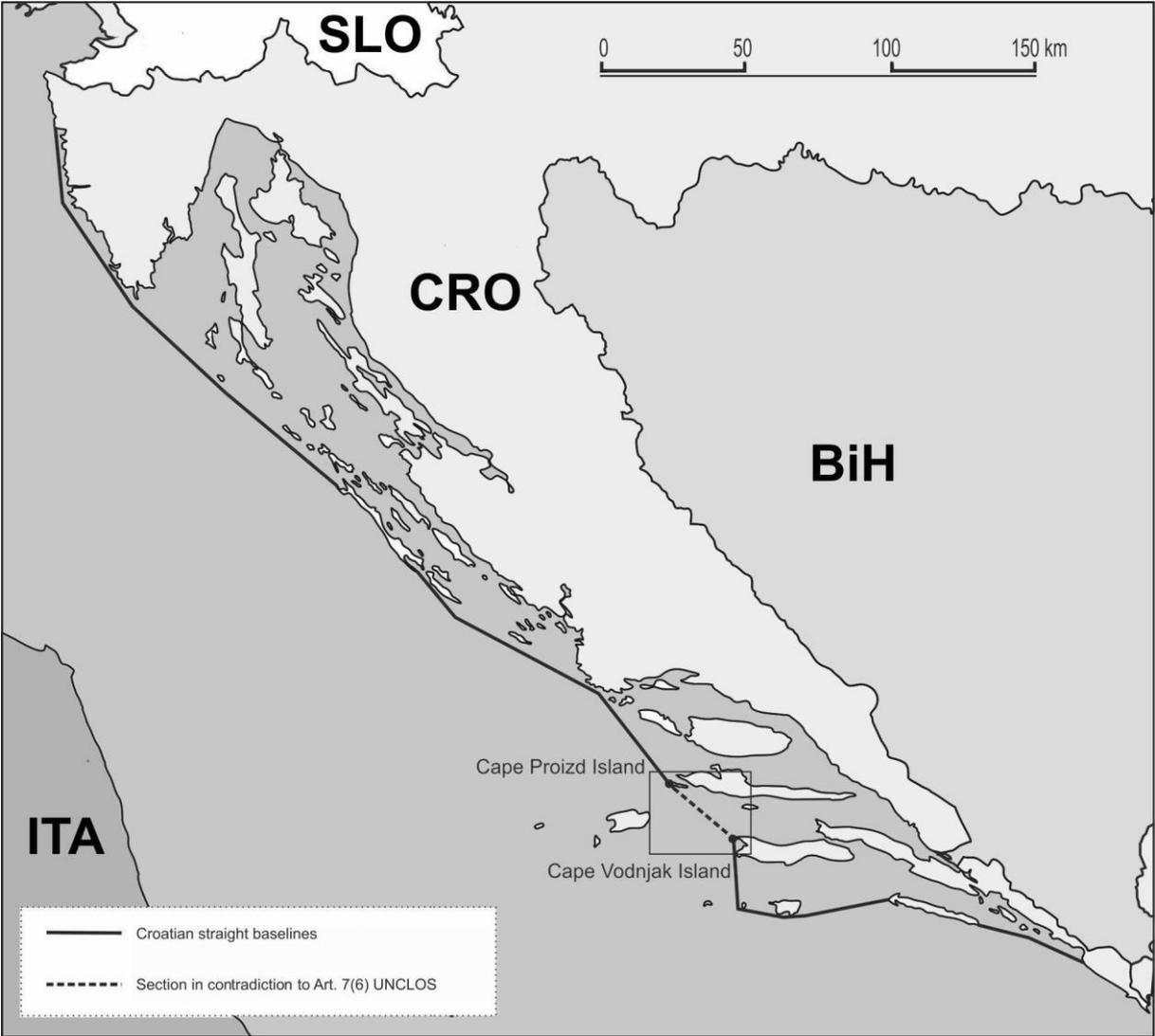
<sup>381</sup> Treaty on the State Border between the Republic of Croatia and Bosnia and Herzegovina, 30 July 1999. The Preamble cites, *inter alia*, Opinion No. 3 of the Badinter Commission stating that the former (internal) boundaries between the SFRY Republics were to become international boundaries protected by international law. Article 2(1) expressly confirms that “the State border [...] is determined on the basis of the state of the borders at the time of the end of the Socialist Federal Republic of Yugoslavia in 1991” (see also IV.5.1.2.2).

<sup>382</sup> Damir Arnaut MP was Ambassador for Bosnia-Herzegovina to Australia and New Zealand 2010-2014, and previously Legal Advisor to the BiH Presidency *inter alia* in charge of delimitation issues.

high seas or the Croatian territorial sea to the territorial sea of Bosnia-Herzegovina to reach Neum or vice versa, have to go through Croatian internal waters (see fig. 35 below).

It is useful to recall that there is no innocent passage in internal waters. The law-of-the-sea scholarship irrespective of the nationality of the author questions the legality of the Croatian straight baselines as they violate Art. 7(6) UNCLOS ruling out the enclosure of the territorial waters of a State by the straight baselines of another State (see Grbec, 2015: 155-7; Arnaut, 2014: 165-7; Vukas, 2008: 187-8). Alternatively, Art. 8(2) UNCLOS stipulates that innocent passage does exist when the baselines with a cut-off effect have been newly drawn.<sup>383</sup>

Figure 35: Croatian straight baselines cutting off the territorial waters of Bosnia-Herzegovina



Since there is some considerable obscurity with regard to the freedom of navigation to and from Neum, the issue of maritime access of Bosnia-Herzegovina ought to be tackled. In fact, the Presidency, the Foreign Minister, and the Parliamentary Assembly of Bosnia-Herzegovina

<sup>383</sup> Art. 8(2) UNCLOS: “Where the establishment of a straight baseline [...] has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.”

protested the Croatian straight baselines on a number of occasions between 2007 and 2010 (see Arnaut, 2014: 166-7)<sup>384</sup> notwithstanding the fact that marine traffic to and from Neum has been faint (interview senior civil servant DG REGIO European Commission, 04-05-2018).

► *It is recommended, therefore, that it would make for a great good-neighbourly gesture if Croatia addressed the issue by amending its baselines accordingly, or at least by issuing a declaration to the extent that access to and from the territorial sea of Bosnia-Herzegovina is regarded unhindered in terms of Art. 8(2) UNCLOS. An appropriate timing would be upon ratification of the 1999 Treaty on the State border with Bosnia-Herzegovina in the Croatian parliament. Ratification in Sabor should take place well before the upcoming general election (December 2020) to keep the debate away from the electoral campaign where reconciliatory moves tend to be seen as unpatriotic.*

### **VIII.3      Strengthening dispute resolution**

It is one thing to say that bilateral disputes must be resolved before EU accession, and it is another thing to narrow down what this entails in practice to actively support that process and to manage bilateral conflict in the context of EU enlargement more efficiently.

There are two operational levels here: dispute resolution in the framework of EU accession negotiations, and third-party dispute resolution by means of international arbitration.

#### **VIII.3.1      A new EU framework**

Dispute resolution in the context of EU enlargement must become a priority for the next European Commission 2019-2024.

The “fundamentals first” principle applied to the operational stage of EU accession negotiations since 2011 stipulating that rule-of-law issues and the resolution of bilateral disputes are key priorities, not least in the order the Chapters are negotiated (see VI.2.1.1) was a vital step. Little was done, however, to actively support dispute resolution and provide a *framework*. To be sure, it is none of the European Commission’s or the Member States’ business to tell Candidate Countries *how* to settle bilateral issues. Bilateral negotiations can be a very good means to do it, especially amongst neighbouring States from the region. Arbitration may be an equally appropriate avenue, as can be a submission to the International Court of Justice.

Yet, there must be a clear framework which includes transparent procedures to *identify* the issues at dispute, the *timetable* for their resolution, and a range of *facilitation* services by the European Commission and the Member States.

##### **VIII.3.1.1      Clear identification and timetable**

► *In practice, the Commission should start to include clear identifications of the respective bilateral conflicts in its annual country reports, at the latest in 2020 when the next*

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<sup>384</sup> Notably, as of 2017, there never was a single law-of-the-sea expert in the BiH Ministry of Foreign Affairs (see answers BiH Council of Ministers from 21 December 2017 and 04 September 2017 to the parliamentary question of Damir Arnaut MP from 13 April 2016).

*Commission will be in office. Through the vast network of Delegations (offices of the European External Action Service on the ground) and Member State embassies monitoring developments, there is a crystal-clear picture about disputed bilateral issues. They must be addressed very clearly in the country reports. In the past, much of the wording in Commission country reports would be obscure and unnecessarily filtered through the nebulous language of diplomacy and EU speak, although there has been some progress in that respect over the recent years.*

Further, a realistic but hard-and-fast timetable must be set. No dispute is equal, of course, but there is some experience as to how long the settlement may take procedurally. Depending on the nature of the conflict, 12 months appears a reasonable deadline to conclude an arbitration agreement or a mandate for the ICJ. The judicial procedure itself would potentially take up another 24 months on average. For bilateral negotiations, a maximum of 24 months seems reasonable, too.

It is important to note that the incentive is there for both the Candidate Country and the Member State in question. The popular argument goes that the Member State is always in a superior position because of the veto power. This is true from a strictly legal-political or procedural perspective. The new identification and timetable approach, however, must also be seen as a form of peer pressure on any Member State tempted to use its veto. In an environment where dispute resolution is a priority in EU enlargement, no Member State can easily accept to damage its own reputation.

The incoming European Commissioner in charge of external relations/High Representative for the EU foreign policy, and the Commissioner for enlargement must bring a fresh start to the EU enlargement policy. A functioning dispute resolution mechanism is equally vital as the classical incentive of financial support. The EU needs both to operate a proactive and successful enlargement and accession policy.

#### VIII.3.1.2 Dispute resolution infrastructure

To that end, the European Commission and the Council Presidency *must* offer assistance and facilitation. There is great expertise in the Commission Services and in the national civil service of many Member States on how to deal with brokering agreements on dispute resolution and on drafting mandates for a judicial procedure, not least through the (occasionally painful) experience in the Slovenia-Croatia case.

► *As a priority, the President of the next European Commission 2019-2024 must make sure that there is a new special standing Dispute Resolution Task Force (DRTF). It must be composed of trained and experienced experts from the Directorates-General NEAR (Neighbourhood and Enlargement), JUST (Justice and Consumers), and the Legal Service, plus Member States experts of the trio presidency (current, predecessor, and successor Council Presidency) and from wherever there is recognised facilitation expertise from previous cases.*

### VIII.3.2 Arbitration must become more robust

It may be popular to draw the conclusion that arbitration is not a suitable means of dispute resolution any more because of the ‘bad experience’ which was had in the Slovenia-Croatia case. But was it that arbitration *as such* failed operationally and politically? Not really. The confidentiality and independence provisions of one party-appointed arbitrator were violated in a particular case, so it clearly is unjustified to disqualify the framework of arbitration as such altogether. The record of arbitral proceedings in border disputes is entirely positive and it constitutes an established and popular means of judicial dispute settlement (see VI.3.1). Arbitration also commands widespread support on the political level in the EU (e.g. interview Jean Asselborn<sup>385</sup>, 28-09-2016) and world-wide (see table 3 in V.2.2.3).

Notwithstanding the fact that the International Court of Justice (ICJ) is still a viable alternative, arbitration has indeed two distinct features which render it particularly suitable for bilateral dispute resolution:

First, both parties can define the mandate for the judicial body in a tailor-made fashion according to the (political-legal) needs of the dispute in question. As was demonstrated in the case of the Arbitration Agreement between Croatia and Slovenia, there is a wide range of applicable law available, from the strict application of international law to equity including novel criteria such as good-neighbourly relations, a crucial notion in the EU enlargement context in Southeast Europe, and also allowing for separating and sequencing particular issues, so as to arrive at a clear-cut roadmap for the arbitral tribunal.

Second, the parties to the dispute can choose (together) whom they feel like appointing as arbitrators by taking into account the qualifications for a particular kind of dispute, i.e. parties do not depend on a fixed pool of judges as is the case at the ICJ (which is, *nota bene*, by no means meant to question the expertise of any of the ICJ judges, the Court’s workings, or its impressive record on boundary or other items of dispute settlement).

Yet, international arbitration must become more robust to mishaps or breaches of confidentiality. To achieve that, it appears appropriate to reconsider the role of party-appointed arbitrators. It is worth recalling the special role of party-appointed arbitrators, namely to increase the parties’ acceptance of and the trust in the arbitral procedure. Then again, party-appointed arbitrators potentially raise the expectations of the parties in terms of ‘our expert’ influencing the proceedings in their interest. This, in turn, carries an implicit temptation to engage in unlawful *ex-parte* communication with the party-appointed arbitrator. The sobering news in this respect is that massive intelligence operations by both parties and even third parties to avoid or prove illegal communication appear to have become State practice (see VI.3.3.2).

► *The way out of that dilemma is to scrap party-appointed arbitrators altogether. The benefits would be manifold and ground-breaking: First, the temptation to engage in ex-parte communication would be reduced drastically. Even if a party to the dispute was to contact a member of the arbitral tribunal, the member could be assumed to refuse communication (and perhaps treat the party unfavourably in the further proceedings in light of such blatant effort to compromise the independence of the tribunal). After all, an arbitrator that has engaged in unlawful communication would lose their most valuable assets credibility and standing, indispensable prerequisites for (re-)appointments in arbitral proceedings in future cases.*

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<sup>385</sup> Jean Asselborn is the Foreign Minister of Luxemburg. He has been in office since 2004 and is the longest-serving of all EU Member State foreign ministers.

*Second, a team of independent arbitrators chosen by the parties by way of mutual agreement fosters both the internal cohesion and the independence of a tribunal. The members of a judicial body who know that they command the parties' joint trust are likely to go about their work in a different spirit compared to a situation where two party-appointed members may be perceived as 'persuaders' by the other tribunal members. Third, tribunals comprising just three members, for instance, would reduce the costs of arbitration proceedings of which there may be the need for many amongst and between the successor States of Yugoslavia (see VIII.1.2.1 and VIII.2). Three-member tribunals have worked perfectly well in the past, and there is no reason why that set-up without party-appointed members could not become the default format for State-to-State arbitration on bilateral disputes.*

#### **VIII.4 EU enlargement must be credible and realistic**

The European Commission 2014-2019 made it clear from the outset that the EU would not incorporate new members during their term (speech of President-Designate Jean-Claude Juncker in the European Parliament, 15 July 2014). This was a simple factual statement as accession negotiations with no Candidate Country were in the final stages, but perhaps it was also a gesture of appeasement to the widespread enlargement fatigue. Yet, in his State-of-the-Union speech in 2017, the Commission President injected some new political momentum into the 'Western Balkans' enlargement (see VI.2.1.1 (iii)).

It is crucial to keep up that momentum, and one key measure to secure exactly that would be the establishment of the dispute resolution framework (see above recommendation in VIII.3.1). Even in a best-case scenario where all bilateral disputes can be overcome, there is still the huge task of meeting the EU *aquis* and the political criteria. This means hard work for the Candidate Country, but also hard work for the European Commission and the Member States in being supportive in practice rather than just paying lip-service.

##### **VIII.4.1 Unanimity cannot be scrapped**

Active support is all the more important as it would be naive to consider moving away from the principle of unanimity a feasible option for EU enlargement. It is one thing to consider introducing qualified-majority voting (QMV) at the operational level of EU foreign policy, and proposals have indeed been presented to that end (see European Commission, Qualified majority voting: a tool to make Europe's Foreign and Security Policy more effective, 12 September 2018). One could even argue, in theory, that majority-voting when deciding on the start of accession negotiations or on the final take-in of new EU members would abolish the 'nasty' veto power of individual Member States. However,

► *EU accession must rely on unanimity simply because majority-voting in the area of club membership would not only destroy the internal cohesion of the EU, it would take away any incentive to overcome bilateral disputes prior to accession and would thus result in chaos and destruction.*

*Scrapping unanimity on the operational level of accession negotiations (COELA or even the IGCs) would not make sense, either, since at the end of the process the ratification of accession treaties in the Member States would become an incalculable risk and destroy the process of EU enlargement altogether.*

#### VIII.4.2 Linking EU funds to the rule-of-law track record

EU enlargement cannot be an end in itself. The EU is not only about the single market, indispensable as it has been for the acceptance and legitimacy of the EU amongst its citizens and business. Moreover, the European Union is also about values: it is about democracy, the rule of law including the separation of powers and fundamental freedoms, such as human rights and the freedom of the media.

The latter has become a major point of concern recently with regard to Serbia (European Commission report Serbia, 17 April 2018: 25<sup>386</sup>) and to Montenegro (European Commission report Montenegro, 17 April 2018: 25-6<sup>387</sup>). Further, some Member States have pointed out a clear back-tracking with regard to media freedom in Serbia and in Montenegro over the last few years (interview Member State H COELA civil servant, 16-07-2018; interview Member State I COELA civil servant, 12-07-2018).

