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The Maritime Border Disputes of Croatia

A study within the legal field of international maritime law concerning the on-going maritime border disputes between the Republic of Croatia, Republic of Slovenia, the State of Bosnia and Herzegovina and the State of Montenegro

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Abstract

Since the break-up of the Socialist Federal Republic of Yugoslavia, the Republic of Croatia has been involved in maritime border disputes with its neighbours the Republic of Slovenia, the State of Bosnia and Herzegovina and the State of Montenegro. During the past decades after gaining independence, the States have tried to solve the disputes with numerous negotiations and agreements. Nevertheless, until this day (2020), Croatia and Slovenia have failed to solve the dispute in the Bay of Piran/Savudrija, despite an international arbitration tribunal granting three-quarters of the bay to Slovenia. The '*Neum Agreement*', signed in 1999, between Croatia and Bosnia and Herzegovina is still not in force and the matter is even more complex since Croatia is building the Peljesac Bridge on what Bosnia claims to be their maritime territory. The legal regime at the entrance of the Bay of Kotor and the maritime border between the territorial seas of Croatia and Montenegro is also disputed. Currently, the legal regime and the provisional maritime boundary is governed by a temporary protocol, signed by the governments of the two States under UN observation in 2002. Nevertheless, the agreement is only a temporary solution between the two neighbours, and voices are being raised that the protocol has outplayed its role.

The thesis examines possible and plausible future solutions to the disputes from the perspective of international maritime law. This is done with consideration to relevant international treaties, provisions and regulations can provide in the on-going disputes. Furthermore, the concept of innocent passage is examined, since the Adriatic Sea constitutes an important area for maritime navigation. Maritime jurisdiction and sovereignty is examined, due to the presence of natural resources in the Adriatic Sea, which makes the maritime border delimitations even more delicate, since it involves aspects of exploration and exploitation of the resources in the maritime spaces of mentioned States. The thesis concludes that previous unratified treaties have largely been implemented by all States, in line with the principles of international maritime law. Nevertheless, permanent solutions must be sought mutually by the present and future governments of respective States.

Keywords: Maritime Border Dispute, International Maritime Law, Maritime Delimitation, International Arbitration, The Republic of Croatia, The Republic of Slovenia, Bosnia and Herzegovina, Montenegro, Breakup of Yugoslavia

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List of Abbreviations

BiH	The State of Bosnia and Herzegovina
Bos.	Bosnian Language
BCMS	Bosnian-Croatian-Montenegrin-Serbian
Cro.	Croatian Language
CJEU	Court of Justice of the European Union
CS	Continental Shelf
EU	European Union
EEC	European Economic Community
EEZ	Exclusive Economic Zone
FRY	Federal Republic of Yugoslavia
ICJ	International Court of Justice
ITLOS	International Tribunal for the Law of the Sea
JNA	Jugoslovenska Narodna Armija/Yugoslav People's Army
Km	Kilometer
NATO	North Atlantic Treaty Organization
NM	Nautical Miles
PCJ	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SFRY	Socialist Federal Republic of Yugoslavia
TSC	Convention on the Territorial sea and the Contiguous Zone
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
USA	United States of America

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1 Introduction

National borders at sea are determined through the process of maritime delimitation. The process of dividing maritime areas between coastal States aims to establish clearly defined maritime borders. Furthermore, the process itself is important in order to decide a State's jurisdiction over a specific maritime area.[1]

The Adriatic Sea is an extended arm of the Mediterranean Sea, situated between the Italian and Balkan Peninsulas. It is shared between Italy, Slovenia, Croatia, Bosnia and Herzegovina, Montenegro and Albania. For centuries, various civilizations, cultures and empires have fought over the control of the sea, which hold many natural resources and biodiversity, such as fisheries, rich flora and fauna, to name a few. Furthermore, control of the maritime navigation in the area has, and still is of high importance as well.[2] After the fall of communism in Eastern Europe, the Socialist Federal Republic of Yugoslavia collapsed into several new States. This gave rise to several border disputes between the newly-formed States in the Balkans. For the past three decades, the eastern coast of the Adriatic Sea has seen no less than three maritime border disputes between the Republic of Croatia and its neighbours, the Republic of Slovenia, the State of Bosnia and Herzegovina and the State of Montenegro.[3]

In the Gulf of Trieste, at the border between the Republic of Slovenia and the Republic of Croatia, a maritime border dispute is taking place in the Bay of Piran/Savudrija. Slovenia claims that the bay should fall under Slovenian sovereignty, whereas Croatia claims that the bay should be shared between the two States in two equal parts. An *ad hoc* Arbitration Tribunal was set up to resolve the dispute, which granted three-quarters of the bay to Slovenia, and one-quarters to Croatia. Furthermore, Slovenia was granted a maritime junction from its territorial waters to the High Seas. However, the junction was granted over Croatian territorial waters. Croatia left the Arbitration Tribunal, and has consistently denied and disputed the validity of the Tribunal's Final Award. As of 2020, the legal situation in the Bay of Piran/Savudrija *de facto* remains unsettled.[4]

Further south, the land territory of Croatia is divided in two parts due to a relatively small land stretch of around 20 km, that belongs to its neighbour Bosnia and Herzegovina. Due to this, road travel from the north of Croatia to the south, must pass through border checks at the Croatian/BiH border. Furthermore, the maritime border between the two States is disputed, including the sovereignty over two small islets, Veliki and Mali Ston, that are located in the

[1] Yoshifumi Tanaka, '*The International Law of the Sea'* (3rd edition, Cambridge University Press 2019) 237 (Henceforth 'Tanaka').
[2] Encyclopædia Britannica, 'Adriatic Sea' (*Britannica Academic,* 19 August 2016) <https://academic-eb-com.ezproxy.ub.gu.se/levels/collegiate/article/Adriatic-Sea/3799> accessed 4 September 2020.
[3] Vedran Pavlic, 'Overview of Croatia's Border Disputes with BiH, Montenegro, Serbia, Slovenia, Liberland' *Total Croatia News* (Zagreb, 22 January 2017) (Henceforth 'Pavlic') <https://www.total-croatia-news.com/politics/16084-overview-of-croatia-s-border-disputes-with-bij-montenegro-serbia-slovenia-liberland> accessed 22 September 2020.
[4] Paul McClean, 'Croatia rejects tribunal ruling in border dispute with Slovenia', *Financial Times* (Brussels, 29 June 2017) <https://www.ft.com/content/309147e4-5ce5-11e7-9bc8-8055f264aa8b> accessed 29 October 2020.

Channel of Mali Ston.[5] Moreover, on the Croatian side the construction of the Peljesac Bridge is taking place, which will connect the two parts of Croatia. However, BiH is claiming that the bridge is being built over the territorial sea of BiH.[6] Since 1999, no bilateral negotiations regarding any border settlement have been held between the two neighbours.[7]

At the very south of Croatia, it shares a short land border of 16 km with its neighbour Montenegro. The Prevlaka Peninsula is a part of Croatia. Due to this, the north-western part of the entrance of the Bay of Kotor is controlled by Croatia, and the south-eastern part is controlled by Montenegro[8]. The Bay of Kotor is of significant strategic importance for the latter, since it holds several ports, cities, touristic venues and almost ten percent of the total population of Montenegro. The paradox is that practically all ships passing through the entrance of the Bay of Kotor has Montenegro as their first or final destination, yet the entrance is, in part, controlled by Croatia.[9] Since 2002, a bilateral temporary protocol between Croatia and Montenegro has been in force, regarding the status of the Prevlaka Peninsula. However, a permanent settlement regarding the maritime border is yet to be reached.[10]

1.1 Background

In order to understand why the eastern coast of the Adriatic Sea is the place for several maritime border disputes, it is important to understand the historical and geopolitical context behind the disputes. A summary of each dispute, with a chronological overview of relevant events will follow below before the thesis moves over to detailing the legal maritime situation in the Adriatic Sea.

1.1.1 Border Dispute with the Republic of Slovenia

The Republic of Slovenia and the Republic of Croatia gained independence on the 25th of June 1991. The two newly formed States had both been part of the former Yugoslavia.[11] Despite being two separate republics under the Yugoslav State, the maritime borders between them had never been determined during socialist rule. The need for such settlement was deemed as non-existent and unnecessary. However, during the summer of 1991, the border between Slovenia and Croatia went from being rather abstract, to becoming the State-border between two independent and sovereign States. Nevertheless, it quickly became evident that

[5] Senada Šelo Šabić, Sonja Borić, 'Crossing over – A perspective on Croatian Open Border Issues' *Friedrich Ebert Stiftung* (Zagreb, November 2016) 5 (Henceforth 'Šabić, Borić') <https://www.researchgate.net/publication/320452031_Crossing_over_A_Perspective_on_Croatian_Open_Border_Issues> accessed 10 October 2020.

[5] Šabić, Borić (n 5) 9.

[6] Mladen Lakic, 'Bosnia to Protest to EU over Croatia Bridge Deal' *BalkanInsight* (Sarajevo, 24 April 2018) <https://balkaninsight.com/2018/04/24/bosnia-calls-eu-commision-over-peljesac-bridge-04-24-2018/> accessed 29 October 2020.

[7] Šabić, Borić (n 5) 5.

[8] See *'Appendix 5'*.

[9] Damir Arnaut, 'Adriatic Blues' in Clive H. Schofiled, Seokwoo Lee and Moon-Sang Kwon (eds.) *The Limits of Maritime Jurisdiction* (Koninklijke Brill NV 2014) 155 (Henceforth 'Arnaut').

[10] Šabić, Borić (n 5) 9.

[11] Henceforth *'SFRY'*.

Croatia and Slovenia had opposing views in the matter on how to draw the delimitation line in the Bay of Piran/Savudrija, which is located in the most northern part of the Adriatic Sea.[12]

Furthermore, the two sides have different opinions on the naming of the bay. In the Croatian language, the name for the bay is *Savudrijska vala* (lit. 'Savudrija Bay'), and is named after a small Croatian settlement nearby. In the Slovene language, the term *Piranski zaliv* is used (lit. 'Piran Bay'), and is equally the term mainly used in the English language.[13]

In 1975, the Osimo Treaty ('*Treaty on the delimitation of the frontier for the part not indicated as such in the Peace Treaty of 10 February 1947'*) between the SFRY and the Republic of Italy was signed, and the two States reached a final agreement on how the border in the northern Adriatic Sea would be drawn.[14] The treaty came into force in 1977.[15] Shortly after independence of the two States in 1991, Croatia claimed that the Bay of Piran/Savudrija was divided in two equal parts between Croatia and Slovenia, along the Dragonja River, in accordance with the principle of equidistance.[16] Slovenia, on the other hand, disputed Croatia's position and instead claimed that the Osimo Treaty of 1975 never made any reference to the internal borders between the two socialist republics within the SFRY. Therefore, the maritime border between the two newly formed States was yet to be determined.[17]

What followed in the coming years after 1991, were several attempts to reach a final solution to the maritime border dispute. Both States made overlapping claims over the Bay of Piran/Savudrija, which came under conflict between the two due to questions regarding sovereignty and jurisdiction in the area. Negotiations, diplomatic commissions and expert panels were held throughout the 1990s, but with little success in finding a solution for the dispute.[18]

In 2001, Janez Drnovšek and Ivica Račan, the then-Prime Ministers of Slovenia and Croatia signed the '*Treaty between the Republic of Slovenia and the Republic of Croatia on the Common State Border'*, commonly referred to as the '*Drnovšek-Račan Agreement'*. The two parties agreed that Slovenia would gain around two-thirds, and Croatia one-third of the Bay of

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[12] Matej Avbelj, Jernej Lentar Černič, *'The Conundrum of the Piran Bay: Slovenia v. Croatia – The Case of Maritime Delimitation'* [2007] Journal of International Law & Policy Vol. V, University of Pennsylvania 6:3 (Henceforth Avbelj, Lentar Černič) <https://www.law.upenn.edu/journals/jil/jilp/articles/5-1_Cernic_Jernej_Letnar.pdf> accessed 13 September 2020.

[13] 'Plenković Hopeful Border Dispute with Slovenia Won't Affect Croatia's Schengen Bid' *(Total Croatia News*, 2 November 2019) <https://www.total-croatia-news.com/politics/39378-schengen> accessed 13 September 2020.

[14] Arbitration Between the Republic of Croatia and the Republic of Slovenia (2017) PCA, Case No 2012-04, Final Award, 29 June 2017 (Henceforth 'The *Croatia/Slovenia* Arbitration Award') 12, para. 44-45. Available at <https://pca-cpa.org/en/cases/3/>.

[15] Avbelj, Lentar Černič 6:4.

[16] See *'Appendix 1'*.

[17] The *Croatia/Slovenia* Arbitration Award 13, para. 47.

[18] Ibid 13-15, para. 48-55.

Piran/Savudrija.[19] Furthermore, the two parties agreed that Slovenia would be granted a corridor over Croatian territorial waters, onwards to international waters.[20] The Slovenian government ratified the agreement, however the Croatian Parliament and the Foreign Affairs Committee rejected it and the agreement never came into force.[21]

The Republic of Slovenia entered the European Union (henceforth '*EU*') in 2004. The Republic of Croatia began its accession negotiations with the European Union in late 2005.[22] Due to the on-going land and border dispute, Slovenia blocked the EU-Croatia negotiations in 2008, which further deteriorated the bilateral relations of the two neighbours. After negotiations between the respective governments, the Slovenian blockade was lifted in July 2009. The two sides agreed to reach a final settlement regarding the border dispute in an *ad hoc* Arbitration Tribunal. Croatia joined the EU on the 1st July 2013.[23]

The two parties submitted the arbitration agreement to the United Nations (henceforth '*UN*'), on 25 May 2011, with the aim to find a final solution to the land and maritime border disputes. Slovenia claimed a maritime corridor over Croatian territorial waters to international waters. This due to the fact that a strict equidistance line (which is a practice within international maritime law), would only grant Slovenia a small part of the northern Adriatic Sea.[24]

On the 22 July 2015, a major Croatian newspaper, '*Večernji List'*, revealed that the Slovenian judge Jernej Sekolec and the Slovenian member of the arbitration panel Simona Drenik had put pressure on international members of the tribunal to vote in favour of Slovenia's claims. Due to the accusations, Judge Sekolec and Panel Member Drenik decided to resign from the Arbitration Tribunal on the 23 July 2015.[25] Croatia's Prime Minister at the time, Zoran Milanović, announced that Croatia would leave the Arbitration Tribunal and would not implement the final award. Croatia further sought that the Arbitration Tribunal would be suspended and not continue with the proceedings, due to *'(...) material breaches of the*

[19] Dejan Scepanovic, *'Territorial dispute between Croatia and Slovenia countries'* (*Armed Politics*, 1 July 2017) <https://www.armedpolitics.com/2671/territorial-dispute-croatia-slovenia-continues/> accessed 22 September 2020.

[20] Treaty Between the Republic of Slovenia and the Republic of Croatia on the Common State Border (Slovenia-Croatia) (20 July 2001) article 4(2) (Henceforth 'Drnovšek-Račan Agreement'), available at <http://www.assidmer.net/doc/Drnovsek-Racan_Agreement.pdf> [Unofficial English Version].

[21] The *Croatia/Slovenia* Arbitration Award 27, para. 92 and 96.

[22] 'Croatia – EU-Croatia Relations' (*Europa.eu*, 2012) <https://web.archive.org/web/20120102123647/http://ec.europa.eu/enlargement/candidate-countries/croatia/eu_croatia_relations_en.htm> accessed 23 September 2020.

[23] Pavlic (n 3).

[24] *'Croatia and Slovenia submit arbitration agreement to UN'* (Durham University IBRU, 2011) <https://www.dur.ac.uk/ibru/news/boundary_news/?itemno=12176> accessed 25 September 2020.

[25] 'Jernej Sekolec podnio ostavku, ostavku ponudila i Simona Drenik' (*Večernji List*, 23 July 2015) <https://www.vecernji.hr/vijesti/slovenski-clan-arbitraznog-suda-podnio-ostavku-1016089> accessed 25 September 2020.

Arbitration Agreement'.[26] Slovenia objected Croatia's claims to terminate the Arbitration Tribunal.[27]

The Tribunal underwent an internal investigation, where it was concluded that Slovenia did breach the procedural rules by putting pressure on members of the Panel to vote in their favour. However, the Tribunal found that the breach was neither severe nor serious enough to a point that it was reasonable to accept Croatia's claims to terminate the work of the Tribunal. Furthermore, due to the resignation of the two Slovene members, the internal investigation of the Tribunal found no obstacles in maintaining the independence of the Tribunal.[28]

On the 29 July 2017, the Arbitration Tribunal disclosed its final award. The decision included demarcations and delimitations along the land, river and sea border.[29] Slovenia was granted three-quarters of the Bay of Piran, and a junction over Croatian territorial waters to international waters. Croatia was granted one-quarter of the bay. However, Croatia's government reaffirmed that they would maintain their position from 2015,[30] In other words, that the Tribunal had no competence to continue its work and that any verdict would be regarded as invalid.[31]

In 2018, Slovenia planned to file a lawsuit to the Court of Justice of the EU (henceforth '*CJEU'*) against Croatia, for not respecting the verdict of the Arbitration Tribunal. Slovenia turned to the European Commission, as according to the procedural rules, the Commission is the body which decides if a lawsuit should be settled by the CJEU or not. However, the European Commission proclaimed that it would remain neutral in the matter. Instead, the Commission ushered the two States to find a joint bilateral solution that would suit both sides.[32]

As of 2020, the maritime border dispute between Slovenia and Croatia is still unsettled, despite the fact that the *ad hoc* Arbitration Tribunal has already decided on the matter. Croatian Coast Guard still escort Croatian fishermen in the bay, into what Slovenia considers to be their maritime area. On the other hand, Slovenian Coast Guard have issued fines to Croatian fishermen for alleged violations of Slovenian law. It shall also be noted that Croatia aspires to, in a foreseeable future, become a member of the Schengen Area. But as long as the

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[26] Arbitration Between the Republic of Croatia and the Republic of Slovenia (2016) PCA, Partial Award, 30 June 2016 (Henceforth 'The *Croatia/Slovenia* Partial Award') 17, para. 84. Available at <https://pcacases.com/web/sendAttach/1787>.