The 2019 Freedom House Report for Serbia confirms these findings. For the first time, the country is no longer rated “free”, but “partly free” due to a “deterioration in the conduct of elections [and] continued attempts by the government and allied media outlets to undermine independent journalists through legal harassment and smear campaigns [...]”<sup>388</sup> (Freedom in the World 2019 Serbia Report, Status Change Explanation).

Notably, since the beginning of December 2018, thousands of Serbian citizens have taken to the streets of Belgrade and other cities every Saturday night to protest the infringements on the freedom of the media in what is known as the “1 of 5 million” movement. On 16 March

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<sup>386</sup> “Intimidation and violence against journalists remain a concern. There are numerous credible reports of verbal, physical attacks and attacks against property of journalists. In this respect, Serbia needs to [classify such attacks] as criminal or other type of offences and closely monitor their follow-up by the law enforcement authorities. While several cases have been solved and some criminal charges have been filed, convictions are still rare. Serious efforts are needed to identify and prosecute those suspected of violating internet freedoms.” (<https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-serbia-report.pdf>)

<sup>387</sup> “Progress on addressing violence against journalists and media remains very limited, especially in dealing with old unsolved cases. Seven cases of attacks on journalists took place in 2017. Three of these cases resulted in misdemeanour proceedings, while in one case the authorities found no elements of criminal or minor offences. Criminal investigations into old cases, including the 2004 murder of an editor-in-chief, continue to be ineffective and the authorities have so far failed to step up and prioritise efforts to solve these cases. In October 2017, a first-instance court awarded compensation to a journalist for lack of effective investigation into an attempt on his life in 2007. In the same case, in November 2017 the Constitutional Court awarded the journalist additional compensation. Protection offered to the same journalist was withdrawn based on the assessment that the threat was no longer imminent. There have also been reports of undue pressure on journalists by law-enforcement to disclose their sources.” (<https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-montenegro-report.pdf>)

<sup>388</sup> The Freedom House 2019 assessment of Serbia on the issue of “free and independent media”: “Despite a constitution that guarantees freedom of the press and a penal code that does not treat libel as a criminal offense, media freedom is undermined by the threat of lawsuits or criminal charges against journalists for other offenses, lack of transparency in media ownership, editorial pressure from politicians and politically connected media owners, and high rates of self-censorship. The state and ruling party exercise influence over private media in part through advertising contracts and other indirect subsidies. While many outlets take a pro-government line or avoid criticism of the leadership, some continue to produce independent coverage. A number of critical journalists and outlets faced smear campaigns, punitive tax inspections, and other forms of pressure in 2018. According to NUNS, there were 102 media freedom violations against journalists during the year. They included physical assaults, though most incidents involved aggressive rhetoric and other forms of pressure or intimidation. In December 2018, investigative reporter Milan Jovanović, who has reported extensively on corruption, was the victim of an arson attack in which unknown assailants threw a Molotov cocktail into his home.” (<https://freedomhouse.org/report/freedom-world/2019/serbia>)

2019, protesters stormed the headquarters of the public broadcaster RTS in Belgrade, and several people were arrested by riot police (Balkan Insight, 17 March 2019). Similar protests have gained momentum in Montenegro, too, since the beginning of February 2019.

For the moment, the budgetary avenue appears suitable to keep some responsivity and credibility in the EU enlargement system. The budgetary reply to developments on the ground must be strengthened. The EU cut 70 million of pre-accession funds for Turkey in the EU budget for 2019<sup>389</sup> following the deterioration of the human-rights situation in the country (see European Commission report Turkey, 18 April 2018: 29-41).

► *It is a matter of urgency therefore that the EU be consistent and relate all Candidate Countries' rule-of-law and human rights record to pre-accession funding. As a consequence, conditional cuts of pre-accession funds for Serbia and for Montenegro should be considered with immediate effect. To that end, the European Parliament and the Council as the budgetary authorities ought to opt for budgetary cuts for Serbia and Montenegro for 2020 subject to improvements in the rule of law with particular regard to the freedom of the media. The upcoming EU multi-annual budget 2021-2027 must include clear and quasi-automatic mechanisms to link EU funds to the rule-of-law track record of not only the Member States, but also of the Candidate Countries. The law-making in progress in that regard must be amended accordingly.*<sup>390</sup>

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<sup>389</sup> The European Parliament decided the cuts by 544 to 28 votes with 74 abstentions on 02 October 2018 (ANSAmEd, 02 October 2018).

<sup>390</sup> The European Parliament adopted its first-reading position on 17 January 2019, see <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2019-0038+0+DOC+XML+V0//EN&language=EN>. The Member States, however, have not reached a common position yet. The interinstitutional negotiations on the final text of the EU Regulation can start as soon as Council has agreed on a position. In any case, negotiations will start only after the European elections. The European Commission issued a Communication "Further strengthening the Rule of Law within the Union. State of play and possible next steps" on 03 April 2019 containing no new suggestions on the rule of law with regard to Candidate Countries; see [https://ec.europa.eu/info/sites/info/files/rule\\_of\\_law\\_communication\\_en.pdf](https://ec.europa.eu/info/sites/info/files/rule_of_law_communication_en.pdf).

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<p>Overview</p> <p><b>Drafting stages Croatia-Slovenia Arbitration Agreement</b></p>
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**Rehn I**

(First draft 23 April 2009)

**Draft Agreement on Dispute Settlement**

The Governments of the Republic of Croatia and the Republic of Slovenia (hereinafter referred to as "the Parties"),

Whereas through numerous attempts the parties have not resolved their territorial and maritime border dispute in the course of the past years,

Recalling the peaceful means for the settlement of disputes enumerated in Article 33 of the UN-Charter, Affirming their commitment to a peaceful settlement of disputes, in the spirit of good neighbourly relations,

**Rehn II**

(Second draft 15 June 2009)

**Draft Agreement on Dispute Settlement**

The Governments of the Republic of Croatia and the Republic of Slovenia (hereinafter referred to as "the Parties"),

Whereas through numerous attempts the parties have not resolved their territorial and maritime border dispute in the course of the past years,

Recalling the peaceful means for the settlement of disputes enumerated in Article 33 of the UN-Charter, Affirming their commitment to a peaceful settlement of disputes, in the spirit of good neighbourly relations, reflecting their vital interests,

**Arbitration Agreement**

(Final version 04 November 2009)

**Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia\***

The Governments of the Republic of Croatia and the Republic of Slovenia (hereinafter referred to as "the Parties"),

Whereas through numerous attempts the parties have not resolved their territorial and maritime border dispute in the course of the past years,

Recalling the peaceful means for the settlement of disputes enumerated in Article 33 of the UN-Charter, Affirming their commitment to a peaceful settlement of disputes, in the spirit of good neighbourly relations, reflecting their vital interests,

Welcoming the facilitation offered by the European Commission

Have agreed as follows:

Article 1: Establishment of the Arbitral Tribunal

The parties hereby set up an Arbitral Tribunal

Article 2: Composition of the Arbitral Tribunal

(1) Both parties shall appoint by common agreement the President of the Arbitral Tribunal and two members recognized for their competence in international law within fifteen days. In case that they cannot agree within this delay, the President and the two members of the Arbitral Tribunal shall be appointed by the President of the International Court of Justice.

(2) Each side shall appoint a further member of the Arbitral Tribunal within fifteen days after the appointments referred to in paragraph 1 have been finalised. In case that no appointment has been made within this delay, the respective member shall be appointed by the President of the Arbitral Tribunal.

(3) If, whether before or after the proceedings have begun, a vacancy should occur on account of the death, incapacity or resignation of a member, it shall

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Article 2: Composition of the Arbitral Tribunal

(1) Both parties shall appoint by common agreement the President of the Arbitral Tribunal and two members recognized for their competence in international law within fifteen days drawn from a list of candidates established by the President of /by the Member responsible for enlargement of the European Commission. In case that they cannot agree within this delay, the President and the two members of the Arbitral Tribunal shall be appointed by the President of the International Court of Justice from the list.

(2) Each side shall appoint a further member of the Arbitral Tribunal within fifteen days after the appointments referred to in paragraph 1 have been finalised. In case that no appointment has been made within this delay, the respective member shall be appointed by the President of the Arbitral Tribunal.

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(2) Each side shall appoint a further member of the Arbitral Tribunal within fifteen days after the appointments referred to in paragraph 1 have been finalised. In case that no appointment has been made within this delay, the respective member shall be appointed by the President of the Arbitral Tribunal.

(3) If, whether before or after the proceedings have begun, a vacancy should occur on account of the death, incapacity or resignation of a member, it shall

be filled in accordance with the procedure prescribed for the original appointment

Article 3: Task of the Arbitral Tribunal

(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; and

(b) the regime for the use of the relevant maritime areas and Slovenia's contact to the High Sea.

(2) The Parties shall specify the details of the subject-matter of the dispute within one month after entry into force of this Agreement. If they fail to do so, the Arbitral Tribunal shall use the submissions of the parties for the determination of the exact scope of the maritime and territorial disputes and claims between the parties.

(3) The Arbitral Tribunal shall render an award on the dispute.

(4) The Arbitral Tribunal has the power to interpret the present Agreement.

be filled in accordance with the procedure prescribed for the original appointment

Article 3: Task of the Arbitral Tribunal

(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.

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be filled in accordance with the procedure prescribed for the original appointment

Article 3: Task of the Arbitral Tribunal

(1) The Arbitral Tribunal shall determine

(a) the course of the maritime and land boundary between the Republic of Slovenia and the Republic of Croatia;

(b) Slovenia's junction to the High Sea;

(c) the regime for the use of the relevant maritime areas.

(2) The Parties shall specify the details of the subject-matter of the dispute within one month. If they fail to do so, the Arbitral Tribunal shall use the submissions of the parties for the determination of the exact scope of the maritime and territorial disputes and claims between the parties.

(3) The Arbitral Tribunal shall render an award on the dispute.

(4) The Arbitral Tribunal has the power to interpret the present Agreement.

#### Article 4: Applicable Law

(1) 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 for the determination referred to in Article 3 (1)(b).

#### Article 5: Critical date

No document or action undertaken unilaterally by either side after 25 June 1991 shall be accorded legal significance for the tasks of the Arbitral Tribunal or commit either side on the dispute and cannot, in any way, prejudice the award.

#### Article 6: Procedure

(1) Each side shall submit a memorial to the Arbitral Tribunal within two months after entry into force. Each side has the right to comment on the memorial of the other side within a deadline fixed by the Arbitral Tribunal.

(2) Unless envisaged otherwise, the Arbitral Tribunal shall conduct the proceedings according to the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States.

#### Article 4: Applicable Law

(1) 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).

#### Article 5: Critical date

No document or action undertaken unilaterally by either side after 25 June 1991 shall be accorded legal significance for the tasks of the Arbitral Tribunal or commit either side on the dispute and cannot, in any way, prejudice the award.

#### Article 6: Procedure

(1) Each side shall submit a memorial to the Arbitral Tribunal within two months after entry into force. Each side has the right to comment on the memorial of the other side within a deadline fixed by the Arbitral Tribunal.

(2) Unless envisaged otherwise, the Arbitral Tribunal shall conduct the proceedings according to the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States.

#### Article 4: Applicable Law

(1) 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).

#### Article 5: Critical date

No document or action undertaken unilaterally by either side after 25 June 1991 shall be accorded legal significance for the tasks of the Arbitral Tribunal or commit either side on the dispute and cannot, in any way, prejudice the award.

#### Article 6: Procedure

(1) Each side shall submit a memorial to the Arbitral Tribunal within twelve months. Each Party has the right to comment on the memorial of the other Party within a deadline fixed by the Arbitral Tribunal.

(2) Unless envisaged otherwise, the Arbitral Tribunal shall conduct the proceedings according to the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States.

(3) The Arbitral Tribunal may seek expert advice and organize oral hearings.

(4) The Arbitral Tribunal shall, after consultation of the parties, decide expeditiously on all procedural matters by majority of its members.

(5) The proceedings are confidential and shall be conducted in English.

(6) The parties shall appoint representatives to act as intermediary between them and the Arbitral Tribunal. They may retain counsel to support their representative.

(7) The Arbitral Tribunal shall be supported by a Secretariat. The costs of the Arbitral Tribunal shall be borne in equal terms by the two parties. The parties invite the European Commission to provide secretarial support to the Arbitral Tribunal. The place of arbitration shall be Brussels, Belgium.

(3) The Arbitral Tribunal may seek expert advice and organize oral hearings.

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(8) The Arbitral Tribunal may at any stage of the procedure with the consent of both parties assist them in reaching a friendly settlement.

#### Article 7: The award of the Arbitral Tribunal

(1) The Arbitral Tribunal shall strive to issue its award within one year after its establishment. The Arbitral Tribunal adopts the award by majority of its members. The award shall state the reasons on which

(3) The Arbitral Tribunal may seek expert advice and organize oral hearings.

(4) The Arbitral Tribunal shall, after consultation of the parties, decide expeditiously on all procedural matters by majority of its members.

(5) The proceedings are confidential and shall be conducted in English.

(6) The parties shall appoint representatives to act as intermediary between them and the Arbitral Tribunal. They may retain counsel to support their representative.

(7) The Arbitral Tribunal shall be supported by a Secretariat. The costs of the Arbitral Tribunal shall be borne in equal terms by the two parties. The parties invite the European Commission to provide secretarial support to the Arbitral Tribunal. The place of arbitration shall be Brussels, Belgium.

(8) The Arbitral Tribunal may at any stage of the procedure with the consent of both parties assist them in reaching a friendly settlement.

#### Article 7: The award of the Arbitral Tribunal

(1) The Arbitral Tribunal shall issue its award expeditiously after due consideration of all relevant facts pertinent to the case. The Arbitral Tribunal adopts the award by majority of its members. The

it is based. No individual or dissenting opinions shall be attached to the award.

(2) The award of the Arbitral Tribunal shall be binding on the parties and shall constitute a definitive settlement of the dispute.

(3) The Parties shall take all necessary steps to implement the award, including by revising national legislation, as necessary, within six months after the adoption of the award.

#### Article 8: EU accession negotiation documents

(1) No document presented in the EU accession negotiations shall prejudice the Arbitral Tribunal when performing its tasks or commit either side on the dispute.

(2) The above applies to all documents and positions either written or submitted orally, including, *inter alia*, maps, negotiating positions, legal acts and other documents in whatever form, produced, presented or referred to in the framework of the EU accession negotiations. It also applies to all EU documents and positions which refer to or summarize the above-mentioned documents and positions.

it is based. No individual or dissenting opinions shall be attached to the award.

(2) The award of the Arbitral Tribunal shall be binding on the parties and shall constitute a definitive settlement of the dispute.

(3) The Parties shall take all necessary steps to implement the award, including by revising national legislation, as necessary, within six months after the adoption of the award.

#### Article 8: EU accession negotiation documents

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(2) The award of the Arbitral Tribunal shall be binding on the parties and shall constitute a definitive settlement of the dispute.

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Article 9: The continuation of the EU accession negotiations according to the negotiating framework

(1) The Republic of Slovenia shall lift its reservations as regards opening and closing of negotiation chapters where the obstacle is related to the dispute.

(2) Both parties shall refrain from any action or statement which might negatively affect the accession negotiations.

Article 10: Stand-still

(1) Both parties refrain from any action or statement which might intensify the dispute or jeopardize the work of the Arbitral Tribunal.

(2) The Arbitral Tribunal has the power to order, if it considers that circumstances so require, any provisional measures it deems necessary to preserve the stand-still.

Article 11

(1) The present Agreement on Arbitration shall be ratified expeditiously by both sides in accordance with their respective constitutional requirements.

(2) It shall enter into force on the first day of the week following the exchange of diplomatic notes with which the parties express their consent to be bound.

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(3) All procedural timelines expressed in this Agreement shall start to apply from the date of the signature of Croatia's EU Accession Treaty.

(4) The Agreement shall be registered with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations.

#### Article 12

The Agreement on Arbitration is drawn up in three originals in the English, Croatian and Slovenian language, the texts in each of these languages being equally authentic. In case of any divergence the English version shall prevail.

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Done at Stockholm on 4 November 2009 in three originals in English language.

Done at Brussels on [ ]

Done at Brussels on [ ]

#### Signed by

For Croatia

For Slovenia

#### Signed by

For Croatia

For Slovenia

#### Signed by

For Croatia

*Jadranka Kosor*

For Slovenia\*

*Borut Pahor*

#### Witnessed by

For the European Commission

For the French Republic

For the Czech Republic

For the Kingdom of Sweden

#### Witnessed by

For the European Commission

For the French Republic

For the Czech Republic

For the Kingdom of Sweden

#### Witnessed by

For the Presidency of the Council of the European Union, *Fredrik Reinfeldt*

\*Parties in alphabetical order. The Arbitration Agreement was signed in three originals in English. The order of the Parties in the headline and signature line of the Agreement alternated in the respective Party's copy (see Annexes HRLA-75 and SI-395 of the Final Award in Appendix 2 overleaf).

**PCA CASE NO. 2012-04**

**IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION AGREEMENT  
BETWEEN THE GOVERNMENT OF THE REPUBLIC OF CROATIA AND THE  
GOVERNMENT OF THE REPUBLIC OF SLOVENIA, SIGNED ON 4 NOVEMBER 2009**

**- between -**

**THE REPUBLIC OF CROATIA**

**- and -**

**THE REPUBLIC OF SLOVENIA**

**(together, the “Parties”)**

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**ANNEX TO THE FINAL AWARD**

**29 June 2017**

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**ARBITRAL TRIBUNAL:  
Judge Gilbert Guillaume (President)  
Ambassador Rolf Einar Fife  
Professor Vaughan Lowe  
Professor Nicolas Michel  
Judge Bruno Simma**

**REGISTRAR:  
Dr. Dirk Pulkowski  
The Permanent Court of Arbitration**

**ARBITRATION AGREEMENT**  
**between the Government of the Republic of Croatia**  
**and the Government of the Republic of Slovenia**

The Governments of the Republic of Croatia and the Republic of Slovenia (hereinafter referred to as "the Parties"),

Whereas through numerous attempts the Parties have not resolved their territorial and maritime border dispute in the course of the past years,

Recalling the peaceful means for the settlement of disputes enumerated in Article 33 of the UN-Charter,

Affirming their commitment to a peaceful settlement of disputes, in the spirit of good neighbourly relations, reflecting their vital interests,

Welcoming the facilitation offered by the European Commission,

Have agreed as follows:

**Article 1: Establishment of the Arbitral Tribunal**

The Parties hereby set up an Arbitral Tribunal.

**Article 2: Composition of the Arbitral Tribunal**

(1) Both Parties shall appoint by common agreement the President of the Arbitral Tribunal and two members recognized for their competence in international law within fifteen days drawn from a list of candidates established by the President of the European Commission and the Member responsible for the enlargement of the European Commission. In case that they cannot agree within this delay, the President and the two members of the Arbitral Tribunal shall be appointed by the President of the International Court of Justice from the list.

(2) Each Party shall appoint a further member of the Arbitral Tribunal within fifteen days after the appointments referred to in paragraph 1 have been finalised. In case that no appointment has been made within this delay, the respective member shall be appointed by the President of the Arbitral Tribunal.

(3) If, whether before or after the proceedings have begun, a vacancy should occur on account of the death, incapacity or resignation of a member, it shall be filled in accordance with the procedure prescribed for the original appointment.

Article 3: Task of the Arbitral Tribunal

(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.

(2) The Parties shall specify the details of the subject-matter of the dispute within one month. If they fail to do so, the Arbitral Tribunal shall use the submissions of the Parties for the determination of the exact scope of the maritime and territorial disputes and claims between the Parties.

(3) The Arbitral Tribunal shall render an award on the dispute.

(4) The Arbitral Tribunal has the power to interpret the present Agreement.

Article 4: Applicable Law

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).

Article 5: Critical date

No document or action undertaken unilaterally by either side after 25 June 1991 shall be accorded legal significance for the tasks of the Arbitral Tribunal or commit either side of the dispute and cannot, in any way, prejudice the award.

Article 6: Procedure

(1) Each Party shall submit a memorial to the Arbitral Tribunal within twelve months. Each Party has the right to comment on the memorial of the other Party within a deadline fixed by the Arbitral Tribunal.

(2) Unless envisaged otherwise, the Arbitral Tribunal shall conduct the proceedings according to the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States.

- (3) The Arbitral Tribunal may seek expert advice and organize oral hearings.
- (4) The Arbitral Tribunal shall, after consultation of the Parties, decide expeditiously on all procedural matters by majority of its members.
- (5) The proceedings are confidential and shall be conducted in English.
- (6) The Parties shall appoint representatives to act as intermediary between them and the Arbitral Tribunal. They may retain counsels to support their representative.
- (7) The Arbitral Tribunal shall be supported by a Secretariat. The costs of the Arbitral Tribunal shall be borne in equal terms by the two Parties. The Parties invite the European Commission to provide secretarial support to the Arbitral Tribunal. The place of arbitration shall be Brussels, Belgium.
- (8) The Arbitration Tribunal may at any stage of the procedure with the consent of both Parties assist them in reaching a friendly settlement.

#### Article 7: The award of the Arbitral Tribunal

- (1) The Arbitral Tribunal shall issue its award expeditiously after due consideration of all relevant facts pertinent to the case. The Arbitral Tribunal adopts the award by majority of its members. The award shall state the reasons on which it is based. No individual or dissenting opinions shall be attached to the award.
- (2) The award of the Arbitral Tribunal shall be binding on the Parties and shall constitute a definitive settlement of the dispute.
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Article 9: The continuation of the EU accession negotiations according to the negotiating framework

(1) The Republic of Slovenia shall lift its reservations as regards opening and closing of negotiation chapters where the obstacle is related to the dispute.

(2) Both Parties shall refrain from any action or statement which might negatively affect the accession negotiations.

Article 10: Stand-still

(1) Both Parties refrain from any action or statement which might intensify the dispute or jeopardize the work of the Arbitral Tribunal.

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Article 11

(1) The Agreement shall be ratified expeditiously by both sides in accordance with their respective constitutional requirements.

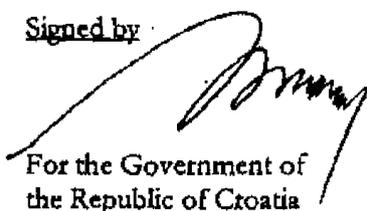
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(3) All procedural timelines expressed in this Agreement shall start to apply from the date of the signature of Croatia's EU Accession Treaty.

(4) The Agreement shall be registered with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations.

Done at Stockholm on 4 November 2009 in three originals in English language.

Signed by

  
For the Government of the Republic of Croatia

  
For the Government of the Republic of Slovenia

Witnessed by

  
For the Presidency of the Council of the European Union

**ARBITRATION AGREEMENT**  
**between the Government of the Republic of Slovenia**  
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Whereas through numerous attempts the Parties have not resolved their territorial and maritime border dispute in the course of the past years,

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**SI-395**

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(5) The proceedings are confidential and shall be conducted in English.

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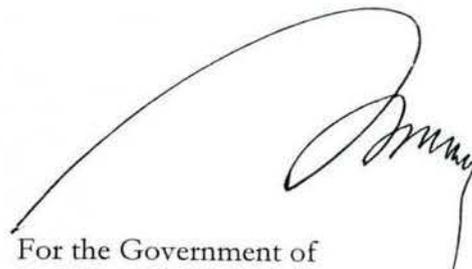
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Done at Stockholm, on 4 November 2009 in three originals in English language.

Signed by



For the Government of  
the Republic of Slovenia



For the Government of  
the Republic of Croatia

Witnessed by



For the Presidency of the Council of the European Union

**PERMANENT MISSION OF THE REPUBLIC OF CROATIA TO THE UNITED NATIONS**

820 Second Avenue, 19<sup>th</sup> Floor  
New York, N.Y. 10017 USA

Tel: (212) 986-1585  
Fax: (212) 986-2011

No. 55/2016

The Permanent Mission of the Republic of Croatia to the United Nations presents its compliments to the Permanent Missions and Permanent Observer Missions accredited to the United Nations and with reference to the arbitration between Croatia and Slovenia to resolve the two states' territorial and maritime border dispute at an *ad hoc* Arbitral Tribunal, has the honour to state the following position of the Croatian Government:

By its actions, the Republic of Slovenia has caused irreparable harm to the arbitration process and the work of the Arbitral Tribunal, committing at the same time material breach of the Arbitration Agreement. The Republic of Croatia, in order to protect its legitimate interests and rights, reacted to the breach by ceasing to apply the Arbitration Agreement and initiating its termination. The Republic of Croatia expects that the Arbitral Tribunal terminates its work without delay and expresses its willingness to work with the Republic of Slovenia in the spirit of good neighbourly relations to resolve the matter in accordance with international law.

The Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia was signed on 4 November 2009. It entered into force on 29 November 2010. Following the appointment of the President of the Arbitral Tribunal and its members, the two States submitted three rounds of written pleadings – on 11 February 2013, 11 November 2013 and on 26 March 2014. Oral hearings were held in The Hague from 2 to 13 June 2014.

Throughout the proceedings Croatia has acted in good faith in carrying out and respecting all obligations under the Arbitration Agreement. Croatia invested significant resources to ensure that the proceedings would succeed and bring about a final determination of the state border between the two States. On the other hand, Slovenia has clearly breached the provisions of the Arbitration Agreement and undermined the role, the trustworthiness and the authority of the Arbitral Tribunal. Slovenia has irrevocably corrupted the proceedings and the sound administration of justice. As a result, the process has been fundamentally tainted and no award issued under these legally and ethically completely compromised proceedings could be considered as effective, authoritative or credible.

**Permanent Missions and Permanent Observer Missions  
to the United Nations  
New York**

This first indication of Slovenia's regrettable actions came as early as in February 2013, when the Slovenian Parliament, in authorising Slovenia's first written submission in the arbitration, adopted a public decision with the effect that Slovenia would not recognize an award that did not meet its expectations. (In express terms, Slovenia's parliamentary decision stated that Slovenia "will consider any decision of the (...) Tribunal that would not ensure [its] territorial contact (...) with the High Seas (...) as a decision *ultra vires* (in violation of the mandate of the Arbitral Tribunal).") This decision, while indicative of Slovenia's further intentions, was for all intents and purposes a negation of the Arbitration Agreement.

In April 2015, following reports throughout the Slovenian media that Slovenia had "unofficial" information about the Tribunal's award and that it had communicated certain messages to the Tribunal, which were not found in the official verbatim of the proceedings, Croatia approached the Arbitral Tribunal and informed it of its concerns that Slovenia might have a "separate channel" of communication with the Tribunal. The Tribunal investigated the matter and assured Croatia that there were no reasons for concern.

In July 2015, in manifest contradiction with those assurances, recordings of telephone conversations between a member of the Arbitral Tribunal and the Agent of Slovenia were made public. Transcripts of recordings plainly revealed that confidential information about the Tribunal's deliberations had been disclosed to Slovenia and that Slovenia had been continuously and meticulously informed about internal deliberations of the Arbitral Tribunal. Further, the transcripts and recordings demonstrated that the Member of the Tribunal had requested the production of additional arguments and evidence from the Agent of Slovenia, that Slovenia had provided such arguments and evidence, and that these were then made available to the Tribunal. In this way, the factual record of the case was changed well after the closing of the oral hearings. The Member of the Tribunal and the Agent of Slovenia also colluded to conceal the true source of these documents and the Member of the Tribunal presented to the Arbitral Tribunal these documents, prepared by the Slovenian side, as being produced by himself, thus including them into the official records of the proceedings.

Slovenia has neither denied, nor challenged acts revealed by these recordings.

These actions have irrevocably tainted and irreparably damaged the entire process. It is impossible to conclude that the arbitrators have not been influenced by Slovenia's actions and by materials made available to them through the actions of the arbitrator serving as a conduit for Slovenia. The grave wrong that has occurred cannot be repaired by tinkering with the procedure, or merely replacing one or two arbitrators. The entire process has been profoundly and irreversibly corrupted and stripped of basic credibility and integrity required for third party dispute settlement.

Such conduct amounts to a repudiation of the Arbitration Agreement, and a rejection of the most fundamental principles that govern the integrity of international proceedings such as this. Under international law, these acts, including those of the Agent of Slovenia, are directly attributable to Slovenia. In accordance with the Vienna Convention on the Law of Treaties, they constitute material breach of a treaty, entitling Croatia to seek its termination and suspend its operation.

Accordingly, and to protect its rights under international law, subsequent to a unanimous decision of the Croatian Parliament, on 30 July 2015 Croatia initiated the procedure to terminate the Arbitration Agreement, ceased to apply it and withdrew from the arbitration process. Slovenia objected and the question of termination of the Arbitration Agreement is to be resolved bilaterally “through the means indicated in article 33 of the Charter of the United Nations”, as foreseen by the Vienna Convention on the Law of Treaties. The Convention also avails Croatia of another mechanism, i.e. conciliation, to resolve the question of termination of the Arbitration Agreement. Nevertheless, the Vienna Convention on the Law of Treaties does not provide a role for the Arbitral Tribunal in this process.

As for the arbitration process itself, Croatia submits that – to assure the sound administration of justice, and for legal and ethical reasons – the Arbitral Tribunal should terminate its work with immediate effect. An international adjudicatory process as tainted and compromised as this cannot reasonably continue in any form. Any award it might give would lack essential authority, and propel the parties to an interminable dispute. Such an award could never be implemented, or enforced. Consequently, any effort to continue this arbitration would be futile and counterproductive.

Immediate termination of these compromised proceedings is of paramount importance for peaceful settlement of disputes between states and the system of international adjudication as a whole, as it is for the bilateral relations between Croatia and Slovenia. It also has the potential of reassuring the many states with unresolved bilateral issues – in Southeast Europe and elsewhere – that their disputes shall indeed be resolved competently, independently and impartially, thus reaffirming their confidence in international adjudication that meets all appropriate legal and ethical standards. The adverse consequences of Slovenia’s actions are widely recognised. In this context, Croatia notes that the prompt resignation of the President of the International Court of Justice (ICJ) from this Arbitral Tribunal confirms its concerns. The President of the ICJ, after initially accepting appointment by Slovenia to replace the Member of the Tribunal directly involved in the wrongdoing with the Agent of Slovenia – resigned on 3 August 2015, having served on the Tribunal for just six days. In resigning, he stated that he “agreed to be appointed to the Arbitral Tribunal (...) in the hope that this appointment would help restore confidence between the Parties and the Arbitral Tribunal and to allow the process to continue normally, with the consent of both Parties”, but decided to resign when he came to appreciate that “the current situation cannot meet that expectation”.

In December 2015, the Arbitral Tribunal requested further written submissions from the two States on the most recent developments and scheduled an additional oral hearing for 17 March 2016. Since Croatia withdrew from the proceedings, it did not formally react to these communiqués: it will not do so, and will not participate in the oral hearing. The Arbitral Tribunal is aware of Croatia's position. At the time when it initiated the termination of the Arbitration Agreement and ceased to apply it, Croatia provided the Tribunal with all the relevant information on the recent events, allowing it to decide on the termination of its work.

This arbitration cannot resolve the outstanding border issue between the two States. Croatia has invited Slovenia to discuss other modalities to settle the outstanding border issues in accordance with international law and in the spirit of good neighbourly relations stands ready to resolve the matter bilaterally, as many states have done so far, or refer it to a different international judicial body.

In the meantime, the border between the two States has existed as an international border for twenty-five years and normal everyday life of people living on both sides of the border functions well, with full local border cooperation. At sea, pursuant to the International Maritime Organization's navigational routes in the Northern Adriatic, all vessels enjoy unimpeded access to and from Slovenian ports, which register continuous rise in passenger and cargo throughput. The two States are members of the European Union and NATO. Therefore, there exist no pressing obstacles which should prevent the two States from creating conditions for a constructive exchange on the way forward, leaving behind a failed arbitration process which endangers their bilateral relations and the confidence of States in international adjudication.

The Permanent Mission of the Republic of Croatia to the United Nations avails itself of this opportunity to renew to the Permanent Missions and Permanent Observer Missions accredited to the United Nations the assurances of its highest consideration.



New York, 16 March 2016

## **TREATY BETWEEN THE REPUBLIC OF SLOVENIA AND THE REPUBLIC OF CROATIA ON THE COMMON STATE BORDER**

The Republic of Slovenia and the Republic of Croatia (hereinafter referred to as "the Contracting Parties");

Convinced that peaceful cooperation and good neighbourly relations between the two states and their citizens are in the vital interest of both states, and that the agreements concluded thus far provide favourable conditions for the further development and strengthening of their mutual relations;

Respecting the principles of international law, in particular the inviolability of international borders and the protection of fundamental human rights and freedoms;

Proceeding from the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia of 25 June 1991 and the Constitutional Decision on Sovereignty and Independence of the Republic of Croatia of 25 June 1991;

Considering that the two states have no territorial claims towards each other;

Respecting the existing state borders;

Have agreed as follows:

### **I SUBJECT OF THE TREATY**

#### Article 1

#### **SUBJECT OF THE TREATY**

The subject of this Treaty is the determination of the maritime boundary and the establishment of the course of the land border between the Contracting Parties, as well as the principles of demarcation, maintenance and restoration of the state border.

#### Article 2

#### **DEFINITION OF THE STATE BORDER**

The state border between the Republic of Slovenia and the Republic of Croatia (hereinafter referred to as the "state border") is the surface perpendicular to the line of the border on the surface of the Earth dividing the territory of the two states, their air space, subsoil, and any above and underground structures and installations.