[27] Ibid 20, para. 86.

[28] Špela Novak, 'Court of Arbitration to define border between Slovenia and Croatia' *RTVSlo* (The Hague, 1 July 2016) <https://www.rtvslo.si/news-in-english/court-of-arbitration-to-define-border-between-slovenia-and-croatia/397118> accessed 27 September 2020.

[29] The *Croatia/Slovenia* Arbitration Award.

[30] A map over the final award of the disputed area in the Gulf of Piran/Savudrija is to be found in 'Appendix 3'.

[31] 'Slovenia wins battle with Croatia over high seas access' (*BBC News*, 29 June 2017) <https://www.bbc.com/news/world-europe-40449776> accessed 29 September 2020.

[32] Anja Vladisavljevic, 'EU Stays Out of Croatia-Slovenia Border Dispute' *BalkanInsight* (Zagreb, 18 June 2018) <https://balkaninsight.com/2018/06/18/ek-remains-neutral-on-croatia-slovenia-border-arbitration-dispute-06-18-2018/> accessed 30 September 2020.

border dispute with Slovenia remains an open question between the two States, Croatia's accession to the Area will not be straight forward.[33]

1.1.2 Border Dispute with the State of Bosnia and Herzegovina

The Republic of Croatia has a coastal length of approximately 1,777 km. If the 1,246 islands are calculated, the total length adds up to approximately 4,058 km.[34] Croatia's neighbour, the State of Bosnia and Herzegovina (henceforth '*BiH'*), has a small coastline of approximately 24 km.[35] The southernmost county of Croatia, the Dubrovnik-Neretva County (Cro. '*Dubrovačko-Neretvanska županija*') is divided in two parts, due to the BiH town Neum, commonly referred to as the 'Neum Corridor'.[36] Due to this, the southern part of Croatia is an exclave, disconnected from the Croatian mainland. Road travel between the two parts of Croatia, e.g. between Zagreb (the capital of Croatia) and Dubrovnik (historic and touristic destination), must pass through its neighboring country BiH.

The history of the Neum Corridor dates back centuries. In 1699, the Treaty of Karlowitz was signed between the Ottoman Empire and the Habsburg Empire (commonly referred to as '*Austria-Hungary'*). The Ottoman Empire was forced to give up conquered areas in Central Europe, and withdraw south to the Balkan Peninsula. The historic Republic of Ragusa (later renamed '*Republic of Dubrovnik'* and today a part of Croatia) feared an invasion from the Republic of Venice. With the withdrawal of the Ottoman Empire to the borders of modern-day BiH, the Republic of Dubrovnik no longer enjoyed the socio-political safety and geographical protection of the Ottoman Empire, since the northern coast of modern-day Croatia, was in the hands of Venice. Due to this, the Republic of Dubrovnik ceded the city of Neum to the Ottoman Empire, through which it became a part of BiH. Neum and the surrounding waters has remained as a part of BiH ever since.[37]

In 1999, the President of Croatia, Franjo Tuđman and the member of the BiH Presidency, Alija Izetbegović, negotiated and signed the *'Treaty on the State Border between the Republic of Croatia and Bosnia and Herzegovina'*, (commonly referred to as the *'Neum Agreement'*).[38] Nevertheless, the respective State parliaments never ratified the treaty. The agreement included not only a maritime border delimitation, but also focused on administrative solutions, i.e. smoother border-crossings for citizens and companies of the two countries.[39]

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[33] Peter Müller, 'Why Did EU Commission Chief Go Silent in Border Dispute?' (*Spiegel International*, 14 September 2018) (Henceforth 'Müller') <https://www.spiegel.de/international/europe/eu-commission-chief-silent-in-slovenia-croatia-dispute-a-1228169.html> accessed 30 September 2020.

[34] The Miroslav Krleža Institute of Lexicography, '*The Adriatic Sea and Islands'* (Croatia.eu, 2020) <http://croatia.eu/index.php?view=article&id=11&lang=2> accessed 13 September 2020.

[35] Ljiljana Krejic, '*Neum: Bosnia's Sole Sea Resort'* (Itinari, June 2018) <https://www.itinari.com/neum-bosnia-s-sole-sea-resort-4p3i> accessed 13 September 2020.

[36] Pavlic (n 3).

[37] 'Why does Bosnia have a Coast?' (*BigDataBiH*, 2018) <https://www.bigdatabih.com/blog/2018/12/24/why-does-bosnia-have-a-coast/> accessed 30 September 2020.

[38] Mladen Klemencic, 'The Border Agreement between Croatia and Bosnia-Herzegovina – The first but not the last' [2000] Boundary & Security Bulletin Durham University IBRU Publications 96 (Henceforth 'Klemencic') <https://www.dur.ac.uk/resources/ibru/publications/full/bsb7-4_klemencic.pdf> accessed 28 September 2020.

[39] Pavlic (n 3).

Due to the geographical nature of Croatia, being split in two parts by BiH territory, most recently (2018), Croatia begun the building of the Peljesac Bridge (Cro. '*Pelješki most'*). The project is largely financed by the EU, and will connect what is now both Croatian and EU territory, without the need to pass through BiH (non-EU member). However, the building of the bridge has been contested by BiH, claiming that the Croatian side is building the bridge on BiH maritime territory.[40] The current member of the BiH Presidency, Željko Komšić, commented the situation in 2018 as following:

'*Croatia is directly violating Bosnian territorial integrity and sovereignty. (...) simply unbelievable that a piece of our country is cut off before our eyes – and that people sitting in Bosnian state institutions have done absolutely nothing.*'[41]

Furthermore, BiH currently lacks a harbour, but plans to build one in Neum. The BiH side is worried that the bridge will prevent cargo ships from entering Neum, whereas the Croatian side claims that the bridge will be 55 m high, and thus will neither prevent, nor obstruct free passage of ships with Neum as destination. In addition, the Croatian side claims that the bridge will exclusively be built on Croatian maritime territory.[42] As of 2020, the building of the Peljesac Bridge is on-going, despite objections coming from BiH and is projected to open by summer of 2022.[43]

The two neighbouring States are yet to find a solution on how the maritime border should be drawn. The status of the two nearby islets of Veliki and Mali Školj is unclear, since they are claimed by both States. The construction of the Peljesac Bridge has brought further complications to the bilateral relations, since it remains unclear over which maritime area the bridge is being built.

1.1.3 Border Dispute with the State of Montenegro

The Republic of Croatia and the State of Montenegro share a land-border with a length of only 16 km. The Prevlaka Peninsula is Croatia's most southern tip, close to the border with Montenegro.[44] The peninsula has historically been a part of the Republic of Ragusa.[45] In 1441, Ragusa built a fortress at Cape Oštra, Prevlaka, at the entrance of the Bay of Kotor

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[40] Anja Vldisavljevic, Danijel Kovacevic, 'Croatia Starts Building Peljesac Bridge Amid Bosniak Fury' *Balkan Insight* (Banja Luka, Zagreb, 30 July 2018) <https://balkaninsight.com/2018/07/30/bosnia-and-croatia-in-new-row-over-peljesac-bridge-07-30-2018/> accessed 14 September 2020.

[41] Ibid.

[42] Ibid.

[43] 'Latest Photo Update from the Pelješac Bridge Construction' *Croatiaweek* (Zagreb, 13 July 2020) <https://www.croatiaweek.com/latest-photo-update-from-the-peljesac-bridge-construction/> accessed 14 September 2020.

[44] Nenad N. Bach, 'Prevlaka back in Croatian Hands?' *Croatia.org* (Korfin, 12 October 2002) (Henceforth 'Bach') <http://www.croatia.org/crown/articles/7396/1/E-Prevlaka---Whats-the-deal.html> accessed 14 September 2020.

[45] See definition of the historic '*Republic of Ragusa'*, which today is a part of Konavle Municipality, Republic of Croatia, under section 1.1.2.

(BCMS. *Boka Kotorska*), in order to serve as protection of the citizens of Dubrovnik. Under SFRY rule, the peninsula was administered by the Socialist Republic of Croatia, and in its proximity, the land-border with the Socialist Republic of Montenegro was drawn just north of the peninsula. The fortress at Cape Oštra was a facility of the Yugoslav People's army (commonly referred to as *'JNA'*).[46]

From 1955 and onwards, the JNA declared that the peninsula would remain off limits for civilians, since the army established military installations at Cape Oštra. Thus, the Bay of Kotor was well protected from a potential foreign attack. This was of significant importance for the JNA and Yugoslavia as a whole, since the bay houses harbours, the airport in Tivat and two major cities of Montenegro, Herceg-Novi and Tivat.

Shortly after the declaration of independence in 1991, the war in Croatia broke out. In late September, the JNA managed to occupy the peninsula and several towns and villages in southern Dalmatia. The JNA also besieged the city of Dubrovnik and its historic Old Town, which was declared a World Heritage site by UNESCO in 1979.[47] A year after, in September 1992, the Presidents of Croatia and Federal Republic of Yugoslavia (Henceforth 'FRY') managed to resolve the issue, which ended with the withdrawal of FRY forces from the peninsula.[48] From 1992 until 2002, UN peacekeeping troops controlled the peninsula. Having been a demilitarized area, but claimed by both the FRY and Croatia, it was reintegrated under the jurisdiction of Croatia in 2002, as it had been under the rule of SFRY.[49]

The '*Temporary Protocol between Republic of Croatia and Federal Republic of Yugoslavia (Serbia and Montenegro)*' was signed on the 10th of December 2002. The agreement clearly states that it is only temporary. The aim of the protocol was to normalize the bilateral relations and that the dispute would be addressed at one point in the future, in order to reach a permanent agreement concerning the delimitation of the sea border. Worth mentioning is that there have not been any major incidents between the two States since the signing. Nevertheless, the two sides are yet to agree on a permanent settlement.[50]

1.2 Scope and purpose

1.2.1 Purpose

The purpose of the thesis is to examine the border disputes that the Republic of Croatia is involved in with its neighbours, the Republic of Slovenia, the State of Bosnia and Herzegovina and the State of Montenegro. All three disputes date back to the break-up of the SFRY. Also, its purpose is to analyse the current legal regime in each dispute in order to be

[46] Gerald Blake, Dusko Topalovic, '*The Maritime Boundaries of the Adriatic Sea – Maritime Briefing'* [1996] Durham University IBRU Publication Vol. 1 No. 8 46-47 <https://www.dur.ac.uk/ibru/publications/view/?id=231> accessed 17 September 2020.
[47] Ibid 48.
[48] Ibid 45.
[49] Bach (n 44).
[50] Pavlic (n 3).

able to present possible and plausible solutions for maritime border delimitations in accordance with relevant treaty and case law within the field of international maritime law.

1.2.2 Research questions

- How should a final maritime border delimitation be drawn in the Bay of Piran/Savudrija and in the Northern Adriatic?
- Does Croatia violate the rights of Bosnia and Herzegovina, as a maritime State, to access the high seas through its construction of the Peljesac Bridge?
- Should the maritime border between Croatia and Montenegro, in the proximity of the Bay of Kotor, be drawn in accordance with the principle of equidistance or the principle of equity?

1.2.3 Method and material

1.2.3.1 Qualitative Analytical Research

To achieve the purpose of the thesis, the maritime border disputes that the Republic of Croatia is involved are in the focus of the study. Two different legal methods are used in order to reach the purposes of the thesis. Through the method of qualitative analytical research, the aim is to describe and create an understanding for the delicate issues related to each specific dispute. Focus is put on historic and present relations between the relevant States, in order to objectify why the disputes, with its legal questions, have arisen in the first place and why they are yet to be solved. Moreover, the research will be undertaken through the analysis of relevant bilateral agreements between the States and interpreting them in the light of international maritime treaties.

1.2.3.2 Legal Dogmatic Method

The legal dogmatic method will be used in order to examine the legal rules and provisions within the field of international maritime law. The method can be described as having the aim to solve and answer legal questions through applying generally accepted legal sources of law.[51] The maritime disputes that Croatia is involved in will be put into its legal context. The analysis will focus on relevant treaties and well-established principles of international maritime law that are in force and binding for the States in question, respectively. Furthermore, within the field of international maritime law, other legal sources of interest consist of customary international maritime law and answers to the legal questions asked will be based on these sources. Lastly, through the method, the aim is to produce relevant and possible solutions to the disputes that will uphold the practices already established within the legal field.

1.2.3.3 Material

The on-going maritime border disputes along the eastern coast of the Adriatic Sea have been subject of several previous research papers and articles. However, a majority of the studies were written during the second half of the 1990s and the first half of the 2000s. But due to the

[51] Jan Kleineman ’Rättsdogmatisk metod’ in Maria Nääv and Mauro Zamboni (2nd edition) *Juridisk Metodlära* (Studentlitteratur AB Lund 2018) 21-22.

stand-still in negotiations, the amount of published research in recent years has diminished. Information concerning the disputes is largely, but not exclusively, based on academic works published in Durham University International Boundaries Research Unit (IBRU)[52] and major international news outlets. As for questions concerning international maritime law and maritime border delimitations, the thesis is based on the works of Professors Yoshifumi Tanaka, Martin Dixon, Donald R Rothwell and Tim Stephens, among others. Specific concepts and principles within the mentioned domain are also based on works published in Max Planck Encyclopedias of International Law. The thesis also includes remarks made by Dr Robin Cleverly from Marbdy Consulting Ltd, legal expert and member of the Slovenian team at the PCA Arbitration in the Croatia/Slovenia dispute.

The referencing style used in the thesis is based on the 'Oxford University Standard for the Citation of Legal Authorities' (OSCOLA, 4th edition). Regarding sources that are referenced to in the thesis, the primary focus will lay on sources written in the English Language. However, a significant amount of bilateral agreements and research papers that are relevant to the thesis are available only in the local languages spoken in South-Eastern Europe (i.e. Bosnian/Croatian/Montenegrin/Serbian). Due to the authors proficiency in these languages, references are also made to non-English sources.

1.2.4 Scope

The scope of the research is limited to the following border disputes that the Republic of Croatia is currently (2020) involved in; (1)*Croatia-Slovenia maritime border dispute*, (2)*Croatia-Bosnia and Herzegovina maritime border dispute* and (3)*Croatia-Montenegro maritime border dispute*. All three disputes concern the delimitation of sea borders along the eastern coast of the Adriatic Sea. The thesis will not analyse the on-going *Croatia-Serbia border dispute*, due to its focus on the border demarcation along the river Danube. Moreover, the border disputes on land, between Slovenia and Croatia along the Mura river and between BiH and Croatia around Kostajnica (previously '*Bosanska Kostajnica'*) and Hrvatska Kostajnica will not be analysed.

Furthermore, the thesis is of legal nature, but the disputes are politically charged due to the ever-changing bilateral relations between the States. In the discussion and analysis, comments of geopolitical character are briefly made. Nevertheless, the political aspects are not the basis for the thesis, but complementary for the general analysis. When it comes to the aspect concerning sources of law and their application in each dispute, the thesis is limited to the international treaties TSC 1958 and UNCLOS 1982, relevant case law and doctrine within the domain of maritime border delimitations. As for the aspects of maritime jurisdiction and sovereignty, the thesis only focuses on the legal regimes in territorial and internal waters of coastal States. Hence, questions concerning jurisdiction and sovereignty in other maritime spaces are excluded.

[52] 'Croatia', Durham University International Boundaries Research Unit (*IBRU*, 20 February 2013) <https://www.dur.ac.uk/ibru/publications/search/?keywords=Croatia> accessed 24 September 2020.

1.2.5 Overview

The thesis is divided into five chapters. In the first chapter, the reader is provided with a brief and relevant background introduction of the three maritime border disputes that Croatia is currently involved in. Furthermore, the purpose, the research questions, method, material and scope of the thesis are presented. The second chapter, named 'The Border Disputes of Croatia', constitute a part of the main body of the thesis, which begins with putting the disputes into their historic context, which is needed in order to understand why they have arisen in the first place. Thereafter, it turns to presenting thoroughly the main legal issues of the three disputes in a chronological order, from the independence of the States until today. The third chapter, named 'Law of the Sea and Maritime Border Delimitations', explains the historic developments of international maritime law and the legal principles it rests upon. Special focus is put on providing a basic understanding of the concept of maritime border delimitations and how they are made in accordance with relevant treaty and case law. The fourth chapter, named 'A State's Maritime Jurisdiction and Sovereignty', focuses on legal aspects in the territorial sea of a coastal State and the concept of innocent passage for foreign vessels. Lastly, it explains the legal principle 'Uti Possidetis'. The fifth chapter, named 'Final Solutions to the Disputed Border Delimitations in the Adriatic Sea', concerns the findings of the previous chapters are discussed and analysed. The chapter is divided into three subsections, in which the research question is answered by the end of each subsection. The first section concerns the dispute between Slovenia and Croatia, and it differs from the second and third section, due to the existence of a judgement by the PCA. Hence, the discussion is focused on the 'Final Award' of the International Arbitration Tribunal, the critique of it and Croatia's unwillingness to accept the outcome. The remaining research questions allow discussion and analysis of plausible outcomes of the disputes between BiH/Croatia and Montenegro/Croatia, respectively. The sixth, and final chapter of the thesis, named 'Conclusion', summarizes and concludes the discussions made in previous chapters.