### **II DETERMINATION OF THE STATE BORDER AT SEA**

### Article 3

#### LATERAL BORDER

1. The state border at sea between the Contracting Parties shall be determined as follows: The border shall run from the middle of the outfall of the Dragonja River into the sea from point A (Y 5.389.794, X 5.038.097;  $\varphi$  45°28'43.3",  $\lambda$  13°35'25.7")<sup>\*</sup> and in a straight line to point B (Y 5.385.011, X 5.041.869;  $\varphi$  45°30'42.7",  $\lambda$  13°31'41.3"), representing one fourth of the distance between the northernmost points of the Savudrija and the Madona promontories measured from the northernmost point of the Savudrija promontory. The border shall run from point B along the parallel in the straight line through point B westwards to point C (Y 5.365.527, X 5.042.258;  $\varphi$  45°30'42.7",  $\lambda$  13°16'43.4"), located on the border determined in the Treaty between the Socialist Federal Republic of Yugoslavia and the Italian Republic, signed in Osimo (Ancona) on 10 November 1975, except at the point of junction of the territorial sea of the Republic of Slovenia with the high seas, as defined in Article 4 of this Treaty.
2. The map at a scale of 1:25,000, to which this description refers, is contained in Annex I.
3. Where the description of the state border does not correspond to the map, the verbal description shall prevail.

### Article 4

#### JUNCTION OF THE TERRITORIAL SEA OF THE REPUBLIC OF SLOVENIA WITH THE HIGH SEAS

1. The Contracting Parties agree that the sea surface limited with points C1 (Y 5.372.959, X 5.042.102;  $\varphi$  45°30'42.7",  $\lambda$  13°22'25.9"), C2 (Y 5.367.526, X 5.042.215;  $\varphi$  45°30'42.7",  $\lambda$  13°18'15.5"), T5 (Y 5.360.404, X 5.035.862;  $\varphi$  45°27'12.0",  $\lambda$  13°12'54.0") and T6 (Y 5.361.377, X 5.031.764;  $\varphi$  45°25'00.0",  $\lambda$  13°13'42.9") shall be the high seas.
2. The width of the junction of the territorial sea of the Republic of Slovenia with the high seas shall equal the distance from point B referred to in Article 3, paragraph 1, of this Treaty, to the Madona promontory.
3. The map at a scale of 1:25,000, to which this description refers, is contained in Annex I.
4. Where the description of the state border does not correspond to the map, the verbal description shall prevail.

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<sup>\*</sup> The points are given in rectangular coordinates of Zone 5 of the Gauss-Krueger projection rounded off to 1 metre and in geographic coordinates based on the Bessel ellipsoid rounded off to 0.1".

The accuracy of the definition of the position of the points is 10 metres.

5. No sovereign rights may be acquired in relation to the water column under the sea surface referred to in paragraph 1 hereof. The Contracting Parties shall, in their mutual relations, refrain from exercising sovereign rights in the seabed and the relevant subsoil under the sea surface referred to in paragraph 1 hereof.

#### Article 5

### JUNCTION BETWEEN THE TERRITORIAL SEA OF THE REPUBLIC OF CROATIA AND THE ITALIAN REPUBLIC

1. The Contracting Parties agree that the sea surface limited with points C (Y 5.365.527, X 5.042.258;  $\varphi$  45°30'42.7",  $\lambda$  13°16'43.4"), C2 (Y 5.367.526, X 5.042.215;  $\varphi$  45°30'42.7",  $\lambda$  13°18'15.5") and T5 (Y 5.360.404, X 5.035.862;  $\varphi$  45°27'12.0",  $\lambda$  13° 12'54.0") shall be the territorial sea of the Republic of Croatia.

2. The map at a scale of 1:25,000, to which this description refers, is contained in Annex I.

3. Where the description of the state border does not correspond to the map, the verbal description shall prevail.

### III STATE BORDER ON LAND

#### Article 6

### ESTABLISHMENT OF THE COURSE OF THE STATE BORDER

1. The state border on land between the Republic of Slovenia and the Republic of Croatia shall be the border between the Republic of Slovenia and the Republic of Croatia within the former Socialist Federal Republic of Yugoslavia, running from the tripoint between the Contracting Parties and the Republic of Hungary to the Adriatic Sea.

2. The state border on land between the Contracting Parties has been established as presented in the verbal description with coordinates contained in Annex II.

3. Maps nos. 1-47 at a scale of 1:25,000, referred to in the verbal description with coordinates under the foregoing paragraph are contained in Annex III.

4. Where the description of the state border does not correspond to the map, the map shall prevail.

#### Article 7

### EXCHANGE OF AREAS

1. The Contracting Parties confirm that the exchange of areas, which occurred on the occasion of the consensual establishment of the course of the state border, is balanced.

2. The exchange of areas shall have no effect on any rights of natural or legal entities under the law of property and law of obligations with regard to land and other immovable property included in such an exchange. Holders of rights under the law of property and law of

obligations shall use such property in accordance with a special agreement between the Contracting Parties.

#### Article 8

##### DEMARCATION OF THE COURSE OF THE STATE BORDER

1. The course of the state border on land shall be demarcated by joint bodies, as established by this Treaty, and in the manner defined in the instructions for the work of mixed technical groups.
2. The Contracting Parties shall, within the period of five years after the date of entry into force of this Treaty, measure, demarcate and mark the state border on the ground.

#### Article 9

##### PRINCIPLES OF DEMARCATION OF THE COURSE OF THE STATE BORDER

1. The demarcation of the state border on the ground shall be carried out with border markers directly on the border line or indirectly in the following ways:
  - (a) Single — directly on the border line or alternately on both sides of roads, channels and watercourses on the common state border;
  - (b) Double — at the beginnings and ends of roads, channels and watercourses on the common state border and in locations where the terrain does not allow placing markers directly on the border line;
  - (c) Triple — in cases where double border markers are not sufficient for a clear demarcation of the course of the state border.
2. Detailed provisions on demarcation shall be defined in accordance with the instructions referred to in Article 8, paragraph 1, of this Treaty.

#### Article 10

##### MAINTENANCE AND RESTORATION OF THE STATE BORDER

1. After the demarcation of the state border on the ground, the Contracting Parties undertake to regularly inspect, maintain and restore border markers in accordance with the instructions referred to in Article 8, paragraph 1, of this Treaty.
2. The Contracting Parties shall, in intervals not longer than five years, jointly inspect the condition of the border line and border markers, and, if necessary, restore the demarcation of the state border or additionally mark it. The five-year interval shall be calculated as of the date of the beginning of the last joint restoration.

#### Article 11

## INALTERABILITY OF THE COURSE OF THE STATE BORDER

The established border line shall not change even in the case of changed courses of roads, channels or watercourses on the common state border.

### Article 12

#### UNIFORMITY OF BORDER MARKERS

The course of the state border shall always be demarcated in a uniform and unequivocal manner. The border line and the belt along it shall be regularly maintained and restored. Any replacements of border markers and any activity undertaken shall be entered into documents relating to the border immediately.

### Article 13

#### BELT ALONG THE BORDER LINE

1. The belt along the border line shall mean the area along the border line extending not more than 1.5 meters to both sides of the border line.
2. The Contracting Parties shall regularly clear and maintain the belt along the border line in accordance with the instructions referred to in Article 8, paragraph 1, of this Treaty.

### Article 14

#### COSTS

The Contracting Parties shall ensure financial resources for demarcation, maintenance and restoration of the state border. The Contracting Parties shall adhere to the principle that each side shall carry out a comparable amount of work and bear an equal amount of costs.

### Article 15

#### OBLIGATIONS OF OWNERS, USERS, ADMINISTRATORS AND OTHER HOLDERS OF RIGHTS UNDER THE LAW OF PROPERTY AND THE LAW OF OBLIGATIONS

1. Owners, users, administrators and other holders of rights under the law of property and the law of obligations on land, facilities and installations situated on or in the vicinity of the state border must allow any works and measures that are necessary for the demarcation, measuring, maintenance, clearing and restoration of the state border, as well as grant access to any person carrying out these works. In performing such works the legitimate interests of owners, users, administrators and other holders of rights under the law of property and the law of obligations must be taken into account; they must be notified in advance about the beginning of these works.

2. In performing the works referred to in paragraph 1 hereof as well as in accessing or driving onto such land and towards such facilities and installations, the national legislation of the Contracting Party on whose territory these works are being carried out shall be respected.

#### Article 16

#### COMPENSATION FOR DAMAGE

Any damage resulting from the works referred to in Article 15, paragraph 1, of this Treaty shall be compensated for by the Contracting Party on whose territory such damage occurred. In filing claims for damages, the national legislation of the Contracting Party on whose territory such damage occurred shall be applied.

#### Article 17

#### TRIPPOINT

Works relating to the demarcation, maintenance, clearing and restoration of the tripoint can only be carried out by mutual agreement of the three states.

#### Article 18

#### PROTECTION OF MARKERS

The Contracting Parties shall ensure the protection of border and geodetic markers and other equipment used in demarcation of the state border against damage, destruction, illicit displacement and any use that is inconsistent with their purpose.

### IV JOINT REGIMES

#### Article 19

#### SPECIAL REGIMES AND MEASURES IN THE BORDER AREA

1. The Contracting Parties shall conclude special agreements on special regimes and measures in the border area, such as the use of transport connections for the needs of population and authorities of the Contracting Parties, and any other issues resulting from the established course of the state border.

2. The Contracting Parties engage to retain at least the present level of the protection of nature along the entire course of the state border and particularly in the protected areas, such as the nature reserves *Krajinski park Sečovelje* and *Park prirode Žumberak — Samoborsko gorje*, and to continue to develop mutual cooperation. The Contracting Parties shall ensure environmental regime complying with the highest environmental standards of the European Union along the entire course of the state border, particularly in the areas intended for the development of tourism.

3. The Contracting Parties engage to guarantee to each other the use of water sources in the border area at least to the present extent for a period of 30 years as of the date of the entry into force of this Treaty. The Contracting Parties shall conclude a special agreement on this issue within one year after the entry into force of this Treaty.

#### Article 20

#### BENEFITS OF THE INHABITANTS OF THE HAMLETS MLINI-ŠKRILE, BUŽINI AND ŠKODELIN

In addition to benefits provided for in the concluded agreements between the Contracting Parties for the border population, persons with permanent residence in the hamlets Mlini-Škrile, Bužini and Škodelin as at the date of the signing of this Treaty, shall have:

- (a) The right, when returning from the neighbouring state, to bring with them, free of customs duties and import charges, goods of such type and in such quantity as appropriate for their personal use and for the use by the members of their households: the Contracting Parties shall conclude in this respect a separate implementing agreement within six months from the date of the entry into force of this Treaty;
- (b) The right to acquire citizenship of the Republic of Slovenia.

#### V JOINT BODIES

#### Article 21

#### PERMANENT SLOVENIAN-CROATIAN COMMISSION FOR THE STATE BORDER

1. The Contracting Parties shall set up a Permanent Slovenian-Croatian Commission for the State Border (hereinafter referred to as "the Commission"), responsible for the implementation of the present Treaty.
2. The Commission shall be composed of the delegation of the Republic of Slovenia and the delegation of the Republic of Croatia. Each Contracting Party shall appoint a chairperson and five members to its part of the Commission. The Contracting Parties shall notify each other of the appointment and discharge from office of the chairperson and members of the Commission through diplomatic channels. The chairpersons shall notify each other in writing of any changes in the composition of the delegations.
3. Each delegation may engage experts and auxiliary staff in its work, if necessary.
4. The Contracting Parties shall cover the costs incurred by their respective delegations in the Commission.

#### Article 22

#### TASKS AND WORKING METHOD OF THE COMMISSION

1. The tasks of the Commission shall be:

(a) To decide on the manner of demarcation of the border line on the ground and to adopt instructions for the work of mixed technical groups;

(b) To organise and supervise the demarcation, maintenance, clearing and restoration of the entire border line on the ground;

(c) To draw up new and supplementary documents relating to the border and to enter new data in the applicable documents relating to the border;

(d) To propose changes to the state border, if necessary.

2. The Commission shall decide unanimously. If the Commission fails to adopt a decision, the matter shall be submitted to the governments of the Contracting Parties for settlement.

3. The working method of the Commission shall be defined in detail in its rules of procedure.

#### Article 23

#### MIXED TECHNICAL GROUPS

The Commission shall set up mixed technical groups to carry out certain works on the state border. Their number and composition shall be determined according to the scope and type of the work to be performed.

#### Article 24

#### DEVIATIONS

With the aim of the final demarcation of the course of the state border on the spot, the Commission may deviate for not more than 50 metres from the line determined by this Treaty, in order to adjust the state border to the local geographic and economic circumstances. However, no important road or railway track, important water or power supply facility, or property of historical or cultural significance may be placed under the jurisdiction of the state whose jurisdiction does not derive from the delimitation determined and established by this Treaty.

### **VI SETTLEMENT OF DISPUTES BETWEEN THE CONTRACTING PARTIES**

#### Article 25

1. Any potential disputes between the Contracting Parties arising from the interpretation and application of this Treaty shall be settled through negotiations in accordance with the principle of good neighbourly relations.

2. Should the Contracting Parties be unable to reach an agreement within six months from the date of receiving the initiative for negotiations, the dispute shall be submitted for arbitration at the request of either Contracting Party.

3. The arbitral tribunal shall be set up on a case-by-case basis in the following manner. Each Contracting Party shall appoint two arbitrators two months after receiving the request for arbitration. The appointed four arbitrators shall then select a national of a third country who shall be appointed president of the arbitral tribunal after he/she has been approved by both Contracting Parties. The president shall be appointed within two months after the date of appointment of the other four arbitrators.

4. Should these appointments not be made within the deadlines set in paragraph 3 hereof, either Contracting Party may, unless otherwise agreed, request the President of the International Court of Justice to make the necessary appointments. If the President is a national of one or the other Contracting Party or if he/she cannot perform this task for any other reason, the Vice-President of the International Court of Justice shall be requested to make the necessary appointments. If the Vice-President is a national of one or the other Contracting Party or cannot performed this task for any other reason, the senior member of the International Court of Justice who is not a national of either Contracting Party shall be requested to make the necessary appointments.

5. The arbitral tribunal shall decide by the majority of votes. The decisions of the arbitral tribunal shall be final and binding on the Contracting Parties. Each Contracting Party shall cover the costs of its arbitrators and its representation in the arbitral procedure. The remaining costs shall be covered by both Contracting Parties in equal shares.

6. The arbitral tribunal shall define the rules of procedure, taking into consideration the provisions of this Article and the Model Rules on Arbitral Procedure drawn up by the United Nations International Law Commission.

## VII TRANSITIONAL PROVISIONS

### Article 26

#### TRANSFER OF THE ENTRY IN THE LAND REGISTER

The transfer of the entry of the rights under the law of property and the law of obligations in the land register relating to the areas exchanged under Article 7 of this Treaty, shall be carried out *ex officio* no later than one year after the final demarcation of the state border.

### Article 27

#### EXEMPTION FROM ADMINISTRATIVE FEES

1. The dealings of natural and legal entities relating to regulating the property relations in the areas exchanged under Article 7 of this Treaty shall be exempt from administrative fees. The scope, method and duration of this exemption shall be regulated by the Contracting Parties in a special agreement.

2. The Contracting Parties shall ensure, free of charge, the exchange of all data, documents and other documentation relating to the areas exchanged under Article 7 of this Treaty no later than one year after the entry into force of this Treaty.

Article 28

**CARTOGRAPHIC DOCUMENTATION**

Within one year after the entry into force of this Treaty, the Contracting Parties shall make a digital orthophoto map of the state border depiction contained in Annexes II and III, which shall be applied in the event referred to in Article 6, paragraph 4, of this Treaty.

**VIII FINAL PROVISIONS**

Article 29

**ANNEXES**

Annex I (a map of the state border at sea at a scale of 1:25,000), Annex II (a verbal description of the course of the state border on land with coordinates), and Annex III (maps nos. 1- 47 at a scale of 1:25,000) shall be integral parts of this Treaty.

Article 30

**ENTRY INTO FORCE**

1. This Treaty shall be subject to ratification in accordance with the national legislations of the Contracting Parties.
2. This Treaty shall enter into force on the date of the receipt of the last of the notifications by which the Contracting Parties notify each other through diplomatic channels that the internal legal requirements for the entry into force of this Treaty have been fulfilled.

Done at ..... on ..... in two originals in the Slovenian and Croatian languages, both texts being equally authentic.

FOR THE REPUBLIC OF SLOVENIA

FOR THE REPUBLIC OF CROATIA

## ANNEX II

The border runs from the confluence of the Krka and the Ledava (point 1) southward for 250 meters (point 2). It then turns westward to the former Mura channel, crosses the Margitmajor–Podturen road (point 3) and continues westward across benchmark 152 (point 4) up to the middle of the course of the Mura (point 5). It continues along the middle of the riverbed to the middle of the railway bridge of the Lendava–Mursko Središče railway line, turning north along the west side of the railway line up to the middle of the spillway, continuing 200 meters and then turning westward at the middle of the road spillway on the Lendava–Mursko Središče road. Midway from the western edge of the road and the left bank of the Mura's tributary (point 6), it turns north and continues to the heel of the Mura dyke.

The border then runs along the heel of the dyke along the Mura up to the tributary of the Mura beneath the Gaberje settlement (point 7). It continues along the south side of the Mura tributary towards benchm.3 (point 8), turns westward along the track to the point that is a t 230 meters from the benchmark (point 9) and turns north-westward again to the heel of the dyke. It then continues its course under the dyke to the Hotiza–Sv. Martin na Muri road, crosses it and turns towards the river at point 10, continuing up to the middle of the course of the Mura. From there, it runs along the middle of the riverbed to point 11 beneath the Gibina settlement, then turning southward to the Gibina–Mursko Središče road. It runs along the north side of the road for approximately 300 meters westward (point 12). It turns south to the first hillsides of the Slovenske Gorice hills through Šafarsko (point 13), then westward, thereby circumventing the Cmager estate, leaving it on the north side of the border (point 14). West of the estate, it turns uphill across the Razkrižje–Banfi road. After 105 meters, it turns north (point 15), continuing west and then again north, circumventing from the north side the Bedekovič estate (point 16). From there, it continues mainly south-westward up to point 17. It then continues across Slovenske Gorice, past Šprinc and Globoka towards the valley of the Presika stream. It runs on the stream, along the east side of the Presika–Štrigova road and the eastern edge of the Madgič-bound track (point 18).

The border then continues southward across benchmark 226 on the Šantavec stream, past the Kocijan estate to the Trnava stream. At point 19, it turns south-westward to the valley of the Zelen stream and then southward. Near benchmark 179.4 it crosses the Mursko Središče–Čakovec railway track. It then runs southward; after 1125 meters (point 20), it turns westward through Trnovščak. It continues southward from Sekelj to the former riverbed of the Drava beneath Majerček (point 21). It then runs along the middle of the former riverbed of the Drava to point 22, Mehika, and from there westward

beneath Jurkovec to the heel of the dyke of Lake Ormož (point 23). It continues beneath the northern heel of the dyke to the garden of the lake house (point 24), then to the middle of the lake and, along the middle, to the middle of the Ormož–Virje bridge. On the west side of the bridge, it turns to the right side of the penstock of the Drava, continuing along it up to Meka (point 25) and past benchmark 195.8 (Brezji Otok) westward to point 26, where it turns south and passes Dubrava Križovljanska, running along the hillside above Goričak up to Drenovec (point 27) and past benchmark 319 towards Sv. Mohor (benchmark 365) and from there along the hill crest towards Sv. Florjan (benchmark 349). There, it turns southward and runs westward across Vranika past benchmarks 334, 401, 424, 459, 481 up to Sv. Avguštin (benchmark 503). It continues along Vučje (benchmark 459) and Brezova Gora (benchmark 567) to the valley of the Lipnica stream. It runs on the stream to the Gruškovje settlement (point 28), turningthward beneath the settlement and running on the east side of the Ptuj –Macelj regional road through the underpass of the local road up to the Lipnica stream to point 29, where it turns westward to Maceljjska Gora across Debeli Vrh (benchmarks 628, 623, 614, 718) to point 30 at 150 meters from benchmark 714. There, it turns south to the Sotla valley.

The border then runs on the middle of the Sotla River to the Rigonci settlement, except in the area of Rajnkovec, where it turns from the riverbed and continues for some 300 meters along the former riverbed of the Sotla (points 31 and 32). In the area of Lake Vonarsko, the border runs along the southeastern lake shore, leaving both barriers on the west side of the border. Before the confluence with the Sava beneath the Spodnji Rigonci settlement at benchmark 137.0, the border turns off the riverbed to the right bank of the Sotla and across Nego and Potfrenk entering the middle of the Sava riverbed (point 33). It then continues on the middle of the Sava riverbed to point 34 at 500 meters upstream from benchmark 133.0.

The border then runs westward across Panovje (points 35 and 36) past the Obrežje border crossing point through the Bregana and Obrežje settlements up to the bridge across the Bregana River (point 37) on the Bregana–Obrežje road.

From the west side of the bridge, the border continues on the Bregana River, past Gabrovica, on the streams of Usklopec, Sklednik and Gramski Jarek above the Čedenj village up to point 38, which is at 200 meters from benchmark 648. There, it turns north to point 39, Blatnica, and continues westward across Sinja Reber to the valley of the Piroški stream. It runs across the valley of the stream up to point 40 and across Planinska Gora (benchmark 844) under Goli Vrh (benchmark 707) to Tršljikovina (benchmark 567) to the valley of the Laznica stream and across benchmark 647 to the valley of the

Sušica River (point 41). Here, it turns south to the Strašni Jarek valley up to Luka (point 42) and then westward across Stričanica, benchmark 844 on Opatova Gora and benchmark 955, reaching Japetova Košenica at benchmark 978, leaving the forest road Petričko Selo–Sopotske Planine on the south. It continues along the crest of the Gorjanci hills across benchmark 946 to Trdinov Vrh by crossing the road towards the TV tower above the junction of the Vahta–Trdinov Vrh road, turning across the peak of Trdinov Vrh (1178 metres). It continues westward along the railing of the TV tower between the churches of Sv. Jera and Sv. Ilija. In the Gorjansko ravine it turns south-westward and then southward at Mišino Brdo (point 43) across benchmark 830. At point 44, it turns south-eastward (point 45). From thereon, it runs to the east (point 46) and above Garjevec and beneath Štula across benchmarks 549, 518 and 389, reaching the Bušinja Vas–Radovica road (point 47). It then runs along the north side of the road for 200 meters (point 48), then turning northward and north-eastward above vineyards (point 49) and again northward to Tatinska Draga (point 50). There, it turns to the east and between the Malo Lešče and Goleši Žumberački settlements (points 51, 52) south across the Bušinja Vas–Radovica road (point 53). It continues south-eastward to Smolanovec (benchmark 358). At point 54, it turns north to point 55, then north-eastward (point 56) and finally eastward (point 57). From there, it runs southward to Mrzla Draga (point 58) and along the east side of the settlement Brašljevica northward to point 59 (Kamenica). It runs on the Kamenica stream up to the confluence of the Kolpa and the Kamenica (point 60).

From the confluence, the border runs upstream on the middle of the riverbed of the Kolpa to the confluence of the Kolpa and the Čabranka.

From the confluence of the Kolpa and the Čabranka, the border runs on the middle of the riverbed of the Čabranka to the confluence with its left tributary above Čabar and from there along the ravine beneath Kapišče up to the Pužeti settlement (point 61). There, it turns north across the Novi Kot–Prezid road, runs next to benchmark 882 up to point 62, which is at 100 meters to the west from benchmark 997. It then runs westward across benchmark 934 to point 63. It turns to the south and crosses Vražji Vrtec (benchmark 904) towards Solnički Vrh. It then runs across Beriškova Draga to the south-west up to point 64, where it turns south along the road towards the Škodovnik hunting lodge and continues through Praprotna Draga (benchmarks 783, 849 and 1028) up to Paravičeva Miza. Then it runs through Jelenja Draga to the south-west to Klana Plateau and across Gomanci (point 65), Gumanška Gora hill up to Boršt (point 66), where it turns south to Vela voda (point 67). It continues across Oštarija (benchmark 712) and Prvonoh to point 68 beneath Liskovec. There, it turns northward to Visoč (benchmark 756) across the Novokračine–Rupa road (benchmark 547) and benchmark 657 to point 69. From there, it runs south-westward to point 70 and then north-westward to Velika reber

(benchmark 519), and then again south-westward, across benchmark 619 towards Kališče and to Buričini (benchmark 825). There, it turns to the west across Kovnica (benchmark 901) and Strahovica (benchmark 771) up to Mala Vrata (benchmark 695). It then continues through Jelovščina beneath M. Grižan to point 71, where it turns to the west (point 72) and then south-west across benchmark 603 to Kosmačič (benchmark 736). There, it turns to the south across benchmark 904 up to point 73, where it turns south-westward across point 74 to the Buzet–Vodice road, where it runs to the north or the west of the road up to point 75. Then it runs westward across Stražnica (benchmark 493) and past Mlini beneath Goričica south-westward to Dugo brdo (point 76). From there, the border runs westward across Vele Njive to Klenovica (point 77) and further across benchmarks 363 and 438 up to point 78. There, it turns to the north past point 79 to the Hrvoji settlement (point 80) and along the valley of the Pasjok stream to the Dragonja River (benchmark 118). It then runs for approximately 1,500 meters on the Dragonja to Ferm's mill (point 81), where it turns to the south to the ravine towards Novi Brič. At point 82, it crosses the Brič–Koštabona road and continues westward to point 83. It runs southward for 400 meters to the crest, then turns to the west and after 1,400 meters continues north again to the Dragonja (point 84). It then runs on the middle of the riverbed of the Dragonja to Mlini at the Kaštel border crossing point (point 85).

From there it runs on the middle of the Dragonja up to its outfall into the Adriatic Sea at point A.

**CÓORDINATES – LAND AND SEA\***

<b>POINT</b>	<b>Y</b>	<b>X</b>	
...			

The points are given in rectangular coordinates of Zone 5 of the Gauss-Krueger projection rounded off to 1 metre

The accuracy of the definition of the position of the points is 10 metres.

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\* Translator's note: crossed out in the original by hand.

*končna delovna različica  
dijf!*

**POGODBA**  
**MED REPUBLIKO SLOVENIJO IN**  
**REPUBLIKO HRVAŠKO**  
**O SKUPNI DRŽAVNI MEJI**

*OK.*

homena delna celostna  
clj.

Republika Slovenija in Republika Hrvaška (v nadaljnjem besedilu: pogodbenici) se

v prepričanju, da miroljubno sodelovanje in dobri sosedski odnosi med državama ter njunimi državljani ustrezajo bistvenim interesom obeh držav in da doslej sklenjeni sporazumi ustvarjajo ugodne pogoje za nadaljnji razvoj in krepitev njunih medsebojnih odnosov,

ob spoštovanju načel mednarodnega prava, predvsem nedotakljivosti mednarodnih meja in varstva temeljnih človekovih pravic in svoboščin,

izhajajoč iz Temeljne ustavne listine o samostojnosti in neodvisnosti Republike Slovenije z dne 25. junija 1991 in Ustavne odloke o suverenosti i samostalnosti Republike Hrvatske z dne 25. junija 1991,

ob upoštevanju, da državi nimata ozemeljskih zahtev druga proti drugi,

ob spoštovanju obstoječih državnih meja,

sporazumeta o naslednjem:

## I. PREDMET POGODBE

### 1. člen PREDMET POGODBE

Predmet te pogodbe je določitev meje na morju in ugotovitev poteka meje na kopnem med pogodbenicama ter načela označevanja, vzdrževanja in obnavljanja državne meje.

### 2. člen DEFINICIJA DRŽAVNE MEJE

Državna meja med Republiko Slovenijo in Republiko Hrvaško (v nadaljnjem besedilu: državna meja) je ploskev, ki poteka navpično skozi mejno črto na površini Zemlje in deli ozemlje dveh držav, njun zračni prostor, prostor pod zemeljsko površino, nadzemne in podzemne gradnje in naprave vseh vrst.

DR.

konin delin  
clj1.

## II. DOLOČITEV DRŽAVNE MEJE NA MORJU

### 3. člen BOČNA MEJA

(1) Državna meja med pogodbenicama na morju se določi kot sledi:  
Meja poteka od sredine izliva reke Dragonje v morje od točke A (Y 5.389.794, X 5.038.097;  $\varphi$  45°28'43,3",  $\lambda$  13°35'25,7") in nato v ravni črti do točke B (Y 5.385.011, X 5.041.869;  $\varphi$  45°30'42,7",  $\lambda$  13°31'41,3"), ki predstavlja eno četrtino razdalje med najsevernejšo točko Rta Savudrija in Rtom Madona, merjeno od najsevernejše točke Rta Savudrija. Od točke B poteka meja po vzporedniku, ki poteka v ravni črti skozi točko B proti zahodu do točke C (Y 5.365.527, X 5.042.258;  $\varphi$  45°30'42,7",  $\lambda$  13°16'43,4"), ki leži na meji, določeni v Pogodbi med Socialistično federativno republiko Jugoslavijo in Republiko Italijo, podpisani v Osimu (Ancona) 10. novembra 1975, razen v predelu stika teritorialnega morja Republike Slovenije z odprtim morjem, ki je opredeljen v 4. členu te pogodbe.

(2) Zemljevid v merilu 1:25000, na katerega se nanaša ta opis, je v prilogi I.

(3) Če se opis državne meje in zemljevid ne ujemata, je odločilen besedni opis.

### 4. člen STIK TERITORIALNEGA MORJA REPUBLIKE SLOVENIJE Z ODPRTIM MORJEM

(1) Pogodbenici soglašata, da je morska površina, ki je zamejena s točkami C1 (Y 5.372.959, X 5.042.102;  $\varphi$  45°30'42,7",  $\lambda$  13°22'25,9"), C2 (Y 5.367.526, X 5.042.215;  $\varphi$  45°30'42,7",  $\lambda$  13°18'15,5"), T5 (Y 5.360.404, X 5.035.862;  $\varphi$  45°27'12,0",  $\lambda$  13°12'54,0") in T6 (Y 5.361.377, X 5.031.764;  $\varphi$  45°25'00,0",  $\lambda$  13°13'42,9"), odprto morje.

(2) Širina stika teritorialnega morja Republike Slovenije z odprtim morjem je enaka razdalji od točke B iz prvega odstavka 3. člena te pogodbe do Rta Madona.

(3) Zemljevid v merilu 1:25000, na katerega se nanaša ta opis, je v prilogi I.

(4) Če se opis državne meje in zemljevid ne ujemata, je odločilen besedni opis.

(5) Vodni steber pod morsko površino iz prvega odstavka tega člena ne more biti predmet pridobitve suverenih pravic. Pogodbenici se v medsebojnih odnosih vzdržita izvrševanja suverenih pravic na morskem dnu in pripadajočem podzemlju pod morsko površino iz prvega odstavka tega člena.

\* Točke so podane v pravokotnih koordinatah 5. cone Gauss-Kruegerjeve projekcije, zaokrožene na 1 meter in v geografskih koordinatah na Besslovem elipsoidu, zaokrožene na 0,1".  
Natančnost določitve lege točk je 10 metrov.

OKR.

*hrvatska delna ravnateljstva*  
*clj.*

5. člen

**STIK TERITORIALNEGA MORJA REPUBLIKE HRVAŠKE Z ITALIJANSKO  
REPUBLIKO**

- (1) Pogodbenici soglašata, da je morska površina, ki je zamejena s točkami C (Y 5.365.527, X 5.042.258;  $\varphi$  45°30'42,7",  $\lambda$  13°16'43,4"), C2 (Y 5.367.526, X 5.042.215;  $\varphi$  45°30'42,7",  $\lambda$  13°18'15,5") in T5 (Y 5.360.404, X 5.035.862;  $\varphi$  45°27'12,0",  $\lambda$  13°12'54,0"), teritorialno morje Republike Hrvaške.
- (2) Zemljevid v merilu 1:25000, na katerega se nanaša ta opis, je v prilogi I.
- (3) Če se opis državne meje in zemljevid ne ujemata, je odločilen besedni opis.

**III. DRŽAVNA MEJA NA KOPNEM**

6. člen

**UGOTOVITEV POTEKA DRŽAVNE MEJE**

- (1) Državna meja na kopnem med Republiko Slovenijo in Republiko Hrvaško je meja med Republiko Slovenijo in Republiko Hrvaško v okviru nekdanje Socialistične federativne republike Jugoslavije in poteka od tromeje državne meje pogodbenic in Republike Madžarske do Jadranskega morja.
- (2) Državna meja na kopnem med pogodbenicama je ugotovljena, kot je razvidno iz besednega opisa s koordinatami v prilogi II.
- (3) Zemljevidi od št. 1 do št. 47 v merilu 1:25000, na katere se nanaša besedni opis s koordinatami iz prejšnjega odstavka, so v prilogi III.
- (4) Če se opis državne meje in zemljevid ne ujemata, je odločilen zemljevid.

7. člen

**ZAMENJAVA POVRŠIN**

- (1) Pogodbenici potrjujeta, da je zamenjava površin, do katere je prišlo pri sporazumni ugotovitvi poteka državne meje, uravnotežena.
- (2) Zamenjava površin ne vpliva na stvarnopravne in obligacijskopravne pravice fizičnih in pravnih oseb nad zemljišči in drugim nepremičnim premoženjem, ki je vključeno v zamenjave. Inetniki stvarnopravnih in obligacijskopravnih pravic to premoženje uporabljajo v skladu s posebnim sporazumom med pogodbenicama.