2 The Border Disputes of Croatia

In order to be able to understand the maritime border disputes between the four Ex-Yugoslav States that arose after the fall of the latter and to answer the legal research questions, it is important to put them in the context of international maritime law. This chapter firstly provides a short overview of the history of the Balkans, and then moves over to an analysis of each maritime border dispute in the Adriatic Sea, with emphasis on the legal challenges the relevant States are currently facing. It is also important to bear in mind that when referring to treaty law, all mentioned States are parties to 1982 UNCLOS.

2.1 Historic Overview

The Balkan peninsula, geographically situated in south-eastern Europe, stretching from Greece and Turkey in the south to the Slovene/Italian border in the north, has throughout history been a rather unstable region of Europe. Its ethnic diversity and political upheaval have resulted in numerous border changes. Various empires have fought for the control over the area since the peninsula has been regarded as the gateway between east and west. The Roman Empire, Ottoman Empire and Austria-Hungary have, during different times in history, ruled over the different ethnic groups in the Balkans. Historically, the peninsula has mainly been inhabited by Slavic peoples, more specifically South Slavs. Worth mentioning is that the area has been inhabited by smaller numbers of Germans, Hungarians, Ukrainians and Italians.[53]

During the first half of the 20th century, after World War I, a new country emerged in the Balkans. The Kingdom of Serbs, Croats and Slovenes came about through the unification of the various ethnic groups coming together and creating a joint State. The different nations shared a common language, similar culture and traditions. The State was sporadically called by its more known name, the Kingdom of Yugoslavia.[54]

After World War II, communists gained power and the State was renamed "*Socialist Federal Republic of Yugoslavia*". The State was a federation of the following socialist federal republics; Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Montenegro and Macedonia. Furthermore, the SFRY included two autonomous provinces, Kosovo and Vojvodina, which in turn were a part of the largest republic within the federation, the Socialist Republic of Serbia. The communist leader of the SFRY, Josip Broz Tito (henceforth "*Tito*") gained power over the new Yugoslavia and managed to remain in office until his death in 1980. The Communist Party of SFRY, with Tito as the president, held a firm grip over the State. Nationalistic sentiments of the different ethnic groups within the State were quickly pushed

[53] Loring Danforth, 'Balkans' (*Encyclopædia Britannica,* 19 November 2019) <https://www.britannica.com/place/Balkans> accessed 8 September 2020.
[54] John B. Allcock, 'The First Yugoslavia' (*Encyclopædia Britannica,* 22 February 2019) <https://www.britannica.com/place/Yugoslavia-former-federated-nation-1929-2003#ref228361> accessed 8 September 2020.

aside, with the result of many members of oppositional formations being forced to leave the SFRY.[55]

After the death of Tito in 1980, there was no clear successor and the Communist Party of SFRY introduced a rotating collective presidency, named the '*Presidency of Yugoslavia'*, with each republic being represented by one member. The position as President of the Presidency was limited to a term length of one year, after which he or she would be replaced by a new president from another republic.[56]

By the beginning of the end of communism in eastern Europe, starting with the fall of the Berlin Wall in 1989, the wind of change started to blow over the political life of the SFRY. In 1990, the first multi-party elections were held. In Slovenia, Croatia and Bosnia and Herzegovina, so-called 'national parties', with the aim of independence of their respective republics gained power. On the 25th of June 1991, the Republic of Slovenia and the Republic of Croatia declared their independence from the SFRY. On the 1st of March 1992, the Republic of Bosnia and Herzegovina followed the path of Slovenia and Croatia. What followed was break-up of SFRY and wars broke out in Slovenia, Croatia and Bosnia and Herzegovina.[57]

The independence war in Slovenia lasted ten days, between the 27th of June and 7th of July 1991, ending with the signing of the Brioni Declaration between the newly formed Republic of Slovenia and the SFRY.[58] The independence wars in Croatia and Bosnia and Herzegovina started on the 31st of March 1991 and on the 6th of March 1992, respectively.[59] Both wars ended simultaneously through the signing of the Dayton Peace Agreement on the 14th of December 1995, due to the international pressure put on what remained of Yugoslavia (renamed the '*Federal Republic of Yugoslavia'* and later renamed '*State Union of Serbia and Montenegro'*).[60]

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[55] Ivo Banac, 'Josip Broz Tito' (*Encyclopædia Britannica,* 4 May 2020) <https://www.britannica.com/biography/Josip-Broz-Tito> accessed 9 September 2020.

[56] John R. Lampe, 'The Second Yugoslavia' (*Encyclopædia Britannica,* 22 February 2019) <https://www.britannica.com/place/Yugoslavia-former-federated-nation-1929-2003#ref228362> accessed 9 September 2020.

[57] United States Department of State '*The Breakup of Yugoslavia, 1990-1992'*. (Office of the Historian, Foreign Service Institute 2016) <https://history.state.gov/milestones/1989-1992/breakup-yugoslavia> accessed 14 September 2020.

[58] 'Slovenia's Ten-Day War' (*The Slovenia Times*, 24 June 2004) <https://sloveniatimes.com/slovenia%E2%80%99s-ten-day-war/> accessed 10 September 2020.

[59] 'Timeline: Break-up of Yugoslavia' (*BBC News*, 22 May 2006) <http://news.bbc.co.uk/2/hi/europe/4997380.stm> accessed 10 September 2020.

[60] Bill Clinton, *'Dayton Accords'* (*Encyclopædia Britannica,* 27 June 2013) <https://www.britannica.com/event/Dayton-Accords> accessed 14 September 2020.

2.2 Bay of Piran

2.2.1 Slovenia's claims

The Slovenian-Croatian maritime border dispute largely takes place in the Bay of Piran/Savudrija (henceforth referred to by its English name '*Bay of Piran'*). The Republic of Slovenia has claimed the Bay of Piran to be fully under Slovenian sovereignty. The Slovene side bases its claims on the second paragraph of article 15 of UNCLOS, which was agreed in the *Drnovšek-Račan Agreement* from 2001, signed by the then-prime ministers of the two States. Nevertheless, the Croatian Parliament chose not to ratify the agreement. The article states, in its first paragraph, that an equidistance line shall be drawn between two States with opposite or adjacent coasts, which the two States have. In other words, the line shall be drawn from the baselines of the territorial sea[61]. In that case, the border would be draw in the way that both States would equally share the bay. However, even though Slovenia acknowledges the equidistance principle to be a commonly accepted rule, it does not consider it to be the only principle available for delimitation of maritime borders.[62]

Instead, Slovenia put forth two claims at the Arbitration Tribunal. Firstly, the Bay of Piran was to be considered as a 'historic bay'. In their view, the Treaty of Osimo from 1975[63] (SRFY-Republic of Italy), recognized it as a historic bay and part of the internal waters of SFRY. This was based on the official charts of the treaty, which show that the bay was closed across the mouth of the bay. Thus, the bay was to be considered as a part of the internal waters of the Socialist Republic of Slovenia.[64] Slovenia claimed that since the SFRY was a signatory party to the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, the bay was to be considered as internal waters of the former State, through having the status of being a historic bay, in accordance with article 7 of the named convention. Therefore, Slovenia claimed to have inherited the sovereignty over it.[65]

Secondly, Slovenia claimed that it had complete jurisdiction, both prior (from 1975) and after independence (since 1991), over the bay. This by having economic and police control over the bay. In their view, the bay was considered a part of the Socialist Republic of Slovenia and hence, it should fall under Slovenian sovereignty.[66] They based the claim on article 15(2) in UNCLOS 1982 which states that the first paragraph of the article (i.e. the application of the principle of equidistance) is not applicable if a bay can be considered to be a historic bay.[67]

[61] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 1 November 1994) 1833 UNTS (Henceforth 'UNCLOS') Article 15(1); Tanaka 256.
[62] The *Croatia/Slovenia* Arbitration Award 294, para. 954.
[63] Section 1.1.1, 'Border Dispute with the Republic of Slovenia'.
[64] The *Croatia/Slovenia* Arbitration Award 246, para. 782.
[65] The *Croatia/Slovenia* Arbitration Award 245, para. 779.
[66] Ibid 244, para. 774-775.
[67] UNCLOS article 15(2).

Furthermore, Slovenia argued that delimitation must be based on the legal principle of '*uti possidetis'*.[68] The principle is considered to be a well-established principle within international law, and roughly translates to 'as you possess'. Slovenia claimed that the bay constituted internal waters of SFRY and the Socialist Republic of Slovenia prior to the break-up of the country.[69] In their view, Slovenia had always had the *de jure* possession and control over the bay, both prior and after independence. However, due to Croatia's contesting, *de facto* right to and over the bay remained obscure.

Regarding the Slovenian junction to the high seas over Croatian territorial waters, the Slovenian side put forth claims that a State has the right to a corridor that would link their territorial sea to the high seas. According to Slovenia, the sole principle '*right of innocent passage'*[70] for Slovenian vessels through Croatian territorial waters could not be considered as an adequate guarantee, since Slovenia would be subject to Croatian national legislation, procedures and restrictions. In their view, Croatia would have the right to temporarily suspend passage and hinder maritime traffic to and from Slovenian shores and harbours. Thus, the rights of Slovenia as a maritime State would be limited, and would heavily rely on Croatia's goodwill. Therefore, Slovenia based its claims to a maritime junction across Croatian territorial waters on the necessity for Slovenia's economic, security and safety interests.[71]

2.2.2 Croatia's claims

The Republic of Croatia claims that the maritime border should be drawn in accordance with the principle of equidistance, i.e. the two States should draw a median line across the middle of the bay. Furthermore, the Croatian side views the several claims of Slovenia to be contrary to established regulations and principles of international maritime law.[72]

In Croatia's view, the thought of the Bay of Piran being internal waters of any State is out of question, since the bay was no longer in the possession of one common State (as was the case prior to 1991), but now being shared by two States. Thus, Croatia found it impossible to view the bay as internal waters of any State. Instead, Croatia claims that the bay should be regarded as territorial waters of both State, and in the arbitration, they opted for a maritime border delimitation made in accordance with the principle of equidistance.[73] Furthermore, Croatia also claims that the SFRY never recognized the bay as internal waters of the former State.

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[68] PCA, 'Press Release – Arbitration between the Republic of Croatia and the Republic of Slovenia' (*The Hague*, 29 June 2017) 6 (Henceforth '*PCA Press Release'*) <https://www.pcacases.com/web/sendAttach/2175> accessed 2 October 2020.

[69] 'Uti Possidetis Law and Legal Definition' (*USLegal*, 2020) <https://definitions.uslegal.com/u/uti-possidetis/> accessed 2 October 2020.

[70] *'Right of innocent passage'* is a well-established principle within the international maritime law, meaning that vessels of one flag-state has the right to traverse and navigate the territorial waters of a second state continuously and expeditiously. The right is treaty-based, generally recognized and implemented due to its importance for the freedom of trade. The principle dates back to the 1930s and has been incorporated into the TSC 1958, and later in UNLOSC 1982.

[71] The *Croatia/Slovenia* Arbitration Award 329, para. 1030.

[72] Avbelj, Lentar Černič 6:6 and 6:10.

[73] PCA Press Release (n 68) 7.

Here, Croatia opposed the claims of Slovenia that official charts showed a closing line being drawn across the mouth of the bay, after the signing of the 1975 Osimo Treaty.[74] Moreover, Croatia argued before the Arbitration Tribunal, that it was in fact the former and common Yugoslav State (which both were a part of) that exercised police and economic control in the bay, and not the Socialist Republic of Slovenia. Hence, Slovenia could not claim a historic title, since the modern-day Slovenian State has only existed since 1991. In Croatia's view, this was Slovenia's attempt to circumvent historical facts.[75]

Croatia also disputes the claims of Slovenia to a maritime junction across Croatian territorial waters. According to Croatia, throughout the time that both States have been independent, there has not been any disruptions of Slovenia's right to access the high seas through Croatian territorial sea. During the war in Croatia (1991-1995), no Croatian institution suspended the right of innocent passage for Slovenian vessels. In the view of Croatia, the reasoning behind Slovenia's claim to a maritime junction was unnecessary and unjustified. This due to Slovenia's right to access the high seas, right of innocent passage and future economic development was not dependent on Croatia's goodwill, since Slovenia already have all the rights guaranteed through international treaties and conventions, which both States are parties to.[76]

Furthermore, Croatia argued that both States are members of the EU. Since the core principle of the EU is the free movement of goods, capital, services and labour, and the territorial seas of Croatia and Slovenia are both subject to EU legislation, Slovenia should not worry about the possibility of Croatia preventing its economic development and vice versa. Regarding Slovenia's claims to the junction based on security reasons, both States were at the time, and still are members of NATO. Hence, Croatia claimed that both are supposed to jointly uphold security in the northern Adriatic Sea.[77]

2.2.3 The Arbitration Tribunal's Final Award

In 2009, the governments of Croatia and Slovenia signed the 'Arbitration Agreement', where the two sides expressed their willingness to solve the issue of maritime border delimitation within the Bay of Piran. Hence, an *ad hoc* Arbitration Tribunal was set up by the PCA.[78] The tribunal was partly asked to determine where the maritime boundary in the Bay of Piran would be drawn. Furthermore, the Tribunal was tasked with assessing the prospects of Slovenia to gain a junction to the high seas, without passing through Croatian maritime waters.[79]

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[74] The *Croatia/Slovenia* Arbitration Award 246, para. 784 and 787.
[75] Ibid 258, para. 829-830.
[76] Ibid 332, para. 1036-1037.
[77] The *Croatia/Slovenia* Arbitration Award 332, para. 1038.
[78] Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia (Slovenia-Croatia) (Stockholm, 4 November 2009) article 1, available at <https://pcacases.com/web/sendAttach/2165> [Official English Version].
[79] Ibid article 3(1a-b).

Regarding the Bay of Piran, the Tribunal found that the bay itself had been declared as internal waters by SFRY according to national legislation in 1987. It was also concluded that there was no requirement to draw a closing line across the mouth of the bay under the Geneva Convention on the Territorial Sea and the Contiguous Zone 1958, in order for a bay to be considered as internal waters of a State. Nevertheless, the Tribunal acknowledged that such a provision has been included in UNCLOS, but since the convention only came into force in 1994 and the SFRY ceased to exist in 1991, the provision was found to be irrelevant. Hence, the bay was found to be a historic bay on the 25 June 1991, the day of independence of Slovenia and Croatia. This was in favour of Slovenia's claims.[80] The Tribunal made reference to the ICJ case '*Case Concerning Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras/Nicaragua), commonly referred to as '*Gulf of Fonseca Case'* from 1992, where it was concluded that a bay that once was a part of one State, but due to historical events came to be shared by two or more States, may keep its status as a historic bay and constitute internal waters.[81]

The Tribunal went on to delimit the bay between the two States. It was found that no delimitations within the bay had been made during the rule of the SFRY. In order to decide upon the matter, the Tribunal had to analyse what legal regulations were in force prior to the independence of the two States. The Tribunal concluded that the bay and the land area situated in its proximity was of greater importance to Slovenia than to Croatia. The Slovenian side had several thousand inhabitants. Their primary occupation includes fishing and agricultural work. On the other side, the Croatian part of the coast was largely deserted with no permanent settlements.[82] Hence, the Tribunal concluded, in accordance with the principle of *uti possidetis*[83], that Slovenia had had consecutive possession over the area, due to the presence of developed infrastructure both along the coast and in the bay. The Tribunal took into consideration that the Socialist Republic of Slovenia had enacted several legislative laws in order to regulate fishing activity within the bay throughout the second half of the 1900s. On the other hand, no institution of Socialist Republic of Croatia had neither shown any major presence in the bay, nor on the land close to it.[84]

Slovenia has also, after independence, conducted marine scientific research within the whole bay through the Marine Biology Station in Piran. The Tribunal concluded that even though Croatia has claimed the southern part of the bay, it never disputed the Slovenian scientific research within it, despite being aware of such activity.[85] Thus, the Tribunal concluded that Croatia never exercised its jurisdiction within the bay, but only formally claimed it to be a part of its sovereign territory.[86]

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[80] The *Croatia/Slovenia* Arbitration Award 271, para. 877-878.
[81] Ibid 272, para. 885
[82] Ibid 274, para. 890.
[83] See section 2.2.1, 'Slovenia's claims'.
[84] The *Croatia/Slovenia* Arbitration Award 274, para. 899.
[85] Ibid 279, para. 911 and 912.
[86] Ibid 279, para. 912.