*OKR.*

*končna delovna s. d.p.*

8. člen  
OZNAČITEV POTEKA DRŽAVNE MEJE

- (1) Potek državne meje na kopnem označijo skupni organi, ustanovljeni s to pogodbo, in na način, definiran z navodili za delo mešanih tehničnih skupin.
- (2) Pogodbenici v roku petih let od dneva uveljavitve te pogodbe opravita izmero, označevanje in zaznamovanje državne meje.

9. člen  
NAČELA OZNAČEVANJA POTEKA DRŽAVNE MEJE

- (1) Označevanje državne meje v naravi se opravi z mejnimi oznakami neposredno na mejni črti ali posredno na naslednji način:
  - a) enkratno – neposredno na mejni črti ali izmenično na obeh straneh ob cestah, kanalih in vodotokih na skupni državni meji;
  - b) dvakratno – na začetku in na koncu cest, kanalov in vodotokov na skupni državni meji ter na mestih, na katerih zaradi konfiguracije terena ni mogoče postaviti oznak neposredno na mejni črti;
  - c) trikratno – v primerih, ko dvakratne oznake meje ne zadoščajo za jasno označitev poteka mejne črte.
- (2) Podrobnejše določbe o označevanju so določene v skladu z navodili iz prvega odstavka 8. člena te pogodbe.

10. člen  
VZDRŽEVANJE IN OBNAVLJANJE DRŽAVNE MEJE

- (1) Pogodbenici se zavezujeta, da bosta po označitvi državne meje v naravi redno opravljali pregled, vzdrževanje in obnavljanje mejnih oznak v skladu z navodili iz prvega odstavka 8. člena te pogodbe.
- (2) Pogodbenici najmanj vsakih pet let skupaj opraviti pregled stanja mejne črte in mejnih oznak ter po potrebi obnoviti ali dopolniti označitev državne meje. Doba petih let se računa od dneva začetka zadnjega skupnega obnavljanja.

11. člen  
NESPREMENLJIVOST POTEKA DRŽAVNE MEJE

Ugotovljena mejna črta se ne spremeni, tudi če pride do sprememb v poteku poti, kanalov ali vodotokov na skupni državni meji.

*okl.*

*konan delovni pult  
cvt.*

12. člen  
ENOTNOST MEJNIH OZNAK

Potek državne meje bo vedno označen enotno in nedvoumno. Mejna črta in pas ob njej se redno vzdržuje in obnavlja. Vse izvršene zamenjave mejnih oznak in opravljena dela se takoj vnesejo v dokumentacijo o meji.

13. člen  
PAS OB MEJNI ČRTI

(1) Pas ob mejni črti je območje ob mejni črti v širini največ 1,5 metra na vsaki strani mejne črte.

(2) Pogodbenici pas ob mejni črti redno čistita in vzdržujeta v skladu z navodili iz prvega odstavka 8. člena te pogodbe.

14. člen  
STROŠKI

Pogodbenici zagotovita finančna sredstva za označevanje, vzdrževanje in obnavljanje državne meje. Pri tem pogodbenici izhajata iz načela, da vsaka stran opravi približno enako delo in da vsaka pogodbenica nosi enake stroške.

15. člen  
OBVEZNOSTI LASTNIKOV, UPORABNIKOV, UPRAVLJALCEV IN DRUGIH  
IMETNIKOV STVARNOPRAVNIH IN OBLIGACIJSKOPRAVNIH PRAVIC

(1) Lastniki, uporabniki in upravljalci ter drugi imetniki stvarnopravnih in obligacijskopravnih pravic na zemljiščih, objektih in napravah, ki se nahajajo na državni meji ali v njeni bližini, so dolžni dopustiti vsa dela in ukrepe, ki so potrebni za označitev, izmero, vzdrževanje, čiščenje in obnavljanje državne meje, kot tudi dostop oseb, ki opravljajo ta dela. Pri opravljanju teh del je treba upoštevati upravičene interese lastnikov, uporabnikov in upravljalcev ter drugih imetnikov stvarnopravnih in obligacijskopravnih pravic, ki morajo biti o začetku del vnaprej obveščeni.

(2) Pri opravljanju del iz prvega odstavka tega člena, kot tudi pri dostopu ali dovozu na zemljišče, k objektom in napravam, je treba spoštovati notranjo zakonodajo tiste pogodbenice, na ozemlju katere se opravljajo dela.

*OKL.*

*hvorina delena s...  
cep.*

16. člen  
**POVRAČILO ŠKODE**

Škodo, ki nastane pri opravljanju del iz prvega odstavka 15. člena te pogodbe, povrne tista pogodbenica, na ozemlju katere se je zgodila. Pri uveljavljanju zahtevkov za odškodnino se uporablja notranja zakonodaja tiste pogodbenice, na ozemlju katere je nastala škoda.

17. člen  
**TROMEJNA TOČKA**

Dela v zvezi označevanjem, vzdrževanjem, čiščenjem in obnavljanjem tromejne točke se lahko opravijo le z medsebojnim sporazumom vseh treh držav.

18. člen  
**VARSTVO OZNAK**

Pogodbenici zagotavljata varstvo mejnih oznak, geodetskih oznak in drugih naprav, ki služijo za označitev državne meje, pred poškodovanjem, uničenjem, neupravičeno premestitvijo in uporabo, ki ni v skladu z njihovim namenom.

**IV. POVEZANI REŽIMI**

19. člen  
**POSEBNI REŽIMI IN UKREPI NA OBMEJNEM OBMOČJU**

- (1) O posebnih režimih in ukrepih na obmejnem območju, kot so na primer uporaba prometnih povezav za potrebe prebivalcev in organov obeh pogodbenic in druga vprašanja, ki se pojavijo kot posledica ugotovljenega poteka državne meje, pogodbenici skleneta posebne sporazume.
- (2) Pogodbenici se zavezujeta, da bosta vzdolž cele državne meje, še posebej pa na zaščitениh območjih, kot sta na primer Krajski park Sečovelje, Park narave Žumberak – Samoborsko gorje in drugi, ohranili vsaj dosednji nivo varstva narave in nadalje razvijali medsebojno sodelovanje. Vzdolž cele državne meje, še posebej pa na območjih, predvidenih za razvoj turizma, pogodbenici zagotovita okoljevarstveni režim v skladu z najvišjimi standardi varstva okolja Evropske unije.
- (3) Pogodbenici se zavezujeta, da bosta druga drugu zagotovili izkoriščanje vodnih virov na obmejnem območju vsaj v dosedanjem obsegu za 30 let od dneva uveljavitve te pogodbe. O tem pogodbenici skleneta poseben sporazum v roku enega leta od dneva uveljavitve te pogodbe.

*OKR.*

*konst. delov. sodelit.*  
*afj.*

20. člen  
**UGODNOSTI PREBIVALCEV ZASELKOV MLINI-ŠKRILE, BUŽINI IN ŠKODELIN**

Poleg ugodnosti, ki jih za obmejno prebivalstvo predvidevajo že sklenjeni sporazumi med pogodbenicama, imajo osebe, ki imajo na dan podpisa te pogodbe stalno bivališče v zaselkih Mlini-Škrile, Bužini in Škodelin, tudi:

- a) pravico pri vrnitvi z območja sosednje države brez plačila carine in drugih uvoznih dajatev vnesti blago take vrste in količine, ki je primerno za osebno uporabo in za uporabo članov njihovega gospodinjstva. O tem pogodbenici skleneta poseben izvedbeni sporazum v roku šestih mesecev od dneva uveljavitve te pogodbe;
- b) pravico do pridobitve državljanstva Republike Slovenije.

**V. SKUPNI ORGANI**

21. člen  
**STALNA SLOVENSKO-HRVAŠKA KOMISIJA ZA DRŽAVNO MEJO**

(1) Za izvajanje te pogodbe pogodbenici ustanovita Stalno slovensko-hrvaško komisijo za državno mejo (v nadaljnjem besedilu: komisija).

(2) Komisija je sestavljena iz delegacije Republike Slovenije in delegacije Republike Hrvaške. Vsaka pogodbenica imenuje v svoj del komisije predsednika in pet članov. O imenovanju in razrešitvi predsednikov in članov komisije se pogodbenici obvestita po diplomatski poti. O spremembah v sestavi delegacij se predsednika pisno obvestita.

(3) Vsaka delegacija lahko v svoje delo po potrebi vključi eksperte in pomožne osebe.

(4) Pogodbenici krijeta stroške svoje delegacije v komisiji.

22. člen  
**NALOGE IN NAČIN DELA KOMISIJE**

(1) Komisija ima naslednje naloge:

- a) odloča o načinu označevanja mejne črte v naravi in sprejema navodila za delo mešanih tehničnih skupin;
- b) organizira in nadzira označevanje, vzdrževanje, čiščenje in obnavljanje celotne mejne črte v naravi;
- c) izdeluje nove in dopolnilne dokumente o meji ter vnaša nove podatke v veljavne dokumente o meji;
- d) če smatra za potrebno, predlaga popravek državne meje.

*afj.*

*Lovren delava,*  
*čl. 1.*

- (2) Komisija odloča soglasno. Če komisija ne more sprejeti odločitve, se vprašanje predloži v reševanje vladama pogodbenic.
- (3) Način dela komisije se podrobneje določi s poslovníkom.

#### 23. člen MEŠANE TEHNIČNE SKUPINE

Za opravljanje določenih del na državni meji komisija ustanovi mešane tehnične skupine. Njihovo število in sestava se določi glede na obseg in vrsto dela, ki ga je treba opraviti.

#### 24. člen ODSTOPANJA

Z namenom končne označitve poteka državne meje na kraju samem se komisija lahko oddalji do 50 metrov od črte, določene s to pogodbo, z namenom prilagoditve državne meje krajevnim geografskim in gospodarskim razmeram. Pri tem ne sme uvrstiti pod jurisdikcijo države, katere jurisdikcija ne izhaja iz razmejitve, določene in ugotovljene s to pogodbo, nobene pomembne ceste ali železniške proge, pomembnega oskrbovalnega objekta za vodo ali električno energijo in objektov zgodovinskega ali kulturnega pomena.

### VI. REŠEVANJE SPOROV MED POGODBENICAMA

#### 25. člen

- (1) Vsi spori, ki lahko nastanejo med pogodbenicama v zvezi z razlago in uporabo te pogodbe, se rešujejo s pogajanjem v skladu z načelom dobrih sosedskih odnosov.
- (2) Če pogodbenici ne moreta doseči dogovora v šestih mesecih od dneva prejema pobude za pogajanja, se spor na zahtevo ene od pogodbenic predloži v arbitražno reševanje.
- (3) Arbitražni tribunal se ustanovi za vsak primer posebej na naslednji način. V dveh mesecih od prejema zahteve za arbitražo imenuje vsaka pogodbenica dva arbitra. Imenovani štirje arbitri nato izberejo državljana tretje države, ki se po odobritvi obeh pogodbenic imenuje za predsednika arbitražnega tribunala. Predsednik se imenuje v dveh mesecih od dneva, ko so bili imenovani ostali štirje arbitri.
- (4) Če potrebna imenovanja niso opravljena v rokih, določenih v tretjem odstavku tega člena, lahko ena od pogodbenic, če ni dogovorjeno drugače, zaprosi predsednika Meddržavnega sodišča, da opravi potrebna imenovanja. Če je predsednik državljan ene ali druge pogodbenice ali če iz kakršnega koli drugega razloga ne more opraviti omenjene naloge, se zaprosi podpredsednika Meddržavnega sodišča, da opravi potrebna imenovanja. Če je podpredsednik državljan ene ali druge pogodbenice ali če zaradi kakršnega koli drugega razloga ne more opraviti omenjene naloge, se zaprosi najstarejšega člana Meddržavnega

*OK*

*Arbitražni tribunal*  
*dfj.*

sodišča, ki ni državljan ene ali druge pogodbenice, da opravi potrebna imenovanja.

- (5) Arbitražni tribunal odloča z večino glasov. Odločitve arbitražnega tribunala so za pogodbenici dokončne in zavezujoče. Vsaka pogodbenica krije stroške svojih arbitrov in svojega zastopanja v arbitražnem postopku. Preostale stroške krijeta pogodbenici v enakih delih.
- (6) Arbitražni tribunal določi pravila postopka ob upoštevanju določb tega člena in Modelnih pravil arbitražnega postopka, ki jih je izdelala Komisija za mednarodno pravo Organizacije Združenih narodov.

## VII. PREHODNE DOLOČBE

26. člen

### PRENOS VPISA V ZEMLJIŠKO KNJIGO

Prenos vpisa stvarnopravnih in obligacijskopravnih pravic v zemljiško knjigo v zvezi s površinami, zamenjanimi po 7. členu te pogodbe, se opravi po uradni dolžnosti najkasneje v enem letu od dokončne označitve državne meje.

27. člen

### OPROSTITVEV UPRAVNIH TAKS

(1) Opravila fizičnih in pravnih oseb v zvezi z ureditvijo premoženjskopravnih odnosov na površinah, zamenjanih po 7. členu te pogodbe, so prosta upravnih taks. Obseg, način in čas trajanja te oprostitve pogodbenici uredita s posebnim sporazumom.

(2) Pogodbenici najkasneje v enem letu od začetka veljavnosti te pogodbe zagotovita brezplačno izmenjavo vseh podatkov, dokumentov in ostale dokumentacije, ki se nanaša na površine, zamenjane po 7. členu te pogodbe.

28. člen

### KARTOGRAFSKA DOKUMENTACIJA

Pogodbenici v enem letu po začetku veljavnosti te pogodbe izdelata prikaz državne meje, vsebovan v prilogah II in III, v digitalnem orto foto načrtu, ki se uporablja v primeru iz četrtega odstavka 6. člena tega pogodbe.

*OKL.*

končni delovni listi  
afj.

## VIII. KONČNE DOLOČBE

### 29. člen PRILOGE

Priloga I (zemljevid državne meje na morju v merilu 1: 25000), priloga II (besedni opis poteka državne meje na kopnem s koordinatami) in priloga III (zemljevidi od št. 1 do št. 47 v merilu 1: 25000) so sestavni del te pogodbe.

### 30. člen ZAČETEK VELJAVNOSTI

- (1) To pogodbo je treba ratificirati v skladu z notranjo zakonodajo pogodbenic.
- (2) Ta pogodba začne veljati z dnem prejema zadnjega obvestila, s katerim pogodbenici po diplomatski poti obvestita druga drugo, da so izpolnjeni notranjepravni pogoji za začetek veljavnosti te pogodbe.

Sestavljeno v ..... dne ..... v dveh izvornikih  
v slovenskem in hrvaškem jeziku, pri čemer sta obe besedili enako verodostojni.

ZA REPUBLIKO SLOVENIJO

ZA REPUBLIKO HRVAŠKO

afj.



THE WHITE HOUSE  
WASHINGTON

December 14, 2018

His Excellency  
Aleksandar Vucic  
President of the Republic of Serbia  
Belgrade

Dear Mr. President:

It was a pleasure to see you in Paris during the Armistice Day celebration. The United States values your leadership, especially in securing the full normalization of relations with Kosovo.

As you enter the final phase of reaching an agreement with Kosovo that will bring long-sought peace to the region, I encourage you to seize this moment and to exercise the political leadership in making decisions needed to balance the interests of both countries. It would be extremely regrettable to miss this unique opportunity for peace, security, and economic growth.

I also urge both parties to reach a normalization agreement as soon as possible and to refrain from actions that make one more difficult to achieve. A peaceful, productive relationship between Serbia and Kosovo would be a milestone for the region. The United States stands ready to assist.

An agreement between Serbia and Kosovo is within reach. I look forward to hosting you and President Hashim Thaci at the White House to celebrate what would be an historic accord.

Sincerely,

A large, bold, handwritten signature in black ink, which appears to be "Donald Trump".



THE WHITE HOUSE  
WASHINGTON

December 14, 2018

His Excellency  
Hashim Thaci  
President of the Republic of Kosovo  
Pristina

Dear Mr. President:

It was a pleasure to speak with you in Paris during the Armistice Day celebration. Kosovo is a critical partner in our efforts to guarantee the peace and stability of all of Europe. I welcome your current reconciliation efforts with Serbia. Failure to capitalize on this unique opportunity would be a tragic setback, as another chance for a comprehensive peace is unlikely to occur again soon.

I urge you and the leaders of Kosovo to seize this unique moment, speak with a unified voice during the peace talks, and refrain from actions that would make an agreement more difficult to achieve.

The United States has invested heavily in the success of Kosovo as an independent, sovereign state. We want your country to continue to grow.

We stand ready to assist your efforts to reach an agreement that balances the interests of both Kosovo and Serbia. Such an agreement is within reach. I look forward to hosting you and President Aleksandar Vucic at the White House to celebrate what would be an historic accord.