The Arbitration Tribunal concluded in the Final Award, based on the evidence put forth by the respective parties, that Slovenia did have more convincing arguments to gain the majority of the bay, based on the principle of *uti possidetis*. Hence, the Tribunal found that the maritime border would start from the southern St Odoric Canal[87]. Through this, the land strip between the canal and the Dragonja River, which is inhabited by a Slovene majority, was decided to be a part of Slovenia.[88] As for the delimitation itself within the bay, Slovenia was granted three-quarters of the northern part and Croatia was granted one-quarter of the southern part of the bay.[89]

The Tribunal went on to decide if the equidistance line could be used for border delimitations from the mouth of the bay, into the Adriatic Sea. Due to Slovenia's coastal configuration facing north-west towards the Gulf of Trieste, and Croatia's costal configuration generally facing south-west, apart from the coast adjacent to the Bay of Piran, the Slovenian territorial sea would be 'boxed-in'.[90] Hence, applying a strict equidistance line would generate more maritime area for Croatia due to the fact that the relatively short coastal strip along the bay is geographically facing north. However, the Tribunal found that the coastal strip heavily deviates from its mostly south-west facing coastal configuration.[91] In conclusion, Slovenia's territorial sea would be cut off from accessing the high seas and also boxed-in between the territorial seas of Italy and Croatia. Thus, the Tribunal concluded that the line of equidistance out into the Gulf of Trieste should be drawn from the 'Cape Savudrija', which is the southern entrance point of the bay, but Croatian territory, in accordance with the ICJ 1969 '*North Sea Continental Shelf Case'*.[92] The tribunal acknowledged that the mentioned case concerned the delimitation of a continental shelf, and not the territorial sea of any State. Nonetheless, the tribunal found that the concept of 'natural prolongation' could equally be applied in cases concerning the delimitation of the territorial sea.[93]

Moreover, the Tribunal was tasked to examine the Slovenian 'junction' to the high sea. It concluded that the territorial sea of Slovenia was in-between the territorial seas of Italy and Croatia, and at no point does it connect to international waters.[94] The Tribunal showed significant understanding for Slovenia's claims, based on economic, navigational and safety interests, that ships travelling to and from Slovenia should be able to do so without any risk of Croatian interference. The junction was decided to be 2.5 NM wide, situated across Croatian territorial sea, in-between the line that constitutes the maritime border between of Italy and Croatia.[95] The Tribunal however, did not grant Slovenia the junction as a part of its territorial sea, but rather a junction through which ships and aircrafts going to and from Slovenian ports

[87] See '*Appendix 1'*; The *Croatia/Slovenia* Arbitration Award 279, para. 913.
[88] The *Croatia/Slovenia* Arbitration Award 307, para. 991.
[89] See 'Appendix 3'.
[90] The *Croatia/Slovenia* Arbitration Award 318-319, para. 1011.
[91] Ibid 321, para. 1012.
[92] Section 3.2.5.1, 'Coastal Configuration' for further information concerning the ICJ 1969 *'North Sea Continental Shelf Case'*.
[93] The *Croatia/Slovenia* Arbitration Award 318, para. 1008.
[94] Ibid 344, para. 1078.
[95] Ibid 345, para. 1083.

could freely traverse. The decision was based on the principle 'Freedom of Communication', which includes the right of navigation and overflight.[96] Slovenia was not granted the freedoms that usually are included in a State's sovereign rights in their respective maritime areas, as it is only to be used as transit passage. Hence, Slovenia does not have the right to exploit and explore the area for natural resources.[97]

2.3 The Neum Corridor

2.3.1 Neum Agreement

The negotiations leading up to the 1999 'Neum Agreement' (BiH-Croatia) included several issues that needed to be resolved. Worth mentioning is that, during the rule of the SFRY, there were no significant problems between the Socialist Republic of BiH and Croatia, respectively. But since the border between the two, post-1991, were declared as international borders, several issues arose that needed to be addressed.[98] Before addressing the agreement, it is necessary to understand how the two newly independent States found themselves in a drastically different legal situation.

The origins of the border disputes are more or less of geographic nature. The BiH city of Neum, by the Adriatic Coast, is dividing the Croatian land territory in two parts. At the same time, the maritime area of BiH is surrounded by Croatia, which means that ships travelling to and from BiH, must pass through Croatian internal and territorial waters en route to the high seas. Thus, ships to and from BiH are subject to Croatian laws and regulations. Neum does not hold a harbour and BiH has historically been dependent on the Croatian port in Ploče. Furthermore, the Peljesac Bridge, in the proximity of the maritime border between the two States, is currently being built to connect the two parts of Croatia.[99]

According to the 1999 Neum Agreement, the border between the two States was based on the Badinter Arbitration Commission (full name '*Arbitration Commission on the Peace Conference on Yugoslavia*') held at the beginning of the dissolution of the SFRY in 1991. The Badinter Arbitration Commission was set up by the predecessor of the EU, the European Economic Community (EEC), which consisted of five constitutional judges from France, Germany, Italy, Spain and Belgium, whom were tasked with providing legal opinion regarding the dissolution of the former SFRY.[100]

In 'Opinion 3' of the Badinter Commission, it was concluded that the already existing borders between the republics within the SFRY were to be considered as international borders after independence, in accordance with the principle of '*uti possidetis'*. Any changes of borders,

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[96] Ibid 360, para. 1123.
[97] Ibid 361, para. 1126.
[98] Šabić, Borić (n 5) 2.
[99] Ibid 5.
[100] Alain Pellet, 'The Opinions of the Badinter Arbitration Committee – A Second Breath for the Self-Determination of Peoples' (1992) 3 European Journal of International Law 178 <https://www.researchgate.net/publication/31333779_The_Opinions_of_the_Badinter_Arbitration_Committee_A_Second_Breath_for_the_Self-Determination_of_Peoples> accessed 10 October 2020.

were to be made in accordance with future agreements between the States.[101] Since Neum and the Dubrovnik-Neretva Country exclave had been a part of the Socialist Republics of BiH and Croatia respectively, and under separate jurisdiction for the entirety of SFRY, it was concluded that no unilateral changes to the borders would be made after independence. Furthermore, the borders between BiH and Croatia were reaffirmed once again after the signing of the Dayton Peace Accords in 1995, which ended the war in the two countries.[102] Since the border remained the same, but the legal framework the two States are different, there was a need to resolve the issues mentioned above, that displayed themselves in the years after the end of the wars. The Neum Agreement aimed to resolve the border problems related to the Neum Corridor. As a part of the broader picture, apart from the problem of road transit between two parts of Croatia, the dispute with BiH also includes the questions of border delimitation at sea between the two States and the status of the islands *Veliki* and *Mali Školj*.[103] Worth mentioning, is that the Neum Agreement was the first independent treaty regarding border delimitations made between States that have been a part of the SFRY.[104]

2.3.2 Klek Peninsula

The agreement aimed to resolve the situation in the maritime border region between Croatia and BiH, which include several legal problems. The Klek Peninsula is a part of Bosnia and Herzegovinia's roughly 24 km long coast. But due to the State's coastal configuration, its maritime border with Croatia only measures up to 10 km. In the Neum Agreement, it was decided that the maritime delimitation would be made in accordance with the equidistance principle.[105]

During the negotiations, the parties based the land border delimitation on the SFRY '*Act on State Survey and Real Estate Cadastre'*, set up in 1974 by the former Assembly of SFRY. In the act, the whole peninsula was registered and declared as a part of the Socialist Republic of BiH. Both parties agreed that delimitation would be made in accordance with the records shown in the cadastre of SFRY.[106] Cadastral law is the legal method through which public authorities hold record of ownership over a specific part of land.[107]

However, the Croatian Dubrovnik-Neretva County, which is split in a northern and southern part by the Neum Corridor, opposed the treaty. The assembly of the county, which had not been involved in the negotiations leading up to the agreement, found the border delimitation set out in the agreement as incompatible. The very tip of the peninsula (Bos. Cro. '*Vrh Kleka'*) had historically been a part of the Republic of Ragusa (later the Republic of

[101] Ibid 185.
[102] Šabić, Borić (n 5) 3.
[103] Klemencic (n 38) 97.
[104] Šabić, Borić (n 5) 4.
[105] Ibid 5.
[106] Ibid.
[107] 'Cadastral Law and Legal Definition' (*USLegal*, 2020) <https://definitions.uslegal.com/c/cadastral/> accessed 11 October 2020.

Dubrovnik, and now the Republic of Croatia).[108] Representatives of the county claimed that both the land and maritime border delimitation could not be based on status quo borders, but had to be made in accordance with the historical context. Nevertheless, since the end of the World War II, BiH has had the *de facto* and *de jure* control over the peninsula.[109]

Representatives of the Dubrovnik-Neretva County claimed that if the proposed treaty was put up for debate in the Croatian Parliament (Cro. '*Sabor'*), it would be regarded as a constitutional issue. According to them, the Neum Agreement included the topic of border changes, which would mean that the sovereignty and territorial integrity of the Croatia would be jeopardized, in accordance with article 2 of the Constitution of the Republic of Croatia.[110] Worth mentioning is that the tip of the Klek Peninsula is not connected to any part of Croatian land territory, and any transport to the tip by road would have to pass through BiH territory. Nevertheless, the tip would be accessible from the rest of Croatia by sea.[111]

2.3.3 Veliki and Mali Školj

The Channel of Mali Ston (Bos. Cro. '*Malostonski Zaljev'*) is located between the Croatian Peljesac Peninsula, and the BiH Klek Peninsula. In the channel, two small and uninhabited islets are located, named Veliki and Mali Školj (lit. Big and Small Školj). Geographically, the islets are located closer to the BiH Klek Peninsula, than they are to the Croatian Peljesac Peninsula. During the negotiations leading to the Neum Agreement, it was concluded that the delimitation between BiH and Croatia would be made in accordance with the equidistance principle. Since the islands are closer to BiH, than they are to Croatia, they were considered to be within the territorial sea of BiH and under its sovereignty.[112] Furthermore, the SFRY 1974 '*Act on State Survey and Real Estate Cadastre'* defined the islands as being a part of the Socialist Republic of BiH. However, the Dubrovnik-Neretva County also objected this move, in the same protest note directed to the Croatian Parliament regarding the tip of the Klek Peninsula and claimed that the islands belonged to Croatia.[113]

2.3.4 Aftermath and legal situation post-1999

The Neum Agreement was officially signed by the Presidents of BiH and Croatia on the 8th of December 1999.[114] However, due to the objections from the Croatian Dubrovnik-Neretva County, the Croatian Parliament decided not to ratify the Neum Agreement. Objections were also raised on the BiH side, due to domestic disagreements regarding the land border with

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[108] Šabić, Borić (n 5) 6.
[109] Klemencic (n 38) 99.
[110] Šabić, Borić (n 5) 6; 'Consolidated Version of the Constitution of the Republic of Croatia 2010 article 2, para. 2 and 3 <https://www.wipo.int/edocs/lexdocs/laws/en/hr/hr060en.pdf> [Unofficial English Version] accessed 11 October 2020.
[111] See 'Appendix 4'.
[112] Šabić, Borić (n 5) 5.
[113] Ibid 6.
[114] Sporazum o slobodnom tranzitu kroz teritorij Republike Hravtske u i iz luke Ploče i kroz teritorij Bosne i Hercegovine u Neumu 1999, Official Neum Agreement (In Bos. And Cro.) <http://www.komorabih.ba/wp-content/uploads/2019/01/odluka-hrvatska-neum_2-01.pdf> accessed 11 October 2020.

Croatia along the river Una in northern BiH, in the proximity of the Croatian city of Hrvatska Kostajnica and the BiH city of Kostajnica.[115]

Due to this, both States failed to ratify the Neum Agreement. There have been no further negotiations regarding the border disputes in relation to the Neum Corridor. Nevertheless, both BiH and Croatia have applied provisions from the treaty and no confrontations have taken place between the parties in the area around Neum. However, a final solution to the maritime border delimitation still yet to be agreed upon, since the claims from 1999, of both States, remain the same.[116] The major issue for BiH is the fact that SFRY never made any delimitations of the internal waters between the former socialist republics, since they were all a part of a common State. The use of straight baselines[117] was established by the Yugoslav State in 1970.[118] After the independence of the Republic of Croatia, the internal waters remained unchanged, and has ever since surrounded the territorial waters of the BiH. Thus, sea access to Neum, BiH, is only possible by passing through the internal waters of Croatia.[119] During the 2000s, the two parties showed signs of willingness to settle the dispute in an *ad hoc* arbitration tribunal, similar to the procedure that took place between Slovenia and Croatia.[120] Nevertheless, as of today, there has not been any progress regarding a final settlement between the two States since 1999.[121]

2.3.5 Peljesac Bridge

In the Neum Agreement from 1999, two provisions of the treaty are of interest. The main reason for the negotiations taking place were the infrastructural, road- and business-related issues that both parties faced. For Croatia, the aim was to achieve an undisturbed and unhindered flow of traffic between its two separated parts of land territory, through BiH. For BiH, it was important to gain undisturbed and unhindered access to the Croatian Port of Ploče, since Neum does not hold a port of its own, in order to export and import goods originating from BiH.[122] The provision guaranteeing the rights recently mentioned, are found in article 2 of the Neum Agreement. Furthermore, according to article 3, the parties agreed not to collect tolls, taxes and other charges from vehicles or ships in transit through Neum and the Port of Ploče.[123]

As mentioned, the treaty was negotiated in 1999 and it has not been ratified nor entered into force to this day. The hope of undisturbed and unhindered passage between the two parts of Croatia, as defined in the Neum Agreement, has not become a reality since border checks are

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[115] Klemencic (n 38) 98.
[116] Šabić, Borić (n 5) 7.
[117] Definition of *'Straight Baselines'*, see section 3.2.5.3.
[118] US State Department, *'Yugoslav Straight Baselines'* (1970) International Boundary Study Series A No. 6 <https://www.state.gov/wp-content/uploads/2019/10/LIS-6.pdf> accessed 26 November 2020.
[119] Flanders Marine Institute (2019). '*Maritime Boundaries Geodatabase: Internal Waters'*, version 3 <https://www.marineregions.org/gazetteer.php?p=details&id=49472> accessed 26 November 2020.
[120] See section 2.1, 'Historic Overview' 11.
[121] Šabić, Borić (n 5) 7.
[122] Ibid 5.
[123] Neum Agreement 1999 articles 2 and 3.

carried out by both Croatian and BiH border control when passing through the Neum Corridor.[124] The accession of Croatia to the EU and NATO has led to a drastically changed geopolitical situation in the area, as BiH remains an aspiring candidate for membership in the two organisations. This has been the main incentive for Croatia's desire to build a road bridge which would connect the two parts of Croatia, bypassing Neum and BiH.[125]

The history behind the project 'Peljesac Bridge' was for the first time raised by members of the Croatian Parliament from the Dubrovnik-Neretva County in 1997. In 2000, the Croatian Government at that time, decided that the bridge would be built, since the Neum Agreement with its provisions was not considered as a viable and acceptable option. However, the building of the bridge has been controversial.[126]

The Peljesac Bridge is currently being built just north of Neum, on the Croatian side, across the Channel of Mali Ston, to the Croatian Peljesac Peninsula. The peninsula is connected to the southern part of Croatia that is separated by Neum, BiH.[127] The construction of the bridge has raised concerns in BiH, due to the fact that the only seaway in and out of Neum is through the Channel of Mali Ston, across which the bridge is currently being built. Prior to the commencing of the construction, BiH officials argued that the bridge would prevent sea access to Neum. The first projection of the bridge concluded that the bridge would be 35 meters high, but due to complaints from BiH, this was later modified to 55 meters in height.[128]

In 2017, the European Commission decided to grant Croatia funds of up to 357 million euros, which is approximately 85 % of the project's total cost and is a part of the EU's regional policy for development. The EU supports the Croatian cause of connecting its two parts of territory, as Croatia aims to become a member of the Schengen Area. The bridge is seen as an infrastructural project which will facilitate trade and tourism, as well as fully connecting Croatia with itself.[129] In contrast, the BiH side has opposed the building of the bridge due to the fact that the maritime border between the States in the Neum area has not been settled, since the Neum Agreement has never been ratified. BiH also claims that the bridge is being

[124] Šabić, Borić (n 5) 5.
[125] Ibid.
[126] Krešimir Žabec, 'Nikad ispričana priča o Pelješkom Mostu: Tri puta živio, tri puta umro, tri vlade mučio je gradnjom. Opet je oživio' (*Jutarnji List*, 24 August 2011) <https://www.jutarnji.hr/vijesti/hrvatska/nikad-ispricana-prica-o-peljeskom-mostu-tri-puta-zivio-tri-puta-umro-tri-vlade-mucio-je-gradnjom.-opet-je-ozivio-1815171> accessed 13 October 2020.
[127] 'Croatian PM Happy with Progress of Peljesac Bridge Construction' (*ChinaDaily*, 27 May 2020) <http://global.chinadaily.com.cn/a/202005/27/WS5ecdc9aba310a8b241158c1e.html> accessed 14 October 2020.
[128] Danijel Kovacevic 'Croatia Rejects Bosnian 'Threats' over Peljesac Bridge' *BalkanInsight* (Banja Luka, 7 August 2017) <https://balkaninsight.com/2017/08/07/croatia-rejects-bosnian-threats-over-peljesac-bridge-08-07-2017/> accessed 14 October 2020.
[129] 'Commission Approves EU Financing of the Peljesac Bridge in Croatia' (*European Commission*, 7 June 2017) <https://ec.europa.eu/regional_policy/en/newsroom/news/2017/06/06-07-2017-commission-approves-eu-financing-of-the-peljesac-bridge-in-croatia> accessed 14 October 2020.

built within its territorial waters and that its rights as a maritime State to access the high seas would be limited if the bridge is built.[130]

BiH has consistently claimed that Croatia needs approval from BiH in order to build the bridge. However, Croatia has never asked for the permission of BiH, since it is considered a domestic question. In BiH's view, the construction is seen as a violation of its rights according to UNCLOS. Nevertheless, Croatia has still made modifications of the bridge, to be in accordance with some of the requests coming from BiH. For instance, the height of the bridge was modified by additional 15 meters, and the pillars of the bridge are being placed every 200 meters, in order for ships to be able to enter Neum and BiH.[131]

Furthermore, ships traveling to and from BiH, must still pass through Croatia's internal waters when en route to international waters, where the regime of 'innocent passage' of foreign ships does not have to be tolerated. However, Croatia has said that its straits hold international status, which effectively means that vessels going to Neum have the right to freely navigate in Croatian waters. Thus, the claims of BiH, that its right to access the high seas has been deemed by Croatia as irrelevant to stop the construction of the bridge.[132]

As of 2020, the construction of the Peljesac Bridge is on-going, and it is expected to be opened by summer 2022.[133]

2.4 The Prevlaka Peninsula

The Republic of Croatia and the State of Montenegro share a land-border with a length of only 16 km. The Prevlaka Peninsula is Croatia's most southern tip. From 1992 until 2002, UN peacekeeping troops held presence on the peninsula. The position of the peninsula is of strategic importance, since it is in the proximity of the Bay of Kotor (BCMS. *Boka Kotorska*), which houses one of Montenegro's major harbours. Having been a demilitarized area, but claimed by both the FRY and Croatia, it was reintegrated under the jurisdiction of Croatia in 2002.[134] During the beginning of the war in Croatia (1991-1995) the Prevlaka Peninsula was the scene of intense fighting between the Croatian and the SFRY armies.[135]

2.4.1 A Temporary Solution

The '*Temporary Protocol between Republic of Croatia and Federal Republic of Yugoslavia (Serbia and Montenegro)*' was signed on the 10th of December 2002. The name states that it is

[130] Kovacevic, (n 128).
[131] Vedran Pavlic, 'Bosnia Determined to Stop Peljesac Bridge Construction' (*TotalCroatiaNews*, 5 August 2017) <https://www.total-croatia-news.com/politics/20989-bosnia-determined-to-stop-peljesac-bridge-construction> accessed 14 October 2020.
[132] Šabić, Borić (n 5) 5.
[133] Jack Parrock, 'Much-delayed €420m Bridge to Connect Croatia back on Track' (*Euronews*, 30 July 2019) <https://www.euronews.com/2019/07/30/much-delayed-420m-bridge-to-connect-croatia-back-on-track> accessed 14 October 2020.
[134] Bach (n 44).
[135] Šabić, Borić (n 5) 8.

only temporary and that the issue will have to be addressed at one point in the future, in order to reach a final settlement over the delimitation of the maritime border. Worth mentioning is that there has not been any major incident between the two States since the signing.[136] The reason for the temporary agreement being signed was primarily to normalize relations between Croatia and FRY. This step was widely seen as important for the whole stability of the Western Balkans. Furthermore, the border between Croatia and Montenegro is in the middle of many historical and touristic points, which has further contributed to economic development on both sides of the border.[137]

The State of Montenegro declared its independence from Serbia and Montenegro (previously '*FRY'*) in 2006. This event changed the character of the border dispute. Croatia and Montenegro have maintained good bilateral relations and widely consider each other as good neighbours. Both States share a similar vision regarding the future of the ex-Yugoslav countries and their membership within the EU and NATO.[138] However, the Temporary Protocol is set to be in force until the two sides reach a final and permanent agreement regarding the maritime border delimitation. As of 2020, there is yet a need for the two neighbours to agree on a permanent solution regarding the maritime border.[139]

2.4.2 The Bay of Kotor

The dispute between Croatia and Montenegro concerns the maritime delimitation of the territorial sea in the proximity of the Prevlaka Peninsula, as well as the delimitation of the continental shelf in the Adriatic Sea. The peninsula is located at the entrance of the Montenegrin Bay of Kotor, which holds several major harbours, the Tivat Airport and two of Montenegro's major cities, Herceg-Novi and Kotor. Historically, the control of the entrance of the bay has been important for both parties. However, in modern times, both States have joined NATO, which has played-down the security concerns in the area, and has shifted focus on economic- and touristic-related reasons to find a solution.[140]

The 2002 Temporary Protocol, established a legal regime over and around the Prevlaka Peninsula and the entrance of the Bay of Kotor. The land territory was to remain temporarily as a part of Croatia. On the one hand, the surrounding waters, effectively at the entrance itself was to be shared by joint controls of both States. The main issue for Montenegro is that the control over the entrance of the Bay of Kotor is, according to the protocol, shared between the two States.[141] Croatia does not have any harbours, nor any significant population in the proximity of the peninsula. On the other hand, Montenegro has over 100 km of coastline within the bay, with several economic and security interests. Furthermore, around ten percent

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[136] Pavlic (n 3).
[137] Šabić, Borić (n 5) 8.
[138] Ibid.
[139] Arnaut 155.
[140] Ibid 156.
[141] Milena Milosevic 'Montenegro Acts to Solve Border Dispute with Croatia' *BalkanInsight* (Podgorica, 21 March 2013) (Henceforth '*Milosevic'*) <https://balkaninsight.com/2013/03/21/montenegro-to-form-commission-for-solving-prevlaka-dispute/> accessed 15 October 2020; See 'Appendix 5'.

of the total Montenegrin population live along the coastline that stretches along the shores of the Bay of Kotor.[142]

Furthermore, due to the fact that the protocol was signed in 2002, when the geopolitical situation in the area was drastically different than it is today, some provisions have lost its relevance today, primarily the security-related ones. The harbours in Montenegro have practically been transformed from previously holding naval ships, to house yachts instead, used primarily by tourists visiting the area. Nonetheless, maritime delimitation within the bay, and at its entrance, remains an open issue since the sovereignty at the entrance of the bay is divided. Namely, both States hold an equal number of shipping lanes, despite that more or less all shipping activity that takes place in the Bay of Kotor has Montenegro as its first or final destination.[143]

2.4.3 Border Delimitation of the Territorial Sea

The maritime area, adjacent to the Prevlaka Peninsula and the entrance of the Bay of Kotor, which in turn is considered to be the territorial seas of both the Republic of Croatia and the State of Montenegro, is rich in natural resources. However, the maritime border between the two States in the territorial seas is disputed, since the parties have not agreed on a suitable delimitation of the maritime border within the Bay of Kotor, from which the border is to be drawn from. This caused a smaller, but not insignificant, diplomatic dispute between the two States, when Croatia decided to explore and exploit the disputed area for oil and gas minerals in 2015.[144]

On the other hand, in Croatia's view, the maritime border between the two States, at the entrance of the Bay of Kotor, does not pose an issue. It has consistently claimed that the land borders between the ex-Yugoslav States shall remain the same as prior to 1991, and that the line of delimitation should be drawn just north-east of the peninsula, and then follow the equidistance principle out into the high seas. The peninsula was considered, at the time of independence, to be a part of the Republic of Croatia. Thus, relying on international maritime law, the Prevlaka Peninsula must generate territorial waters of Croatia, even if the Bay of Kotor is practically of greater legal, geographical and economical importance to Montenegro.[145] Nonetheless, Croatia states that it has both sovereignty and sovereign rights in a small part of the Bay of Kotor, and over its territorial waters, which currently overlap with the claims of Montenegro.[146]

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[142] Arnaut 156.
[143] Ibid.
[144] Samir Kajosevic, 'Montenegro Pushed for Arbitration over Prevlaka Dispute with Croatia' BalkanInsight (*Podgorica*, 5 October 2020) (Henceforth '*Kajosevic'*) <https://balkaninsight.com/2020/10/05/montenegro-pushes-for-arbitration-over-prevlaka-dispute-with-croatia/> accessed 15 October 2020.
[145] Ibid.
[146] Arnaut 159.

The State of Montenegro defined its claims over its proposed territorial sea in 2011 and again through national legislation on the 30th October 2014[147], which was regarded by Croatia as a deviation from the 2002 Temporary Protocol, resulting in a diplomatic protest note being sent to the Montenegrin government.[148] Currently, the two States have overlapping claims over a maritime area of roughly 1892 km^2.[149] The claim of Montenegro came roughly twelve years after the signing of the 2002 Temporary Protocol. The reason for this is primarily due to Montenegro's concern regarding the legal regime currently in place at the entrance of the Bay of Kotor.

Montenegro has also consistently rejected Croatia's claims to settle the maritime border according to the principle of equidistance. In their view, the use of the principle would result in an uneven share of territorial sea. The reason for this is the peninsula's south-eastern geographical position and would disproportionately favour Croatia.[150] Croatia's claims are similar to the ones that they presented at the *ad hoc* Arbitration Tribunal, regarding the dispute in the Bay of Piran.[151] Instead, Montenegro opts for a delimitation according to the principle of equity, which is also a recognized tool within international maritime law, based on proportionality.[152] The principle was first projected in the ICJ 1969 'North Sea Continental Shelf Case'. It takes into account the geographical features of a State's coastal configuration.[153]

2.4.4 International arbitration or a permanent bilateral agreement?

In 2008, the two States agreed that the border dispute would be settled through an international arbitration.[154] Moreover, in 2015, an inter-State commission was set up, with the goal to achieve a bilateral solution, but no further progress was made. In 2016, Montenegro's prime minister reaffirmed that the ICJ or any international court should mediate in the dispute, if no bilateral agreement is made. On the other hand, Croatia has since changed its position, due to the outcome of the Slovenian-Croatian arbitration in 2017. Therefore, they have been relatively reluctant to bring the case before an arbitration tribunal, and instead opted that the two States should solve the issue bilaterally.[155]

Montenegro fears that the dispute could bring complications to its negotiations with the EU for its aspired future membership in the organization. In other words, that its accession to the Union would be delayed or even prevented by Croatia. Namely, the European Commission

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[147] Vesna Barić Punda, Valerija Filipović, 'Protokol o privremenom režimu uz južnu granicu (2002.) s posebnim osvrtom na odluke vlada Republike Hrvatske i Crne Gore o istraživanju i eksploataciji ugljikovodika u Jadranu' [2015] Faculty of Law, University of Split, Vol 54, No. 169 73, 83 (Henceforth 'Barić Punda, Filipović') <https://hrcak.srce.hr/144389> accessed 20 September 2020 [in Croatian].
[148] Ibid 83, para 6.
[149] See 'Appenix 6'.
[150] Ibid.
[151] Section 2.2.3, 'The Arbitration Tribunal's Final Award' 18 (n 91).
[152] Arnaut 159.
[153] Tanaka 252-253.
[154] Milosevic (n 141).
[155] Kajosevic (n 144).

released a statement in 2018, where it made clear that potential members must solve its border disputes with current members of the Union.[156]

Nonetheless, the Temporary Protocol from 2002, is largely followed by both States, but it does not address the issue of a permanent maritime border delimitation in an adequate manner. How it is to be solved is yet to be decided either through a bilateral agreement or through the process of arbitration.[157]

2.5 Summary

The break-up of the SFRY during the 1990s has resulted in several border disputes between the now independent States. The Republic of Croatia is currently involved in border disputes with four out of its five neighbours. Three border disputes are taking place in the Adriatic Sea. The SFRY never made any maritime delimitations between its socialist republics, since the Yugoslav Authorities never regarded delimitation as an internal issue, due to the fact that the territorial waters in the Adriatic Sea was part of the same State. This has proved to have negative effects on the bilateral relations between the States. As of 2020, there are still no clear and settled border delimitations at sea between Croatia and its neighbours, Slovenia, BiH and Montenegro. The Slovene-Croatian maritime border is the only case which has been brought before international arbitration. Nonetheless, the Tribunals Final Award has not been recognized by Croatia, and the dispute is still on-going. As for the disputes between BiH and Montenegro, there have been bilateral negotiations and agreements, but neither of the two cases have resulted in a permanent maritime border delimitation. Thus, both disputes are still on-going, as of 2020. Currently, there are no projections of when, nor how the disputes can be settled since the involved States have largely overlapping and contradicting maritime claims.

3 Law of the Sea and Maritime Border Delimitations

In order to understand the maritime border disputes along the eastern coast of the Adriatic Sea and the legal questions related to them, it is important to put the disputes into the context of international maritime law. Firstly, this chapter provides a brief historic overview regarding the law of the sea, its principles upon which it rests and UNCLOS. Thereafter, it deconstructs treaty law and case law regarding maritime border delimitations, with primary focus on article 15 of UNCLOS. Thereafter, a presentation of several relevant and special circumstances is displayed, since they have proven to have significant effect on cases which have been brought before the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS).

3.1 Law of the Sea

3.1.1 Historic overview

Throughout history, mankind has used the oceans for a variety of reasons. In ancient Egypt, technological development led to widespread commerce of materials through shipping.

[156] Ibid.
[157] Šabić, Borić (n 5) 8.

Nonetheless, it was in Roman times that maritime jurisprudence made its first progression. Since the whole Mediterranean Sea was under Roman control, there was a need to uphold shipping as a means of transport within the Empire. But threats against ships and seafarers, such as looters were present in the Mediterranean, which created the need of a legal framework which would regulate conduct and prevent crimes at sea.[158]

As empires rose and fell, customary international maritime law remained. However, they were largely unwritten and generally needed further clarification. The first attempt to codify the law of the sea happened during *The Hague Conference for the Codification of International Law* in 1930. Even though the conference did not result in a binding treaty, the parties managed to recognize some of the most important principles of International Maritime Law, such as freedom of navigation, right of innocent passage and a State's territorial sovereignty over its territorial sea.[159] Despite that several international conferences were held throughout the 20th century, with the aim of codifying the customary international maritime law, it was not until the *Third UN Conference on the Law of the Sea*, which resulted in the *1982 Convention on the Law of the Sea* (henceforth 'UNCLOS').[160]

The creation of UNCLOS is considered to be the milestone in the long-sought codification process of the law of the sea. It is widely considered to be the first comprehensive treaty within the legal field, since it regulates a wide range of marine activities. The treaty also includes limits for the various maritime zones, which have historically been interpreted differently by States.[161]

3.1.2 The principles of the law of the sea

International law, and in particular international maritime law differentiates itself from national legislation, since international law heavily depends on States coming together and creating common obligations, that are to be generally applicable across different jurisdictions.[162] There are three legal principles within international maritime law, which are considered to be universally accepted.[163]

The *principle of freedom* is considered to be the fundament that has historically dominated the law of the sea. Freedoms that are incorporated into the principle are freedom of navigation, overflight, laying of submarine cables and pipelines, construction of artificial islands, fishing and marine scientific research. The history behind the principle stretches back to the end of the 15th century, when the Kingdoms of Spain and Portugal divided the oceans between themselves in a western and eastern part, respectively. The Dutch philosopher and jurist Hugo

[158] Nicholas Joseph Healy, 'Maritime Law' (*Encyclopædia Britannica,* 22 January 2020) <https://www.britannica.com/topic/maritime-law> accessed 20 October 2020.
[159] Tanaka 26-28.
[160] Ibid 32-33.
[161] L. Dolliver M. Nelson, 'Reflections on the 1982 Convention on the Law of the Sea' in David Freestone, Richard Barnes and David Ong *The Law of the Sea* (Oxford University Press 2006) 29.
[162] Tanaka 11.
[163] Ibid 22.

Grotius wrote the book *Mare Liberum* by the turn of the century. The book included the idea that the principle of freedom is necessary, in order to uphold the economic and political interests of maritime powers around the globe.[164]

The *principle of sovereignty*, together with the principle of freedom, are the two principles that have traditionally been of utmost importance for the law of the sea. Upholding sovereignty is of significant interest to any State, since it needs to protect its borders and territory. In the context of the law of the sea, the principle allows a coastal State to expand its sovereignty across its internal and territorial sea.[165] Under customary law and UNCLOS, a State can claim up to 12 NM of territorial sea, which falls under the sovereignty of the coastal State.[166]

The *principle of the common heritage of mankind* focuses on preserving the interests of the whole mankind, as opposed to the two former principles, which instead focuses on the interests of individual States. What is interesting regarding the discussion of 'mankind' in relation to the law of the sea, is that it has historically not been mentioned as a principle. Instead, it is considered to be a new factor that has gained importance during the past century.[167]

3.2 Maritime Border Delimitations

3.2.1 Overview

Maritime border delimitation is the process of establishing lines that are to separate and delimitate the territories of two or more States out in the sea. The reason why this kind of legal mechanism is important, is due to the fact that States may exercise its sovereignty and sovereign rights over their respective maritime areas.[168] Coastal States that are opposite or adjacent to each other, are to mutually decide over the maritime border delimitation. Hence, maritime border delimitations are often regulated through bilateral treaties, since States are expected to cooperate in order to draw and settle borders at sea. However, maritime border delimitations may also be of unilateral character. For example, if a coastal State's maritime claims do not overlap with another State, then such delimitations can be accepted if they are in line with international treaties and customary law.[169]

3.2.2 Treaty Law

International maritime law requires predictability.[170] Thus, maritime border delimitations have been regulated through several international treaties. According to 1958 Convention on the Territorial Sea and the Contiguous Zone (henceforth 'TSC') article 12, delimitations of

[164] Ibid.
[165] Ibid 24.
[166] Martin Dixon, Textbook on International Law (7th edition, Oxford University Press 2013) 220 (Henceforth 'Dixon').
[167] Tanaka 25-26.
[168] Ibid 236-237.
[169] Ibid 237.
[170] Ibid.

the territorial sea[171] are to be made in accordance with the equidistance principle, i.e. a median line shall be drawn between two States that are opposite or adjacent to each other. However, if a State claims that there are special circumstances or a historic title over a maritime area, exceptions can be made from the primary principle.[172] The TSC 1958 entered into force in 1964, and has 52 State parties, out of which 41 States are signatory parties to it. This includes the USA, the Russian Federation and several European States.[173]

According to article 1 of the TSC 1958, a State can extend its sovereignty beyond its land territory into its adjacent maritime area, i.e. territorial sea. Furthermore, a State also holds full sovereignty of the air space, seabed and subsoil over and within its territorial sea.[174] Through this, the State acquires full legal powers, equal to those it has over its land territory.[175]

United Nations Convention on the Law of the Sea 1982 came into force in 1994. It has 168 State parties to it, with 157 States as signatory members. Significant parties to the convention are the EU and its members, The People's Republic of China and The Russian Federation.[176] The USA is, however, not a party to the convention, since conservative powers in Washington D.C. have viewed UNCLOS as a treaty that would potentially undermine the sovereignty of the USA.[177]

In UNCLOS, provisions concerning maritime border delimitations are largely based on the TSC 1958, but with a few additions. In the TSC 1958, there were no specific provisions as for how far a State can claim its territorial sea, which has historically been considered controversial. For instance, Latin American States have previously claimed up to 200 NM, whereas the UK has claimed only three NM of territorial waters, which has made customary law and State practice somewhat obscure, at least until the creation of UNCLOS.[178]

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[171] Further information about the maritime area 'Territorial Sea' can be found in section 4.1 'Territorial Sea'.
[172] Tanaka 238-239.
[173] Convention on the Territorial Sea and the Contiguous Zone 1958 (*UN Treaty Collection*, 5 July 2013) (Henceforth 'TSC 1958') <https://archive.is/20130705155944/http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=XXI-1&chapter=21&lang=en> accessed 23 October 2020.
[174] TSC 1958 article 1-2.
[175] Dixon 220.
[176] United Nations Convention on the Law of the Sea 1982 (*UN Treaty Collection*, 23 October 2020. <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 23 October 2020.
[177] William Gallo *'Why Hasn't the US Signed the Law of the Sea Treaty?'* (Voice of America, 6 June 2016) <https://www.voanews.com/usa/why-hasnt-us-signed-law-sea-treaty> accessed 23 October 2020.
[178] Dixon 221.