Sincerely,

A large, bold, handwritten signature in black ink, which appears to be "Donald Trump".

# **COMPREHENSIVE AGREEMENT**

between

**REPUBLIC OF KOSOVO**

and

**REPUBLIC OF SERBIA**

December 2018

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## Preamble

The Republic of Kosovo and the Republic of Serbia (hereinafter “*Parties*”)

- *Recognizing* the will of the peoples of both States that there should be a comprehensive, permanent and binding agreement between the Parties that secures peace, prosperity and harmonious relations between the two States;
- *Recognizing* the responsibility of the Parties to resolve outstanding issues in the interests of the security and prosperity of the region and the international community generally;
- *Recognizing* that the Agreement on Succession Issues (2001) concluded by the successor states to the former Socialist Federal Republic of Yugoslavia provides a framework for assisting in the resolution of certain analogous issues for the Parties;
- *Reaffirming* the aspirations of the Parties for membership of the European Union and the North Atlantic Treaty Organization, as well as other international organisations including in the case of Kosovo the United Nations;
- *Mindful* of the need to promote and implement an inclusive and gender sensitive process of reconciliation and reparation for dealing with the past;
- *Mindful* of the legitimate right of the Republic of Serbia to advocate for the rights of the Serbian community living in Republic of Kosovo;
- *Recognizing* that the right to self-determination in situations where a distinct people is oppressed or where the previous state’s government does not legitimately represent that people’s interests, is clearly enshrined in international law;
- *Recognizing* that it is a principle of international law that newly formed sovereign states should have the same borders as the preceding dependent area before independence;
- *Recognizing* that the 2007 Comprehensive Proposal for the Kosovo Status Settlement concluded that Kosovo should be established as a multi-ethnic society with respect for human rights and fundamental freedoms;
- *Recognizing* the International Court of Justice’s advisory opinion that Kosovo’s unilateral declaration of independence is in compliance with international law;

- *Reaffirming* the obligations arising from the agreements facilitated by the European Union on normalization of relations;
- *Acknowledging* the legitimate interests of the international community in ensuring implementation of and compliance with this Agreement;
- *Reaffirming* the commitments that the Parties have made pursuant to their respective Stabilization and Association Agreements with the European Union

Hereby agree to be bound by the terms of this Agreement.

## Chapter 1: The Political Agreement

The Parties enter into this Agreement solemnly confirming that they will abide by, support and give full effect to the following understandings and principles:

- 1.1 The normalisation of relations between Republic of Kosovo and Republic of Serbia requires a *sui generis* approach and structures that reflect their shared interests as well as the cultural identities of their citizens.
- 1.2 Each Party has a special responsibility to respect, serve and protect the interests of persons who reside in their State but identify with the other State on grounds of religion, political affiliation or ethnicity.

It is therefore agreed as follows:

- 1.3 The Parties agree that each of them is a sovereign and lawfully constituted State.
- 1.4 The Parties agree that they will support each other in furthering their respective interests as members of international and supranational organisations, including in the case of Kosovo in the United Nations.
- 1.5 The Parties commit to political, economic and social cooperation, through governmental and non-governmental structures, to protect and promote the interests of all of the people of both States
- 1.6 The Parties shall be guided in their policy and practice by the need to promote a spirit of peace, tolerance and intercultural and inter-religious respect and dialogue among all Communities and their members, within their jurisdiction.
- 1.7 The Parties reaffirm their commitment to international partnership and cooperation.
- 1.8 The Parties shall provide effective mechanisms to ensure respect for the human rights of all citizens of both States.
- 1.9 The Parties commit to creating shared structures for the resolution of all outstanding issues deriving from the war of 1998-1999 including reparations, missing persons, crimes of sexual violence and war crimes.
- 1.10 The Parties agree that the principle of *Parity of Esteem* shall govern their future relations.

- 1.11 The Parties agree that permanent non-executive inter-governmental structures will be put in place that seek to address the totality of relationships between the two States.
- 1.12 The Parties agree that they will implement whatever legal provisions are required to give full statutory and constitutional effect to this Agreement.
- 1.13 The Parties agree that in resolving certain issues of succession they will refer to and be guided by the principles of the Agreement on Succession Issues (2001) concluded by the successor states to the former Socialist Federal Republic of Yugoslavia except insofar as such principles are superseded by the Brussels Agreements or other agreed arrangements.

## Chapter 2: Confidence Building Measures

1. Parties commit to provide legal, institutional, financial and programmatic support in building confidence and trust between communities in the respective States.
2. Parties commit to establish a joint fund to provide opportunity for academic scholars, researchers, and youth to participate in cross-border educational, cultural, arts and sports exchange.
3. Parties commit to establish joint university degree programs and offer scholarship and fellowship opportunities to enable students of one State to study in the universities of the other in the field of their interest.
4. Parties agree that in the public education institutions in the Republic of Kosovo there shall be language courses in *Albanian* and *Serbian*, including in the education institutions that operate with the Serbian education curriculum in the Republic of Kosovo.
5. Parties agree to establish the *Kosovo-Serbia Business Association* to enable public and private enterprises to address common concerns and reduce barriers to doing business across borders.
6. Parties agree to establish cross-border cooperation programs within the framework of existing Western Balkan programs supported by the European Union.
7. Parties agree to establish inter-municipal cooperation programs and twinning projects to enable municipalities to promote inter-municipal tourism, support local economic development, and strengthen cooperation in the area of agriculture.

## **Chapter 3: Human Rights Guarantees and Protections**

### General commitments

1. Parties recognize that all persons are equal before the law and are entitled, without any discrimination, to equal protection of the law.
2. Parties commit that the principles of non-discrimination and equal protection under the law shall be applied and respected with particular regard to employment in public administration and public enterprises, and access to public services and public financing.
3. Parties agree that they shall promote peace, tolerance, religious and inter-ethnic harmony among all communities and their members.
4. Parties agree to fully support refugees and internally displaced persons in exercising their rights to return and reclaim property and personal possessions in accordance with the law.
5. Parties agree that members of communities shall have the right to freely express, foster and develop their identity and community attributes. The exercise of these rights shall carry with it duties and responsibilities to act in accordance with the laws of the State in which they reside and shall not violate the rights of others.

### Legal guarantees

1. Parties agree that the Serbian community in the Republic of Kosovo shall continue to have specific rights guaranteed in the constitutional and legal framework applicable in Kosovo at the time of signing of this Agreement.
2. Parties agree that in the Republic of Kosovo the legislation on vital interests for the Serbian community shall require for its amendment or repeal both the majority of the Assembly deputies present and voting and the majority of the Assembly deputies present and voting holding seats guaranteed for representatives of communities that are not in the majority.

### Security

1. Parties recognize and agree that, each Party shall exercise total and complete authority over law enforcement, security, justice, public safety, intelligence, civil emergency response and border control on its territory.

2. The law enforcement authorities of the Parties shall cooperate directly, exchange information, engage in joint operations and investigations, joint trainings, exchange of liaison officers and other forms of police cooperation.
3. Parties will refrain from acts that hinder or are intended to hinder contacts among members of same community within one State and will take affirmative measures to establish and maintain free and peaceful contacts with persons of same community to the other State, in particular those with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage, in accordance with the law and international standards.
4. The Republic of Kosovo commits to maintain a police force that reflects the multi-ethnic character of its society and the principles of gender equality and human rights enshrined in the Constitution. The ethnic composition of the police within a municipality shall, to the extent possible, reflect the ethnic composition of the population within that municipality.
5. In municipalities where Serbian community is the largest ethnic community in the Republic of Kosovo, Commanders of Police Stations and Commanders of substations shall be appointed by the Ministry of Internal Affairs on the proposal of the Municipal Assembly and the General Director.
6. Kosovo agrees that Local Station Commanders shall be informed in advance of operations by central or special police forces within the perimeters of local police stations unless operational considerations require otherwise.
7. Parties agree that in the Republic of Kosovo there shall be a Safety Council as an advisory body chaired by the Municipal mayor, municipal and police representatives including the Station Commanders and with membership representing all communities within the municipality.

#### Religious and Cultural Rights and Protections

1. The Republic of Kosovo shall ensure the autonomy and protection of all religious denominations and their sites within its territory.
2. Parties recognize the right of communities to use and display their symbols, in accordance with the law and international standards.
3. The Republic of Kosovo agrees to promote and support the cultural and religious heritage of all communities, as an integral part of the heritage of the Republic of Kosovo. The Republic

of Kosovo shall have a special duty to ensure the effective protection of sites and monuments of cultural and religious significance to the Serbian community.

4. The Republic of Kosovo agrees that The Serbian Orthodox Church in Kosovo, including its clergy and their affiliates, activities and property shall be afforded additional security and other protections for the full enjoyment of its rights, privileges and immunities, as set forth by law.

#### Participation of Serb community in the public life in Republic of Kosovo

1. The Republic of Kosovo supports the right of the Serbian community to have personal names registered in their original form and in the script of their language as well as right to revert to original names that have been changed against their will.
2. The Republic of Kosovo supports the right of the Serbian minority to use local names, street names and other topographical indications which reflect and are sensitive to the multi-ethnic and multi-linguistic character of that area.
3. The Republic of Kosovo agrees to refrain from any action that will interfere in the enjoyment by the Serbian community of contacts with, and participation in the activities of local, regional and international non-governmental organizations.
4. The Kosovo Serb Community and its members shall be entitled to equitable representation in employment in public bodies and publicly owned enterprises at all levels, including in particular the police service in areas inhabited by such community, while respecting the rules concerning competence and integrity that govern public administration.
5. The Kosovo Serb Community shall have the right to maintain and use its own media, including the right to provide information in its language, and the use of a reserved number of frequencies for electronic media in accordance with the law and international standards.

#### Participation of Serb community at central level

1. Kosovo agrees that political parties, coalitions, citizens' initiatives and independent candidates having declared themselves to represent the Kosovo Serb Community shall continue to have the total number of seats won through the open election, with a minimum ten (10) seats guaranteed if the number of seats won is less than ten (10).
2. The Republic of Kosovo agrees that at the Assembly of the Republic of Kosovo One (1) Deputy President shall belong to the deputies of the Assembly holding seats guaranteed for

the Serb community.

3. The Republic of Kosovo shall maintain The Committee on Rights and Interests of Communities as a permanent committee of the Assembly to ensure that community rights and interests are adequately addressed during the legislative process.
4. The Republic of Kosovo agrees to maintain the Consultative Council for Communities which acts under the authority of the President of the Republic of Kosovo in which all Communities shall be represented.
5. There shall be at least one (1) Minister from the Kosovo Serb Community in the Government of the Republic of Kosovo.
6. There shall be at least two (2) Deputy Ministers from the Kosovo Serb Community in the Government of the Republic of Kosovo. If there are more than twelve (12) Ministers, there shall be a third Deputy Minister representing the Kosovo Serb Community.
7. The Republic of Kosovo agrees that decisions on proposal of two (2) judges to the Constitutional Court shall require the majority vote of the deputies of the Assembly present and voting, but only upon the consent of the majority of the deputies of the Assembly holding seats guaranteed for representatives of the Communities not in the majority in Kosovo.
8. The Republic of Kosovo agrees that two (2) members of the Kosovo Judicial Council shall be elected by the deputies of the Assembly holding guaranteed seats for the Kosovo Serb community and that at least one of the two must be a judge.
9. The Republic of Kosovo agrees that at least fifteen percent (15%) of the judges of the Supreme Court, but not fewer than three (3) judges, shall be from Communities that are not in the majority in the Republic of Kosovo.
10. The Republic of Kosovo agrees that at least (15%) of the total seats on the Court of Appeals, but in no case fewer than two (2) shall be guaranteed to judges from communities that are not in the majority in the Republic of Kosovo.
11. Republic of Kosovo agrees that candidates for judicial positions within basic courts, the jurisdiction of which exclusively includes the territory of one or more municipalities in which the majority of the population belongs to the Kosovo Serb community, may only be recommended for appointment by the two members of the Council elected by Assembly deputies holding seats guaranteed for the Serb Community in the Republic of Kosovo acting

jointly and unanimously.

12. Republic of Kosovo agrees that One (1) member of the Central Election Committee shall be appointed by the Assembly deputies holding seats reserved or guaranteed for the Kosovo Serb Community.

Participation at local level

1. Republic of Kosovo agrees that in municipalities where at least ten per cent (10%) of the residents belong to Communities not in the majority in those municipalities, a post of Vice President of the Municipal Assembly for Communities shall be reserved for a representative of those communities.
2. Republic of Kosovo agrees that at local level, The Vice President for Communities shall promote inter-Community dialogue and serve as formal focal point for addressing non-majority Communities' concerns and interests in meetings of the Assembly in its work. The Vice President shall also be responsible for reviewing claims by Communities or their members that the acts or decisions of the Municipal Assembly violate their constitutionally guaranteed rights. The Vice President shall refer such matters to the Municipal Assembly for its reconsideration of the act or decision.
3. In the event the Municipal Assembly chooses not to reconsider its act or decision, or the Vice President deems the result, upon reconsideration, to still present a violation of a constitutionally guaranteed right, the Vice President may submit the matter directly to the Constitutional Court, which may decide whether or not to accept the matter for review.
4. Republic of Kosovo agrees that in municipalities where at least ten per cent (10%) of the residents belong to Communities not in the majority, representation for non-majority Communities in the municipal executive body is guaranteed.

## Chapter 4: Economy

### Free movement of People, Goods, Services and Capital

1. Parties acknowledge that the commitment for free movement of people, goods, services and capital constitutes a key factor in the development of relations and cooperation between the Parties, thus contributing to regional stability and European integration.
2. Parties commit to cooperate and maintain good neighborly relations concerning the movement of persons, goods, capital and services as well as the development of projects of common interest in a wide range of areas.
3. Each Party agrees that citizens of its state shall have the right to seek employment in the others labor market.
4. Parties commit to provide the same assistance from the national employment office and treat the nationals of one another as nationals of the host State, without any discrimination on grounds of citizenship or nationality.
5. Each party agrees to simplify procedures for residence permits and work permits in accordance with applicable standards of each party.

### Trade

1. Parties commit to free trade, in line with the European Union Integration Process and consistent with the relevant principles of the World Trade Organization (“WTO”) which are to be applied in a transparent and non-discriminatory manner.
2. Parties commit to promote harmonious economic relations with the intention of fostering cooperation in all areas of trade that are of mutual interest.
3. Parties commit to the removal of all barriers to the free movement of goods, services, people and capital, and in particular to:
  - 3.1 Remove different national regulations on product standards that do not represent a health threat and that have the effect of blocking imports.
  - 3.2 Amend rules on establishment which require companies to go through lengthy and expensive application procedures to set up operations.
  - 3.3 Eliminate government procurement programs whereby governments discriminate in favor of national companies.

- 3.4 Eliminate governmental regulations that place companies from one State at a competitive disadvantage vis-a-vis companies from the other State.
- 3.5 Eliminate regulations and practices that have the effect of granting state export subsidies.
- 3.6 Introduce legislation to provide property protection (adequate patent, copyright, and trademark regimes and enforcement of intellectual property rights).
- 3.7 Eliminate services barriers offered by financial institutions of one State in the territory of the other.
- 3.8 Adopt all necessary legislation to protect and to prevent discriminatory treatment of investments made by nationals of one State in the other.
- 3.9 Enforce the relevant legal framework outlawing government anticompetitive conduct of state-owned or private firms that restrict the sale or purchase of goods or services in the respective markets of the Parties.

#### Foreign Debts

1. Parties shall establish a Joint Commission to negotiate Kosovo's share of the international debt inherited from the former Socialist Federal Republic of Yugoslavia.
2. Parties agree that Republic of Kosovo's share of international debt to be apportioned include *inter alia* debt to the World Bank, Paris Club and London Club creditors.
3. Parties shall determine the allocation of foreign debt in agreement with relevant creditors referring to principles contained in the Agreement on Succession Issues (2001) concluded by the successor states to the former Socialist Federal Republic of Yugoslavia for the allocation of sovereign debt inherited from the Socialist Federal Republic of Yugoslavia.

#### Outstanding Financial Damages, Pensions and Savings

1. Parties shall establish a Joint Commission to assess:
  - 1.1 Financial contribution of Kosovo citizens in the Former Socialist Federal Republic of Yugoslavia Pension Schemes;
  - 1.2 Compensation of Kosovo Citizens Savings in the Banking System of the Former Socialist Federal Republic of Yugoslavia;
  - 1.3 Compensation of Kosovo Citizens' Foreign Currency Damages in the Banking System of the Former Socialist Federal Republic of Yugoslavia.
2. Parties agree that the Joint Commission shall conduct the assessment of Kosovo citizens' pension contribution and the assessment of damages in the Banking System of the Socialist Federal Republic of Yugoslavia in accordance with principles contained in the Agreement on Succession Issues (2001) concluded by the successor states to the former Socialist Federal Republic of Yugoslavia and applicable international standards.