3.2.3 The Principle of Equidistance

The principle of equidistance first emerged and was defined in article 6 of the TSC 1958[179], and entered into force in 1964.[180] In the official version of UNCLOS 1982, the same article was included under article 15.[181]

Article 15.1
Delimitation of the territorial sea between States with opposite or adjacent coasts

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured.[182]

According to UNCLOS, the primary legal rule is that maritime border delimitations are to be made in accordance with the equidistance principle, i.e. the line is to be measured through a median, which should be situated in the middle of two nearest points from the baseline (measured from the coasts of two or more States).[183] However, it is worth mentioning that the ICJ, in its many cases concerning maritime border delimitations, has not found the principle to be considered a binding rule within international maritime law, but rather a method that can be used in the court process and proceedings.[184] Furthermore, the ICJ views both article 6 in TSC 1958 and article 15 in UNCLOS 1982, to be a part of international customary law in cases concerning maritime delimitation disputes. This was highlighted in the '*Qatar/Bahrain Case'* 2001, where the court concluded that both provisions were considered as applicable, despite the fact that neither State was a party to the Treaty.[185]

Moreover, the principle has been widely used in State practice, since governments have found that drawing an equidistance line to be a reasonable starting point in maritime delimitation disputes. Such an approach has generally been supported by judges in the ICJ.[186] This kind of reasoning within the ICJ has come to be called the 'three stage result-oriented approach'. At the first stage, the court applies the principle of equidistance. If the end-result is found to be

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[179] Aké Lazare Abe, *'The Concept of Equidistance/relevant circumstances in the development of the law of maritime delimitation*' (World Maritime University 2009) 20 (Henceforth 'Abe') <https://commons.wmu.se/cgi/viewcontent.cgi?article=1077&context=all_dissertations> accessed 5 November 2020.
[180] See (n 173).
[181] Abe 20.
[182] UNCLOS article 15, para. 1.
[183] Ibid; Dixon 223.
[184] Nugzar Dundua, '*Delimitation of maritime boundaries between adjacent States'* (UN – The Nippon Foundation Fellow, 2006-2007) 15 (Henceforth 'Dundua') <https://www.un.org/Depts/los/nippon/unnff_programme_home/fellows_pages/fellows_papers/dundua_0607_georgia.pdf> accessed 5 November 2020.
[185] Abe 26.
[186] Dundua 16-17.

inequitable, i.e. unjust or unequal, the court proceeds to the second stage and focuses on 'equity-correction'. Thirdly, according to UNCLOS and customary law, the court is to examine if there are special circumstances on any side, that could opt for further adjustments to the delimitation process. When the legal process has passed all three stages, the court is ready to disclose the final judgement.[187]

However, it is argued that the three-stage approach used by the ICJ in court proceedings, have led to a decline in use and application of the principle of equidistance. The reasons behind this are the legal developments regarding 'special circumstances' that have come to play a more decisive role in the cases brought before the ICJ and ITLOS.[188] Nonetheless, the principle still remains to be an important starting point in these cases.[189]

3.2.4 Special Circumstances

Article 15.2

The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.[190]

As depicted in section 3.2.3 above, the principle of equidistance is not considered to be the only method that can be used in cases concerning maritime border delimitations. The provisions which fall under article 15(2) in UNCLOS (i.e. 'special circumstances') have generally been viewed as a complementary part of the whole provision, and not as exceptions from the principle of equidistance. This approach allows the courts and tribunals to be more flexible in the proceedings leading up to the final judgements.[191] As the latter part of the article states, the principle of equidistance does not necessarily have to be applicable if a State can argue that '*special circumstances*' are present in the specific case.[192] The concept of special circumstances has been incorporated into UNCLOS, due to the risk of delimitations being made in an inequitable manner. Worth mentioning is that the treaty does not provide a clear answer as to what specific circumstances are to be considered as 'special'. However, clarification and guidance is found in international case law and State practices.[193]

In the jurisprudence of international maritime law, within the field of maritime border delimitations, there are two divisions regarding special and relevant circumstances. These are (1) Geographical Factors and (2) Non-Geographical Factors.[194] Below follows an overview of relevant factors, however, it shall be noted that not all types of 'special circumstances' that have been brought before international courts are mentioned. Hence, it is not to be viewed as

[187] Tanaka 249-250.
[188] Dundua 16; Tanaka 249.
[189] Dixon 23.
[190] UNCLOS article 15, para. 2.
[191] Tanaka 276.
[192] UNCLOS article 15.2.
[193] Tanaka 239.
[194] Ibid 250 and 263.

an exhaustive list of circumstances that have been (or may be in the future) brought before international courts by States in cases concerning maritime border delimitation cases.

3.2.5 Geographical Factors

3.2.5.1 Configuration of Coasts

In areas where a maritime border dispute is taking place, States often have different and/or overlapping claims over a limited maritime area that is adjacent to respective State's coastline. Historically, there are several cases where States have solved disputes in a peaceful manner, i.e. through court proceedings at the ICJ.[195] In any international court or tribunal, proceedings firstly tend to apply the principle of equidistance, with no reference to the configuration of any States' coast. However, in several cases, the principle has resulted with inequitable results for one or more States. In the 1969 ICJ *North Sea Continental Shelf Case (Germany v. Denmark and the Netherlands)*, the ICJ found that Germany, with a concave (inward) coastline, gained an inequitable proportion of maritime territory, since the Danish and Dutch coastlines are convex (outward). This resulted in a 'sandwich-effect' for Germany, since its maritime area would have been 'boxed-in' between the area of the remaining two States.[196]

Similar methodology and rhetoric is to be found in several cases that followed the 1969 North Sea Continental Shelf Case. For instance, in the ICJ judgement in the *Libya/Malta Case* from 1985 and the ITLOS[197] *Bangladesh/Myanmar Case* from 2012. In the latter case, the tribunal found that the application of the equidistance principle in the Bay of Bengal resulted in a 'cut-off-effect' for Bangladesh, due to its concave coastline. Thus, had an adjustment of the equidistance line not been made the bay, the result would have been inequitable for Bangladesh, when compared with Myanmar.[198]

3.2.5.2 Proportionality

Proportionality is a second legal special circumstance that international courts have taken into account in the process of maritime border delimitation. Originally, proportionality was first mentioned in the 1969 North Sea Continental Shelf Case, as a relevant circumstance, due to the different coastal configurations of the involved States.[199] The Federal Republic of Germany (former West Germany), argued that States that are adjacent to each other should '*receive a just and equitable share'* of the North Sea continental shelf. However, the ICJ rejected this specific claim from West Germany. But the court acknowledged that if two or more States share a similar coastal length, they should receive an equal treatment in the process of delimitation. Hence, if the application of the equidistance principle would result in one State gaining less maritime area than the others, the border should be adjusted in a way

[195] Ibid 248.
[196] Malcom D. Evans, 'Maritime Boundary Delimitation: Where Do We Go From Here?' in David Freestone, Richard Barnes and David Ong *The Law of the Sea* (Oxford University Press 2006) 150 (Henceforth 'Evans').
[197] '*International Tribunal for the Law of the Sea*' (ITLOS) is an intergovernmental organization established through UNCLOS article 287. It is a 'dispute resolution mechanism', based in Hamburg, Germany.
[198] Tanaka 251.
[199] Evans 155.

that would be more 'equal or comparable' to the two other States.[200] Therefore, the ICJ concluded that there must be a balance between States that have concave coastlines, which produce significantly smaller amount of maritime area (as is the case with Germany), and States that have convex coastlines which, on the contrary, grants such States a more disproportional amount of maritime territory.[201]

In cases brought before the ICJ, prominent scholars within international maritime law have argued that the court had not, in the cases produced in the recent decades, been consistent in depicting exactly how the concept of proportionality in maritime delimitations is to be interpreted and applied.[202] Nonetheless, it is today widely agreed that international maritime law jurisprudence has reached a sufficient amount of consistency and predictability regarding the concept of proportionality, thanks to the 2009 '*Black Sea Case'* between Romania and Ukraine.[203] In the mentioned case, the ICJ concluded that when delimitation disputes arise, firstly, the principle of equidistance shall be applied, and if it proves that the ratio between the maritime areas between two or more States are inequitable and disproportioned, adjustments to the primary delimitation line must be made. Worth mentioning is that the ICJ did not view proportionality to be a method, but rather a concept to consider in order to ensure that maritime border disputes do not result in disproportionate delimitations in such cases.[204]

3.2.5.3 Baselines

The term 'baselines' is mentioned in article 15(1) of UNCLOS. Maritime baselines are the starting points from which the equidistance line is measured. Hence, before deciding the starting points, it is important to locate a State's baseline. There are two types of baselines that are equally accepted in international maritime law.

Article 5
Normal baseline

Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.[205]

[200] Tanaka 252–253.
[201] Ibid.
[202] Evans 156.
[203] Abe 37; Tanaka 254.
[204] '*Maritime Delimitation in the Black Sea'* (Romania v. Ukraine) (Judgement) [2009] ICJ Rep 99-100 para. 110; Tanaka 254.
[205] UNCLOS article 5.

The first type is 'normal baselines', which simply follows the geography (configuration) of the coast. The baseline is to be measured from the low-water line, i.e. during low-tide and from the point at which the water is furthest away from the coast.[206] From there, a provisional equidistance line is measured.[207]

Article 7
Straight baselines

1. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured. (...)[208]

The second type are 'straight baselines', which are more suitable for States with geographical irregularities along their coast. Such practice result in baselines which are drawn in a matter of connecting islands and rocks that lie off the specific State's irregular coastline.[209] The main difference between the two methods is that straight baselines are drawn across waters, while normal baselines are drawn along the State's coast.[210] Worth mentioning is that article 7 in UNCLOS does include further provisions to which a State must abide by. For instance, when a relevant authority in a State is to draw straight baselines, it must follow the general direction of the main coast, and the maritime area must be 'closely linked' to the land, in order to be classed as internal waters of the State.[211] Furthermore, the baseline may only be drawn to and from islands that have some kind of man-made installations, such as lighthouses, and they also have to be above sea level at all times, notwithstanding sea tides. Hence, low-tide elevations are not to be used when drawing straight baselines.[212] Finally, straight baselines of one State may not cross into, nor cut-off another State's territorial sea to and from the high seas or its EEZ.[213]

Finally, it shall also be mentioned that article 14 in UNCLOS allows a State to use a combination of both methods, since the coast configuration of a State might make it simpler to apply the first method along one part of the coast, and the second along another part.[214]

The reason as to why baselines are relevant in the process of maritime delimitation between two or more States, is thanks to the equidistance line being measured from the States'

[206] Tanaka 55.
[207] Evans 159.
[208] UNCLOS article 7(1).
[209] Dundua 15.
[210] Tanaka 56.
[211] UNCLOS article 7(3).
[212] UNCLOS article 7(4).
[213] UNCLOS article 7(6).
[214] UNCLOS article 14; Tanaka 57.

baseline. The ICJ has raised the question of baselines in connection to the 'special circumstances' criteria. It has been found that in some cases, the application of either method of baselines has resulted in inequitable delimitations, which has been one of the causes as to why the cases had been brought before the Court in the first place.[215] For instance, in the ICJ 1999 '*Eritrea/Yemen Case',* the Court dismissed a stretch of the pre-drawn Eritrean straight baseline, which include the 'Negileh Rock'. It was concluded by the Court that the 'rock' was in fact a reef (maritime feature) from which the baseline could not be drawn. It was considered as too small, uninhabited and too far from larger islands.[216] In turn, this led to an adjustment of the Eritrean straight baseline.[217] Similar reasoning of the Court is found in the ICJ 1985 '*Libya/Malta Case'*, where the Maltese rock of Filfla did not constitute a feature named in article 7 of UNCLOS, from which a straight baseline would be measured. This also lead to adjustment of the line.[218]

In conclusion, it shall be said that even though States are free to choose any method, judgements from international courts show that they do not hold a too liberal approach in cases concerning straight baselines.[219]

3.2.5.4 Presence of islands

The legal definition of an island is found in article 121 of UNCLOS. Criteria set up include that it must be a naturally formed area of land, surrounded by water. Furthermore, it needs to be able to sustain human habitation or economic life of their own in order to be able to generate an EEZ or CS to the State in question.[220] In general, islands have been found to constitute a relevant circumstance which the Court has given a varying amount of importance to.[221] Jurisprudence of international maritime law provide different interpretations and solutions, since islands are different in geographic shape, nature and substance. However, what is generally agreed is that there are four types of 'effect' which islands can generate to a coastal State.[222]

Islands that are considered as an integral part of a State's coastal configuration and can sustain a population and/or economic life are given 'full effect', i.e. generate territorial sea of its own up to 12 NM. The second type is 'no effect', where generally rocks and insignificant features out at sea are found.[223] The third type is that islands may also create maritime enclaves, if they are located too far from the coastal State, under whose sovereignty they fall. This reasoning was used in the 1977 '*Anglo-French Continental Shelf Case'*, concerning the

[215] Tanaka 256.
[216] '*Arbitration between the State of Eritrea and the Republic of Yemen'* (Eritrea v. Yemen) (1996) PCA Case No 1996-04, 44 para. 143.
[217] Tanaka 257.
[218] '*Continental Shelf*' (Libyan Arab Jamahiriya/Malta) (Judgement) [1985] ICJ Rep 48 para. 64.
[219] Tanaka 257.
[220] UNCLOS article 121(1) and 121(3).
[221] Dundua 60
[222] Tanaka 258.
[223] Dundua 61.

Channel Islands (part of the United Kingdom) located just off the French coast. The ICJ first took into consideration the main maritime border between the UK and French mainland and concluded that if full effect would be given to the islands, it would result in an inequitable result on behalf of France. Therefore, the islands became UK enclaves and were given 12 NM of territorial sea, but they became encircled by French maritime areas.[224] The fourth, and last type is 'partial effect', or as it is also known, 'half-effect'. The Court elaborated this type in the 1984 '*Gulf of Maine'* (USA/Canada) case where the Canadian Seal Island was found to be geographically too far from mainland Canada. However, the island held a sizable number of inhabitants and it did in fact fulfil the legal criteria to qualify as an 'island'.[225] Hence, the island could not be fully disregarded, and was given partial effect, which resulted in an adjustment of the provisional equidistance line.[226]

In conclusion, the assessment of islands and their specific importance in cases regarding maritime border delimitation differs, and must be examined on a case-by-case basis. This type of approach was raised in the ITLOS 2012 '*Bangladesh/Myanmar Case'* and is a consequence of an island's unique geographical positions and socio-economic features. Hence, it is not possible to find one general rule concerning islands which may be applied, since every case, brought before international courts, is unique. In the end, the aim is to reach a result which is equitable for all parties involved.[227]

3.2.6 Non-Geographical Factors

3.2.6.1 Economic Factors

There are various reasons as to why maritime border disputes between States may arise in the first place. Disputed maritime areas do often hold treasures that are of economic interest for the State and/or its citizens. A common motivating factor to various maritime claims can, but must not exclusively have to, be natural resources in a specific area, such as oil, gas and living organisms which habitat the sea.[228] In recent times, noticeable news reports have been made regarding the maritime border disputes in the Aegean Sea (between Greece and Turkey)[229] and in the South China Sea (between the People's Republic of China, Taiwan, Indonesia, Malaysia, the Philippines and Vietnam)[230], where the involved States have overlapping claims over the same maritime areas. All of which are more or less driven by economic (but not exclusively) reasons, since both areas are rich in natural resources.[231]

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[224] '*Anglo-French Continental Shelf Case'* (UK v. France) [1977] 95, para. 202; Tanaka 259.
[225] '*Gulf of Maine Case'* (Canada v. USA) (Judgement) [1984] 1CJ Rep 337, para. 222; Dundua 61.
[226] Dundua 61.
[227] '*Delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal'* (Bangladesh v. Myanmar) (Judgement) [2012] ITLOS Rep 86, para. 317.
[228] Tanaka 263.
[229] John Bowlus, '*Gas and Power Politics in the Eastern* Mediterranean' (*Brink – The Edge of Risk*, 29 October 2020) <https://www.brinknews.com/gas-and-power-politics-in-the-eastern-mediterranean/> accessed 5 November 2020.
[230] 'Why is the South China Sea contentious?' (*BBC News*, 12 July 2016) <https://www.bbc.com/news/world-asia-pacific-13748349> accessed 5 November 2020.
[231] Evans 156.