3. The Joint Commission supported by teams of experts shall establish procedural mechanism to implement the compensation process laid out in paragraph 1 (1.1 to 1.3) of this heading.
4. Parties agree to establish joint groups of experts to address the following outstanding issues from the period of 1989 through 1999 in Kosovo:
  - 1.1. Fall in the domestic output and in the level of economic development;
  - 1.2. Reduction of economic activities;
  - 1.3. Reduction of investments;
  - 1.4. Damages and losses incurred by the Socially Owned Enterprises (SOEs);
  - 1.5. Lost markets, especially export markets;
  - 1.6. Collapse of financial system;
  - 1.7. Worsening of the social situation and increase in the poverty of due to the dismissal of workers, usurpation and mismanagement of pension fund and children allowances;
  - 1.8. Damages in other social activities including education, health, science, culture and sport.

## Chapter 5: Transitional Justice and Reconciliation

### General provisions

1. Parties acknowledge the importance of addressing the suffering of victims of war as a necessary precondition for reconciliation.
2. Parties agree to establish a joint `War Archive` that will gather evidence-based facts on human losses, victims of war, prisoners of war, victims of sexual violence, and other societal and material damage. Parties agree to involve civil society organizations, families of victims, existing and newly established commissions in the process.
3. Parties undertake to provide legal and institutional support and social services for victims of war, and support for community based organizations and local self-help support groups.
4. Parties pledge to continue support to civil society organizations to promote a culture of tolerance at every level of society, including initiatives to encourage integrated education.
5. Parties shall establish a comprehensive and gender sensitive approach for dealing with the past, which shall include a broad range of transitional justice initiatives for victims of sexual violence.
6. Parties will allocate space in each capital to build a memorial, remembering victims of war.

### War crimes

1. The Republic of Serbia agrees to strengthen efforts to investigate, prosecute and adjudicate cases of war crimes against Kosovo Albanian and other communities. The Republic of Kosovo undertakes to implement the obligations arising from the constitutional and legal provisions of the Kosovo Specialist Chambers.
2. Parties commit to reach Bilateral Agreements on Mutual Legal Assistance, Extradition and Transfer of Legal Proceedings to facilitate legal cooperation among respective law enforcement agencies to improve exchange of and case transfer related to current judicial proceedings, and initiate new cases as necessary based on availability of information.
3. Parties agree to establish Joint Investigation Teams of Prosecutors and Police Investigators based on the agreement on mutual legal assistance to facilitate exchange of information on suspects of war crimes.

Missing Persons

1. The Parties, in accordance with domestic laws and international human rights and humanitarian law and norms, agree in good faith to take all measures necessary to determine and exchange information regarding identities, whereabouts, and fates of missing persons from each Party.
2. Parties agree that government commissions on missing persons and forensic authorities will establish direct communication in the exercise of their mandate related to the fate of missing persons.
3. Parties shall strengthen their respective governmental and rule of law institutions mandated on the issue of missing persons with authority and resources necessary to maintain and intensify this dialogue, and ensure the active cooperation.
4. Parties agree to work closely with international humanitarian organizations clarifying the fate of missing persons and providing social services for families of the missing.
5. Parties accept to implement the commitments deriving from the Joint Declaration on Missing Persons in the Framework of the Berlin Process at the Western Balkan Summit 2018.

War reparations

1. Each of the Parties agrees to engage in the design and establishment of compensation schemes for crimes committed against the citizens of the other Party during the war, including victims of war and material damage.
2. Parties undertake to establish a joint commission for assessing the material damage and establishing criteria and procedures for financial compensation schemes.
3. Serbia will engage in good faith with Kosovo initiatives on recognition of the suffering of victims of sexual violence.
4. Parties will cooperate to provide appropriate redress and compensation for the victims of war, with specific emphasis for victims of sexual violence and families of missing persons.

## **Chapter 6: Education and Youth Affairs**

1. Parties agree that the Serbian public education curricula will be integrated formally into the Kosovo education curricula. Parties agree to establish joint working groups that will make any necessary revisions and adjustment of the textbooks and curriculum required for the implementation of this agreement.
2. Schools that teach in the Serbian language may apply curricula or textbooks developed by the Ministry of Education of the Republic of Serbia upon notification to the Kosovo Ministry of Education, Science and Technology.
3. In the event of an objection by the Kosovo Ministry of Education, Science and Technology to the application of a particular curriculum or textbook, the matter shall be referred to an independent commission to review the said curriculum or textbook to ensure conformity with the Constitution of Kosovo and legislation.
4. Parties agree that the University of North Mitrovica shall be an autonomous public institution of higher education. The university shall enact a statute to specify its internal organization and governance, and procedures and interaction with public authorities, in accordance with central framework legislation of the Republic of Kosovo, which shall be examined by an independent commission. Funding for the university from the government of the Republic of Serbia must be transparent and made public, in accordance with the laws of Kosovo.
5. All municipalities in which the Kosovo Serb Community is in the majority shall have authority to exercise responsibility for cultural affairs, including, protection and promotion of Serbian cultural heritage within the municipal territory as well as support for local cultural communities.
6. Parties agree that youth shall have unhindered contacts with, and participate without discrimination in academic, cultural, sports, and professional exchanges in local, regional and international level.
7. Parties agree to create favourable conditions and support programs, initiatives and other activities to encourage development and exchange of artists, educators, athletes, students, youth, and rising leaders.
8. Parties agree to establish funding schemes to support the establishment of joint schools in which Kosovo Albanian and Kosovo Serb pupils and students will learn together.
9. Parties agree to recognize within their territory the use, by the minority/community, of their language and alphabet freely in private and in public.

## **Chapter 7: National Symbols**

1. Parties agree to respect the other party's flag, seal, anthem, emblem and other state and national symbols. Parties agree to allow the use of state symbols in regional and international events without hindrance.
2. Municipalities in which the Kosovo Serb Community is in the majority may use their own symbols including coats of arms, seals and emblems, provided that such symbols do not resemble symbols of other states or municipalities within or outside Republic of Kosovo.
3. Nothing in this chapter precludes Republic of Kosovo authorities from using state symbols in any part of its territory.

## **Chapter 8: Association of Serb-Majority Municipalities**

1. The Republic of Kosovo shall, subject to procedures and conditions established in this Chapter, establish the Association of Serb-Majority Municipalities.
2. The Association of Serb Majority Municipalities will be established in accordance with the Constitution of the Republic of Kosovo, First Agreement of Principles Governing the Normalization of Relations signed between Kosovo and Serbia on 19.04.2013, judgment of the Kosovo Constitutional Court Case No. KO130/15, and European Charter of Local Self-Government.
3. The Association shall have its statute which shall define its objectives, structure and sources of funding.
4. The Association of Serb Majority Municipalities will be established within the meaning of Article 44 (Freedom of Association) of the Constitution of Kosovo, and applicable legislation on freedom of association.
5. The statute of Association shall, before entry into force, be referred to the Kosovo Constitutional Court for review.
6. Parties acknowledge that the Kosovo competent court may prohibit any function or activity of the Association of Serb Majority Municipalities if such functions and/or activities infringe on the constitutional order, violate human rights and freedoms or encourage racial, national, ethnic or religious hatred.

## **Chapter 9: Transportation**

### General Transportation

1. Parties agree to accept the identification documents issued to the citizens of both parties including passport, identification document and driver's license.
2. Parties agree to permit travel of citizens in own vehicles with the national symbols of each party.
3. Parties agree to establish direct communication and exchange of information between border police and customs to reduce travel barriers for citizens.
4. The Republic of Serbia agrees to allow third-country vehicles to travel from and to Kosovo through Serbia without hindrance.

### Railway

1. Parties accept that railway infrastructure within the territory of Republic of Kosovo shall be managed by Republic of Kosovo's railway regulatory institutions. Parties acknowledge the legitimate right of Kosovo to become member of European and international railway organizations.
2. Parties agree to invest in railway infrastructure and design new lines to allow goods and citizens of the countries to move freely.
3. Parties undertake to integrate the railway system within the regional network for Western Balkans and to establish connections with the European Union.

## Chapter 10: Energy

1. Parties acknowledge and recognize that each is a separate party to the Treaty establishing the Energy Community in South East Europe, and that each shall be equally and independently represented in proceedings, bodies and forums of the Energy Community Treaty and other international bodies and organizations without limitation. Each of the Parties agree that they shall not attempt to limit or prevent the exercise by the other Party of rights and obligations thereunder.
2. Parties recognize that each aims and works towards implementation of EU *acquis communautaire*.
3. Parties agree that each will separately under its own jurisdictions undertake and cause to be undertaken all necessary measures and actions to implement the Energy Agreement (2013) and Conclusions of the EU facilitator on the implementation of the 2013 Energy Agreement (2015).
  - 3.1. Kosovo Transmission System, and Market Operator (KOSTT) will operate as independent Control Area/Block within Continental Europe. Republic of Serbia agrees to undertake all necessary measures and actions in order for KOSTT to operate as independent Control Area/Block within Continental Europe, and will remove and waive all administrative, legal and other means, instruments, barriers within ENTSO-E and other European mechanisms and bodies.
4. Parties acknowledge that there is an open energy transmission dispute between Republic of Kosovo (KOSTT) and Republic of Serbia (EMS). Parties agree that monies and revenues collected by EMS as of year 2007, that are attributable to transmission interconnection lines between Republic of Kosovo and neighbouring countries (Albania, Macedonia, Montenegro) as designated and confirmed by Agency for Cooperation of Energy Regulators (ACER) and/or ENTSO-E, will be immediately upon signing of this Agreement transferred to KOSTT. All revenues and monies from Inter TSO compensation Mechanism attributable to KOSTT that were collected by EMS as of year 2004 shall be transferred to KOSTT as designated and confirmed by ACER and/or ENTSO-E.

## Chapter 11: Implementation of Brussels Agreements

### General provisions

1. Parties reaffirm the following agreements reached between Republic of Kosovo and Republic of Serbia in the technical dialogue and dialogue for normalization of relations facilitated by the European Union:

#### Dialogue for normalization of relations

- 1.1 First Agreement on Principles Governing the Normalization of Relations, signed on April 19, 2013
- 1.2 Agreement on Justice, signed on February 9, 2015
- 1.3 Freedom of Movement / Bridge Conclusions, signed on August 25, 2015
- 1.4 Conclusions of the EU facilitator on the implementation of the 2013 Energy Agreement, signed on August 25, 2015
- 1.5 EU Implementation Plan of the Agreement on the Mitrovica Bridge, signed on August 5, 2016.

#### Technical dialogue

- 1.1 Civil Registers, signed on July 2, 2011
  - 1.2 Freedom of Movement, signed on July 2, 2011
  - 1.3 Customs Seals, signed on September 2, 2011
  - 1.4 Recognition of University Diplomas, signed on July 2, 2011
  - 1.5 Integrated Border Management, signed on December 2, 2011
  - 1.6 Technical Protocol for Implementation of IBM, signed on February 23, 2011
  - 1.7 Regional Representation and Cooperation, signed on February 24, 2011
  - 1.8 Customs Revenue Collection, signed on December 14, 2012
  - 1.9 Liaison Agreements, signed on May, 2013
  - 1.10 Arrangements on Energy, signed on September 8, 2013
  - 1.11 Arrangements on Telecommunications, signed on September 8, 2013
  - 1.12 Agreement on dissolution of civil protection, signed on March 26, 2015
  - 1.13 Mutual recognition of ADR certificates, signed on April 19, 2016
2. Parties reaffirm their commitment to fully implement the obligations arising from these agreements, unless otherwise provided in this agreement.
  3. In case of inconsistencies between the above-listed agreements and this Agreement, the provisions of this Agreement shall prevail.

### Elections

1. Parties agree that elections in the northern municipalities are organized by the Republic of Kosovo's election authorities in accordance with Kosovo election laws and regulations.
2. Parties agree to strengthen their effort in ensuring that elections in the Serb community meet applicable international standards for free, fair and competitive elections.

### Representation of Kosovo in International Fora

Upon entry into force of this Agreement, parties accept the abrogation of the Agreement on Regional Representation and Cooperation (2011).

### Kosovo Police

Parties reaffirm their commitment to continue implementing obligations arising from the agreement on Kosovo Police.

### Civil Protection

Parties reaffirm their commitment to continue implementing obligations arising from the agreement on Civil Protection.

### Establishment of Permanent Diplomatic Missions

1. Parties agree to establish permanent diplomatic missions in the other parties' state. Parties agree to ensuring compliance with international norms establishing diplomatic relations.
2. Upon entry into force of this Agreement, parties accept the abrogation of the agreement on liaison arrangements.

### Telecommunications

1. Parties accept that the Republic of Kosovo will become member of the International Telecommunications Union (ITU) with recognition of all country credentials including radio call signals, regional frequency allotments, international issues number for telecoms and other relevant services.
2. Parties acknowledge that the Republic of Kosovo will become member of the Universal Postal Union (UPU) and obtain internationally recognized postcode for Kosovo.

3. Parties acknowledge that Kosovo will be listed in the UN statistical division, which would allow listing of Republic of Kosovo in the ISO standard 3166 as a prerequisite for obtaining internet top level domain (internet country code) by ICANN and obtaining directly internet IP addresses by RIPE. Listing in this ISO standard (3166) would automatically solve Kosovo's digital presence as an independent state in the internet.
4. Parties agree to coordinate regarding cross border radio frequencies for all the frequency bands based in the relevant international standards.
5. Upon entry into force of this agreement, the unauthorized operations of the Post of Serbia in Kosovo are disbanded.

#### Customs

1. Parties reaffirm their commitment to continue implementing obligations arising from the agreement on customs.
2. Parties agree that custom stamps shall be arranged in accordance with the agreed Conclusions on Customs Stamps/Free Trade (September 02, 2011).
3. Parties agree that the customs duties collection by the Kosovo Customs in the northern municipalities of Serb majority will be conducted in accordance with the Agreement on Customs Revenue Collection (17 January 2013).

#### Integrated Border Management

Parties reaffirm their commitment to continue implementing obligations arising from the agreement on Integrated Border Management.

**Chapter 12: Implementing and Monitoring Mechanisms**

1. *Parties agree that the Guarantors of the implementation of this Agreement shall be The United States of America, The United Kingdom, Germany, France and Italy and the European Union.*
2. *The guarantors of this agreement, upon entry into force of this Agreement, will make continuous substantive effort on the rapprochement of non-recognizing states with Kosovo.*
3. *Parties accept that in order to facilitate the monitoring and implementation of this Agreement, a Joint Monitoring Commission comprised of representatives of the guarantors of this Agreement shall be established.*
4. *The Joint Monitoring Commission for monitoring and fact-gathering purposes shall have presence in Republic of Kosovo and Republic of Serbia.*
5. *Parties recognize that the guarantors may establish such Rules and Procedures in accordance with international law.*
6. *The Joint Monitoring Commission shall produce every three months a report assessing the implementation of the Agreement by the Parties.*
7. *Parties agree that the advancement of the EU integration process shall be conditioned with the satisfactory evaluation of the implementation of the Agreement as specified in count 4 of this chapter.*
8. *Parties agree that the findings of the Joint Monitoring Commission reports may be reflected in the respective European Union Country Reports.*
9. *Parties shall refrain from blocking one another in their respective efforts towards the EU integration process.*

### **Chapter 13: Changes in Legal Framework**

1. Parties will ensure to make necessary arrangements in respective legal frameworks to accommodate this Agreement.
2. Changes in each Party's legal framework shall be consistent with this agreement and, if any, potential decisions deriving from the dispute resolution processes.

## **Chapter 14: Resolution of Dispute under this Agreement**

1. If any dispute arises between the parties as to the interpretation, application or performance of this Agreement, either party may submit the dispute to final and binding arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States, as in effect on the date of this Agreement.
2. The number of arbitrators shall be five.
3. The language to be used in the arbitral proceedings shall be English.
4. The appointing authority shall be the Secretary-General of the Permanent Court of Arbitration.
5. The place of arbitration shall be The Hague, Netherlands.

## **Chapter 15: Recognition and Membership in International Organizations**

- 1. Upon entry into force of this Agreement, Parties and Guarantors agree to initiate the procedure for adoption of a United Nations Security Council Resolution recognizing this Agreement and admitting Kosovo to be a full member of the United Nations.*
2. Parties agree that they will not block or encourage others to block membership of Republic of Kosovo in international organizations including without limitation the European Union, Council of Europe, Organization for Security and Cooperation in Europe.

## **Chapter 16: Entry into Force**

1. This Agreement shall enter into force upon successful fulfilment of the conditions in the specific order as set below:

1.1 Ratification by the Parliaments of both Parties.

1.2 Deposition of instruments of ratification in the United Nations Office of Legal Affairs Treaty Section pursuant to Article 102 of the Charter of the United Nations.

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