In general, the ICJ has not accepted legal claims based on economic factors as an exclusive principle to grant the State in question the claimed maritime area.[232] Nonetheless, in cases that have been presented before the Court, States have often raised economic factors in their claims to a given maritime area.[233] In the 2002 '*Cameroon/Nigeria Case'*, the two parties put forth overlapping maritime claims over an area rich in oil and gas resources. The court concluded that despite that the Nigerian government had granted oil concessions (i.e. given permits to companies in order for them to explore and extract oil and gas resources) in the disputed maritime area between the two States[234]. The court found that such State practice could not in itself pose as a relevant circumstance which would suffice in order to neither change nor adjust the provisional delimitation line.[235]

The Court has dismissed economic factors as a relevant claim in all cases, apart from one exception, which can be found in the 1993 '*Greenland/Jan Mayen Case'* (Denmark v. Norway).[236] In this specific case, the governments of Denmark, Norway and Iceland had prior to the Court proceedings, agreed to a 'joint conservation and management regime' for fishing stocks in the North Atlantic Ocean.[237] The Court took the agreement into account since it was found that changes to the median line could potentially result in 'catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned'.[238]

Hence, in jurisprudence of international maritime law, economic factors have not, in general, been viewed as a sufficient independent 'special circumstance'. Instead, the States have had to justify their maritime claims with other relevant legal substance. Nonetheless, it may be said that the Court has been encouraging in having States enter 'joint development regimes' and bilateral agreements, as seen in the Greenland/Jan Mayen Case. This approach allows flexibility when assessing economic questions in the Court proceedings.[239]

3.2.6.2 Conduct of Parties

In cases where no maritime boundary between States have been previously agreed, the Court has looked into previous conduct of States, which has proved to have some, although limited, effect in judgements concerning 'special circumstances'.[240] In the 1982 '*Tunisia/Libya Case'*, the Court gave attention to the fact that the States had historically conducted in such a way, where they had governed on respective side of a 'de facto' boundary, which had been established in 1919.[241] In the judgement from 1982, the Court concluded that neither State had

[232] Dundua 68.
[233] Tanaka 263.
[234] *'Land and Maritime Boundary between Cameroon and Nigeria'* (Cameroon v. Nigeria) (Judgement) [2002] ICJ Rep 447, para. 303.
[235] Ibid 448, para. 304.
[236] Tanaka 264.
[237] Dundua 77.
[238] '*Case concerning maritime delimitation in the area between Greenland and Jan Mayen'* (Denmark v. Norway) (Judgement) [1993] ICJ Rep 37, para. 75.
[239] Tanaka 264.
[240] Dundua 74.
[241] Tanaka 265; Dundua 75.

contested the conduct of the other. Thus, the boundary line established in 1919 was the *modus vivendi*[242] line, and would continue to be the official maritime boundary.[243]

However, it must be mentioned that no subsequent case brought before the ICJ has been subject to similar treatment and legal rhetoric, even though the question of 'conduct of parties' has been raised.[244] E.g. the Court did not reaffirm its reasoning from the Tunisia/Libya Case, regarding previous conduct of States in the 1984 '*Gulf of Maine'* (USA/Canada) and in the 2002 '*Cameroon/Nigeria Cases'*.[245]

3.2.6.3 Historic Title and Historic Rights

In article 15(2) of UNCLOS, 'historic title' stands as an explicit circumstance, and may equally be applied as an exception to the primary rule regarding the principle of equidistance.[246] The definition of 'historic title' can be described as a State's historic right to a land and maritime area, due to previous usage in a specific area.[247] A historic right is assessed through evidence such as a State's authority which has exercised continuous sovereignty in the area under a long period of time. Moreover, a State's historic title is cemented even further if other States have not contested the claims of the first mentioned State.[248]

It may also be said the concept of 'historic title' and 'historic rights' shall not be confused with the concept of 'historical bays'[249]. This is due to the fact that historic title and rights can be applied in several maritime areas, such as the internal waters, territorial sea, straits and archipelagos. Hence, a 'historic title' is not limited to maritime bays, which is a geographical feature and part of a State's coastal configuration.[250]

3.2.6.4 Security interests of a coastal State

In 1945, the Truman Proclamation on the CS was released. It is named after the former US President Harry S. Truman. Even though the proclamation was a unilateral action, it rapidly gained popularity in State practice across the world. This was partly due to President

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[242] '*Modus Vivendi'* is a Latin phrase, which in the English Language roughly translates into '*way of living'*. In the context of International Maritime Law, it is used to exemplify the previous conduct of disagreeing States in a dispute.
Wojciech Burek, '*Modus Vivendi'* (September 2019) in Rüdiger Wolfrum (ed), *Max Planck Encyclopedias of International Law* (online edn) para 1 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e964> accessed 6 November 2020.

[243] *'Continental Shelf'* (Tunisia/Libyan Arab Jamahiriya) (Judgement) [1985] ICJ Rep 56, para. 94.

[244] Tanaka 265.

[245] Dundua 76.

[246] Atsuko Kanehara, 'Validity of International Law over Historic Rights: The Arbitral Award (Merits) on the South China Sea Dispute' [2017] Sophia University Review Vol. 61, No. 1-2, Sophia University 23 (Henceforth '*Kanehara'*) <https://www.jiia-jic.jp/en/japanreview/pdf/JapanReview_Vol2_No3_02_Kanehara.pdf> accessed 10 November 2020.

[247] Tanaka 266.

[248] Kanehara 80.

[249] Section 4.2.2, 'Historical bays and Bays shared by more than one State'.

[250] Ibid 81.

Truman's view that every coastal State has the right of self-protection and to guard its shores from foreign activities and potential threats.[251]

The ICJ has raised the question of security in cases concerning maritime delimitations. In the 1985 '*Libya/Malta Case'*, the ICJ referred to the Truman Proclamation, and stated that security interests and concerns of one State can have importance and influence over the judgement in cases regarding the delimitation of a maritime border between two States.[252] It shall be noted that security interests of one State often may be connected, or even be same, to the political views of a State's official administration.[253] One relevant legal paradox is that, whilst the ICJ does consider security interests to be a 'special circumstance' under Article 15(2) in UNCLOS, it has not recognized the 'political factor' as a relevant circumstance in the context of the treaty.[254]

Nonetheless, it may be said that the available case law on this specific area is relatively spars and it remains unclear as to what effect 'security interests' may have exactly, other than the fact that they 'may' be relevant for the outcome in cases regarding maritime border delimitations.[255]

3.2.6.5 Navigational interests

In cases where a State's coastal configuration produces a small maritime area, due to the presence of another State, when applying the principle of equidistance, it may hinder the first-mentioned State from accessing the CS or the high seas. This issue was raised in the PCA 'Croatia/Slovenia Case' from 2017, where Slovenia claimed that its territorial sea was cut-off, due its drastically smaller coastal length, compared with its two neighbours Italy and Croatia. The Arbitration Tribunal concluded that Slovenia did in fact have a right, as a coastal State, to secure its navigational interests, and thus, the tribunal came forth with a precedent solution, where Slovenia was given a navigational corridor, connected to the high seas, across the territorial seas of Croatia.[256] Navigational interests were also raised in the 'Eritrea/Yemen Case', and the 'Guyana/Surinam Case', but it is generally regarded as a special circumstance of minor importance in cases concerning maritime delimitations.[257]

4 A State's Maritime Jurisdiction and Sovereignty

In order to understand why maritime border disputes arise, it is important to specify where and under what circumstances they can take place. The legal questions concerning the disputes along the eastern coast of the Adriatic Sea, all have one common aspect, which is that they largely take place in the maritime space called 'the territorial sea'. In this chapter, a

[251] Dundua 78.
[252] *'Continental Shelf'* (Tunisia/Libyan Arab Jamahiriya) (Judgement) [1985] ICJ Rep 42, para. 51.
[253] Dundua 78.
[254] Abe 65.
[255] Tanaka 267; Dundua 80.
[256] The *Croatia/Slovenia* Arbitration Award 345, para. 1081 and 1083.
[257] Tanaka 267.

coastal State's sovereignty and jurisdictional rights over its territorial sea are examined. Thereafter follows a section with focus on the right of innocent passage through the territorial sea and also the legal regime in international straits. In the last pages of this chapter, it examines the concept of historical bays and the legal principle 'Uti possidetis', which has had a significant impact on the outcome of the Croatian/Slovenian Arbitration.

4.1 Territorial Sea

To understand maritime border delimitations, it is important to understand the concept of the maritime area that is called the 'territorial sea'. In order for a State to have territorial sea of its own, it must be a coastal State. In other words, its land territory must at a geographical point meet the sea. According to article 3 of UNCLOS, the territorial sea cannot exceed more than 12 NM from a coastal State's baseline.[258] Baselines are drawn lines that separate a State's coast or internal waters, from the adjacent waters, that are considered to be territorial waters.[259]

Article 3
Breadth of the territorial sea

Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.[260]

In the PCA 1909 '*Grisbådarna Case'* (Norway v. Sweden), the court found that the territorial sea is an addition (*appurtenance*) of land territory to the coastal State, and as such, it is inseparable from the State's land territory.[261] The same cannot be said about other maritime spaces, such as the EEZ and the CS.[262] Furthermore, according to the dissenting opinion[263] of Judge Sir Arnold McNair in the ICJ 1951 'Anglo-Norwegian Fisheries Case' (UK v. Norway)[264], a coastal State does not have the option to refuse its territorial waters, due to the obligations the follow with international law. In his view, the fact that a coastal State possesses territorial sea is compulsory and does not depend on the will of the State itself.[265] On the other hand, in the ICJ 1969 'North Sea Continental Shelf Case', the principle 'land dominates the sea' came into existence. The court found that the coast of a State is the starting

[258] Ibid 102; UNCLOS article 3.
[259] Section 3.2.5.3, 'Baselines'; Tanaka 53.
[260] UNCLOS article 3.
[261] The *'Grisbådarna Case'* (Norway v Sweden) (1909) PCA Case No. 1908-01 4.
[262] Anders Henriksen, '*International Law'* (2nd edn, Oxford University Press 2019) 148 (Henceforth '*Henriksen'*).
[263] 'Dissenting Opinion' *Dictionary.com* <https://www.dictionary.com/browse/dissenting-opinion> accessed 15 November 2020; The definition of '*dissenting opinion'* within international law can be described as the conclusion of a judge that has been present in the proceedings, who partially, or fully, disagree with the final judgement of the court.
[264] '*The Anglo-Norwegian Fisheries Case'* (UK v. Norway) (Judgement) [1951] ICJ Rep.
[265] Arnold McNair, '*Anglo-Norwegian Fisheries Case'* (Dissenting Opinion of Judge McNair) [1951] ICJ Rep 160, para. 2.

point from which the territorial sea is measured. Furthermore, simply by having a coast, a State has the right to claim maritime zones.[266]

As for the breadth of the territorial sea, which is according to article 3, UNCLOS limited to a maximum of 12 NM measured from the baseline, it shall be said that a majority of States do not exceed the limit set out in the treaty. Today, it is generally agreed that the limit constitutes customary international law.[267] On the other hand, prior to UNCLOS coming into force, State practice showed a variety of breadth for the territorial seas, stretching from 3 NM up to 200 NM. In general, European coastal States opted for the 3 NM limit. The Nordic Countries claimed a 4 NM limit. In South America, coastal States located by the Pacific Ocean, opted for a breadth up to 200 NM.[268]

A coastal State has exclusive and full jurisdiction and sovereignty over its internal and territorial waters. Its rights are wide and far-reaching.[269] Nonetheless, there are limits as to what a coastal State may or may not do under international maritime law. E.g. the 'right of innocent passage' concerning foreign vessels, through the territorial sea of a coastal State may not be restricted.[270] Below follows an elaboration of maritime jurisdiction and sovereignty in the territorial seas of a coastal State.

4.1.1 Maritime Jurisdiction in the territorial sea

A State's right to enact, exercise, execute and enforce national laws over juridical persons, nationals and non-nationals within the territorial boundaries of the given State can be described as a State's 'jurisdiction'.[271] However, worth mentioning is that the concept of jurisdiction in international law include several definitions, since there are different types of jurisdictions that States can or may exercise.[272]

One of the most cited international law cases concerning 'State jurisdiction' is the 1927 PCIJ 'Lotus Case' (France v. Turkey), concerning a ship collision at the high seas, between the French mail steamer Lotus, and a Turkish bulk cargo ship, named Boz-Kourt, in which eight members of the Turkish crew lost their lives. The case has been used frequently in the

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[266] Irini Papanicolopulu, *'The land dominates the sea (dominates the land dominates the sea')'* [2018] QIL Vol. 47 39, University of Milano-Bicocca <http://www.qil-qdi.org/wp-content/uploads/2018/02/03_Whats-an-island_PAPANICOLOPULU_FIN.pdf> accessed 2 December 2020.

[267] Henriksen 148.

[268] Donald R. Rothwell, Tim Stephens '*The International Law of the Sea'* (2nd edition, Hart Publishing 2016) 69 (Henceforth Rothwell, Stephens).

[269] Henriksen 149.

[270] The concept of '*innocent passage'* is further elaborated in paragraph 3.3.4, page X.

[271] Bernard H Oxman, '*Jurisdiction of States'* (November 2007) in Rüdiger Wolfrum (ed), Max Planck Encyclopedias of International Law (online edn) para 1 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1436#law-9780199231690-e1436-div1-1> accessed 15 November 2020.

[272] Dixon 148-149.

international law doctrine.[273] By the time the surviving French crew arrived in Constantinople (today Istanbul, Turkey), Turkish authorities decided to launch criminal proceedings which was met by opposition by France, since the crew were made up by French citizens.[274] The Turkish and French governments held negotiations, which resulted in an agreement to submit the case to the PCIJ to answer the question if Turkey had the right to prosecute the French crew. The parties also agreed that the issue would be solved in accordance with the principles of international law.[275] The PCIJ concluded that a State may not exercise jurisdiction on territory belonging to another State. However, the court found that a State is free to exercise jurisdiction and enforce its legislation within its territory, regarding suspected civil wrong that have taken place elsewhere, under the condition that it is not against international law.[276] According to the 'objective territoriality principle', the Boz-Kourt was found to constitute Turkish territory. Thus, Turkey did have the right to prosecute French citizens, since the deaths of the Turkish crew happened on Turkish territory.[277]

As for maritime jurisdiction, it shall be noted that there are different maritime spaces, in which coastal States can exercise jurisdiction to a varying degree. The internal waters and territorial seas are considered to be a part of the coastal State's territory under international law. The two maritime spaces are effectively also the closest to the coastline of the State in question, thus, treated equally as the State's land territory.[278] In these two areas, the State has the right to exercise its (1) 'prescriptive' and (2) 'enforcement' jurisdiction. The first reflects the power of a State to pass laws and apply them within its territory, whereas the second focuses on the State's right to enforce the legislation over all matters and humans (notwithstanding nationality) that find themselves in one of the two maritime spaces.[279]

4.1.2 Maritime Sovereignty in the territorial sea

The concept of sovereignty is an attribute of international law, which is related to 'jurisdiction', but they are not the same. A State's sovereignty may be described as its 'supreme authority' over the territory, within its internationally recognized boundaries.[280] In the context of international maritime law, Tanaka describes sovereignty as a nation's

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[273] Armin von Bogdandy, Markus Rau, '*The Lotus'* (June 2006) in Rüdiger Wolfrum (ed), Max Planck Encyclopedias of International Law (online edn) para. 15-16 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e162> accessed 15 November 2020.

[274] Ibid para 2.

[275] Ibid para 4.

[276] Dixon 148 and 152.

[277] Ibid 152.

[278] Tanaka 9.

[279] Ibid; Nelson Dolliver, '*Maritime Jurisdiction'* (January 2010) in Rüdiger Wolfrum (ed), Max Planck Encyclopedias of International Law (online edn) para. 1 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1195?rskey=OdFzbC&result=2&prd=MPIL> accessed 16 November 2020.

[280] Samantha Besson, '*Sovereignty'* (April 2011) in Rüdiger Wolfrum (ed), Max Planck Encyclopedias of International Law (online edn) para 56 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472> accessed 20 November 2020.

extension of its jurisdiction to offshore spaces, which in itself promotes the territorialisation of the oceans.[281] The territorial sea of a State does not have to be claimed, but is inherent to the State's sovereignty, and through it, the State also have full jurisdiction over this specific maritime space.[282] Worth mentioning is that other maritime zones, such as the EEZ and CS, are not included in a coastal State's territory, as is the territorial sea. Due to this, a State is not granted sovereignty over those areas and thus, may only exercise limited powers.[283]

A coastal States sovereignty was first defined in the TSC 1958[284], which was later incorporated and reaffirmed in article 2, UNCLOS 1982 with some modifications. Although, it may be said that both provisions were codifications of existing customary maritime law.[285]

Article 2
Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil.

1. *The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.*
2. *2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.*
3. *3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.*[286]

As stated in paragraph 1, a coastal State's sovereignty is extended over its territorial sea, through which it has the full legislative and enforcement jurisdiction. The coastal State can regulate and control all activities that take place within its territorial sea and is also given an exclusive right to exploit the area in search for natural resources.[287] According to paragraph 2, a coastal State's sovereignty over the territorial sea is not just limited to the water, but also includes the air space above it, as well as the sea bed and subsoil.[288]

4.2 Innocent Passage in the Territorial Sea

The right of innocent passage for foreign vessels through the territorial sea of a coastal State is protected in UNCLOS. No difference is made between vessels of coastal and land-locked

[281] Tanaka 24.
[282] Dixon 220.
[283] Sarah Wolf, *'Territorial Sea'* (August 2013) in Rüdiger Wolfrum (ed), Max Planck Encyclopedias of International Law (online edn) para 2 (Henceforth '*Wolf*') <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1229?prd=MPIL> accessed 16 November 2020.
[284] TSC 1958 article 1.
[285] Dixon 220.
[286] UNCLOS article 2.
[287] Wolf para 21.
[288] Tanaka 102.

States. This right stem from the historic freedom of the seas, in which navigational rights are included.[289] One motivating factor for granting this right has been, and still is, to uphold international economic trade.[290] Furthermore, both international maritime customary law and UNCLOS seeks to maintain a reasonable balance between the interests of different States. In other words, that a coastal State has the right to exercise sovereignty over its territorial sea, at the same time as it does not have the right to suspend navigation of foreign vessels unless they pose a security risk.[291]

Article 17
Right of innocent passage

Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.[292]

Article 17, UNCLOS grants vessels of all States the right of innocent passage across the territorial seas of another State. However, a coastal State may suspend the right due to security reasons.[293] The definition of 'passage' is found in article 18 of UNCLOS, and it shall also be noted that the right of passage only applies in the territorial seas of a coastal State, and not in the internal waters, since they are regarded in the same manner as land territory.[294]

Article 18
Meaning of passage

1. Passage means navigation through the territorial sea for the purpose of:
(a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
(b) proceeding to or from internal waters or a call at such roadstead or port facility.

2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.[295]

The passage is 'innocent' if the traversing is 'continuous and expeditious'. The speed of the vessel shall be adjusted accordingly, in relation to navigational visibility, vessel capacity and

[289] Rothwell, Stephens 220.
[290] Ibid 222.
[291] Kari Hakapää, *'Innocent Passage'* (May 2013) in Rüdiger Wolfrum (ed), Max Planck Encyclopedias of International Law (online edn) para 44 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1178?rskey=zHe5KK&result=1&prd=MPIL> accessed 16 November 2020.
[292] UNCLOS article 17.
[293] Dixon 221.
[294] UNCLOS article 18(1a-b); Šabić, Borić, (n 5) 5; Henriksen 157.
[295] UNCLOS article 18.

safety.[296] However, exceptions are made and can be justified in situations that may involve elements of 'force majeure' or distress. Furthermore, to render assistance to people, vessels or aircrafts that find themselves in distress, is also found as a justified ground to pause the passage.[297]

Article 19
Meaning of innocent passage

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:[298]

The definition of 'innocent passage' is found in article 19, UNCLOS. It shall be said that as long as the passage does not threaten peace, good order or the security of the coastal State, it shall be deemed as innocent. However, the second paragraph includes a list of activities that, if performed, the passage ceases to be considered as innocent. In such case, the coastal State has the right to take appropriate and necessary means to stop the passage[299]. E.g. fishing activities, serious pollution, threats, use of force and weapon exercises are reasons as to why the passage could be deemed as 'non-innocent passage'.[300]

Under international treaty law, a coastal State can take necessary steps to prevent non-innocent passage.[301] The rights of a coastal State regarding innocent passage of foreign vessels are found in articles 21, 23 and 25 of UNCLOS.[302] For instance, the coastal State holds full legislative powers within its territorial sea, and may adopt laws and regulate innocent passage, in accordance with international law.[303] Authorities of the coastal State may temporarily suspend any passage.[304] Additionally, the coastal State holds, under specific circumstances, the right criminally persecute a person for crimes committed within its territorial sea.[305]

[296] Rothwell, Stephens 231.
[297] Henriksen 157.
[298] UNCLOS article 19.
[299] Dixon 221.
[300] Rothwell, Stephens 233; UNCLOS article 19(2).
[301] Evans 662.
[302] Tanaka 133.
[303] UNCLOS article 21(1).
[304] Evans 662; UNCLOS article 25(3).
[305] UNCLOS article 27(1).

4.2.1 International Straits and Innocent Passage

In order for vessels to navigate across the seas, they may at some point have to pass through a narrow space of water, a strait, which connects two larger maritime spaces. Within international maritime law, significant importance has been given to straits that have been or still are used for international sea communications.[306] The legal situation becomes complex when the waters in the strait are narrow enough that they, therefore, constitute territorial seas of one or more coastal States.[307]

In the ICJ 1949 '*Corfu Channel Case'* (UK v. Albania)[308], the circumstances were such, that two British warships came under attack by Albanian forces, while passing through the Corfu Channel, which in turn is a part of Albania's territorial sea. The UK claimed that their vessels could pass through the strait in accordance with the principle of innocent passage. Albania thought otherwise and declared that the warships should have asked for permission in advance to pass through the strait. Six months later, two British warships, passing through the strait, ran across naval mines in the channel, which resulted in casualties and damages to the ships. After the event, the British cleaned the area of mines. The court was tasked with answering the question if a foreign vessel had the right of innocent passage through an international strait, between two parts of the high seas.[309] The court found that, in peacetime, warships of a State may traverse through a strait used for international navigation, without authorizations by the coastal State, as long as the vessel's passage itself remains innocent.[310] Additionally, the court also found that the Corfu Channel, in fact, constituted an important international maritime highway, through which international traffic could not be hindered.[311] Such reasoning was later reflected in article 16(4), TSC 1958, which states that foreign vessels enjoy the right on 'non-suspendable passage' through straits used for international navigation, between the two parts of the high seas or the territorial sea of a foreign State.[312]

In UNCLOS, the right of 'innocent passage' through straits used for international navigation from the territorial sea of one State, to the high seas/EEZ is found in article 45(1b).[313] Foreign vessels enjoy 'non-suspendable innocent passage' through straits that constitute territorial waters of another coastal State.[314]

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[306] Tanaka 116.

[307] Ruth Lapidoth, *'International Straits'* (July 2018) in Rüdiger Wolfrum (ed), Max Planck Encyclopedias of International Law (online edn) para 1 (Henceforth '*Lapidoth'*) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1226?prd=EPIL> accessed 16 November 2020.

[308] *'Corfu Channel Case'* (UK v. Albania) (Judgement) [1949] ICJ Rep.

[309] Lapidoth, para 2.

[310] *'Corfu Channel Case'* (UK v. Albania) (Judgement) [1949] ICJ Rep 28.

[311] Ibid 29; Rothwell, Stephens 247.

[312] TSC 1958 article 16(4).

[313] UNCLOS article 45(1)(b).

[314] UNCLOS article 45(2); Tanaka 129–130.

4.2.2 Historical Bays and Bays shared by more than one State

There are no definitions of what a 'historical bay' is, neither in the TSC 1958, nor in UNCLOS 1982.[315] However, a reference can be found in UNCLOS, although it does not provide any further elaborations of the concept.[316] Thus, in order to find an explanation as to what 'historical bays' are, one needs to turn to international case law. To start, guidance can be found in the dissenting opinion[317] of ICJ Judge Shigeru Oda in the 1992 '*Land, Island and Maritime Frontier Dispute Case'* (El Salvador v. Honduras: Nicaragua). According to Oda, waters that hold 'bay-like features', but do not necessarily qualify for the status of a legal 'bay', may still be considered as such, if a State can provide historical reasons and justifications as to why the 'bay-like feature' should be internationally viewed as a bay.[318]

Due to the absence of a treaty-based definition of 'historical reasons', with customary international law providing sparse examples, the UN Secretariat has provided some guidance on this particular area in its study '*Juridical Regime of Historic waters including historic bays'*.[319] The Secretariat identified three 'elements' of title to historic waters. They are the following: (1) the exercise of authority over the area by the State claiming historic rights; (2) the continuity of this exercise of authority; (3) the attitude of foreign States (State practice).[320] Generally, due to a variety of claims in areas with unique geographical features, the assessment of whether a bay is 'historic' or not, is dealt with a case-by-case approach by international courts.[321] If States are able to provide convincing evidence, in accordance with the elements described above, the waters will be considered as 'historic' and will be treated as a part of the internal waters of the coastal State.[322]

In modern times, there has been an increase of cases which have resulted in the peculiar situation where a border between two or more States is drawn across bays. The reason behind this is in part due to decolonization of States and the break-up of former States.[323] In the ICJ 1992 '*El Salvador v. Honduras: Nicaragua Case'*, it was concluded by the ICJ that the Gulf of Fonseca was to be considered as a 'historical bay', despite that it was bordered by all three States. Thus, the bay fell under the sovereignty of the three mentioned States.[324] Equally, the Arbitration Tribunal in the 2017 '*Croatia/Slovenia Arbitration'* found that the Bay of Piran/Savudrija previously constituted internal waters of the SFRY, but due to dissolution, an

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[315] Tanaka 67.
[316] UNCLOS article 10(6).
[317] The definition of '*dissenting opinion'*, see footnote 263.
[318] Shigeru Oda, '*Land, Island and Maritime Frontier Dispute'* (El Salvador/Honduras: Nicaragua intervening) (Dissenting Opinion of Judge Oda) [1992] ICJ Rep 733-734, para. 4.
[319] Tanaka 68.
[320] Ibid; UNGA, '*Juridical Regime of Historic Waters including historic bays – Study prepared by the Secretariat'*, A/CN4/143 (1962 vol. II) UNYB 13 para 80.
[321] Tanaka 70.
[322] Ibid 67.
[323] Ibid 71.
[324] *'Land, Island and Maritime Frontier Dispute'* (El Salvador/Honduras: Nicaragua Intervening) (Judgement) [1992] ICJ Rep 616, para. 432.

international border ran across the bay. Even though it was considered as a 'historical bay', a border delimitation had to be made, since two States cannot exercise sovereignty over the same maritime area. The delimitation was made in accordance with the principle of 'Uti Possidetis', based on the actual border situation at the day of independence of the two States.[325]

4.3 Uti Possidetis

The doctrine of '*Uti Possidetis'* can, historically, be traced back to Roman law, in which it was used as a legal method to determine territorial changes after an armed conflict. Peace treaties were signed in accordance with the actual territorial possessions at the time the conflict ended.[326] The historical use of the principle is no longer feasible, since territorial acquisition through the use of force is prohibited under the UN Charter[327], and would pose a violation of the same.[328] The modern interpretation of the principle can be found in the process of decolonization in Africa and South America. In 1964, the Organization of African Unity (OAU), which existed between 1963 and 2002, after which it was replaced by the African Union (AU)[329], adopted a resolution in which the member States agreed to respect the State borders that already existed between their nations at the time of independence from their former colonial powers.[330]

The ICJ held in the 1986 '*Frontier Dispute Case'* (Burkina Faso v. Mali), that the principle, indeed, saw widespread application during the decolonization process in South America[331], and that it was a general principle of international law, closely connected with States' declarations of independence. Thus, Uti Possidetis was equally applicable in cases concerning border disputes in Africa, as it was in South America, since the core of the principle was to avoid provoking instability in the States that gained independence post-colonization.[332] Furthermore, the European Community held in the 1991 '*EC Arbitration Commission on Yugoslavia'* (Badinter Commission)[333], that the boundaries between the newly independent

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[325] The *Croatia/Slovenia* Arbitration Award 273, para. 888; Tanaka 72.

[326] Peter Radan, 'Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission' [2000] 24(1) Melbourne University Law Review, Para C (Henceforth 'Radan') <http://www.austlii.edu.au/au/journals/MULR/2000/3.html#Heading106> accessed 15 November 2020.

[327] United Nations, *Charter of the United Nations,* 24 October 1945, 1 UNTS XVI article 2(4).

[328] Nesi Giuseppe, '*Uti possidetis Doctrine'* (February 2018) in Rüdiger Wolfrum (ed), Max Planck Encyclopedias of International Law (online edn) para 2 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1125> accessed 15 November 2020.

[329] Frans Viljoen, *'African Union (AU)'* (May 2011) in Rüdiger Wolfrum (ed), Max Planck Encyclopedias of International Law (online edn) para 1 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e452> accessed 15 November 2020.

[330] Radan para. C.

[331] Dixon 170.

[332] '*Frontier Dispute'* (Burkina Faso v. Mali) (Judgement) [1986] ICJ Rep 565, para 20.

[333] Malgosia Fitzmaurice, *'Badinter Commission (for the Former Yugoslavia)*' (June 2019) in Rüdiger Wolfrum (ed), Max Planck Encyclopedias of International Law (online edn) para 1 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e13> accessed 15 November 2020.

States in the Balkans would remain the same and follow the old boundaries, which already existed between the republics within the former SFRY.[334] Similar reasoning was held in the process of dissolution of former Czechoslovakia in 1993, i.e. the borders between the two independent States would remain the same as in the time of the federation.[335]

The doctrine of Uti possidetis has reached widespread acceptance within the domain of international law and even though the use of the principle saw its starting point in the decolonization process in Africa and South America, it is today equally applicable in cases concerning dissolutions of federal States.[336]

4.4 Summary

The reasons and motivating factors behind maritime border delimitations, and as to why they occur are many. Historically, the process has been triggered either through decolonisation or through the dissolution of former States. Moreover, States often tend to have opposing interests, due to different coastal configurations, State interests and interpretations of existing treaty law. As for international law, it shall be said that the International Community has tried to codify maritime customary law both through the TSC 1958 and UNCLOS 1982. As for international court proceedings, courts have generally taken a 'case-by-case' approach, since every maritime dispute features a variety of factors that need to be considered. This approach has given rise to several different 'special circumstances', which the courts have had to assess. The result has proven to be rather diverse. Thus, it is hard to say that a previous solution to a dispute can be applicable in a future case. Moreover, a common feature found in existing case law is that coastal States tend to have overlapping claims across different maritime spaces. This further complicates the matter, since States are granted different rights and powers in different maritime zones, according to treaty law. Due to the 'territorialisation' of the internal and territorial waters, coastal States are granted both jurisdiction and sovereignty in these areas. Thus, the courts have had to balance the interests and rights of coastal States with the international framework and regulations for maritime activity, as well as the interests of other coastal and non-coastal States.

5 Final solutions to the disputed maritime borders in the Adriatic Sea

This chapter connects all previous chapters in order to analyse the essence of the thesis. The chapter is divided into three subsections, in which the research question is answered by the end of each subsection. The first section analyses the outcome and reasoning behind the PCA Final Award (2017) in the Croatia-Slovenia maritime border dispute, which Croatia has consistently refused to accept. Afterwhich, an answer to the first research question is presented. The following two subsections differ from the first, since the disputes are yet to be

[334] Dixon 170.

[335] Guiseppe Nesi, 'Uti possidetis Doctrine' (February 2018) in Rüdiger Wolfrum (ed), Max Planck Encyclopedias of International Law (online edn) para 18 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1125> acessed 16 November 2020.

[336] Ibid para 19-20.

resolved. In the second part, the legality of the on-going construction of the Peljesac Bridge is discussed and analysed. Moreover, the unsettled maritime border between Croatia and BiH is elaborated and the answer of the research question also includes plausible outcomes of the dispute between the two neighbouring States. The third and also last subsection analyses the issues with the current legal regime at the entrance of the Bay of Kotor, which is part of the wider dispute between Croatia and Montenegro. Also, the future delimitation between the territorial seas of the two States is discussed and the section ends with the answer to the last research question.

5.1 How should a final maritime border delimitation be drawn in the Bay of Piran/Savudrija and in the Northern Adriatic?

In order to answer the question as to how the maritime border between Croatia and Slovenia should be drawn, it is important to bear in mind that the dispute has been assessed by the PCA, through the *ad hoc* Arbitration Tribunal, with a final award being presented in 2017. Nonetheless, Croatia has objected implementation of the final award, whereas Slovenia has found its outcome as sufficient.[337]

5.1.1 Bay of Piran/Savudrija

5.1.1.1 Internal waters or not

As for applicable law, the PCA applied article 15, UNCLOS in the matter of the delimitation in the Bay of Piran. The analysis above has shown that the tribunal has taken into consideration claims of both parties. The first issue to resolve was whether or not the bay constituted 'internal waters' prior to the dissolution of the SFRY, since Slovenia claimed that it was the case. Croatia, on the other hand, did not agree to this. The tribunal had to analyse the status of the bay prior to 1991, and found that the SFRY declared the bay to be internal waters of that state in 1987.[338] It shall be said that the tribunal based the reasoning from the '*Gulf of Fonseca Case'* from 1992, where the ICJ found that a bay does not lose its status simply because a state ceases to exist.

An interesting aspect of the final award, is the analysis of the conduct of the two States within the bay, both prior and after independence. The Slovene coast has historically been more attached to the bay, with a significant population occupying the shores, whereas the Croatian side was largely seen as deserted. Nonetheless, the tribunal did not give much attention to the fact that the populations on both sides of the border depended on fishing activities within the bay, both before and after 1991. It did however, take into account that the Slovene side did install a marine scientific research station after independence, and that the activities it performed were never questioned by any official institution of Croatia. Thus, it can be said that Croatia and its institutions remained passive in the area of the bay, and did not give enough attention that Slovenia was *de facto* having sole control over the bay post-independence. Croatia seems to have simply relied on the belief that half the bay was a part of the Croatian maritime territory. While Croatia does in fact, due to its long coastline, hold a

[337] Section 2.2.3, 'The Arbitration Tribunal's Final Award'.
[338] Ibid.

significantly larger proportion of the Adriatic Sea, it did in one way neglect the very northern part of its maritime border. The result was that the claims of Croatia could not be interpreted as convincing enough, when compared to the claims of Slovenia.

Furthermore, it is important to mention that each maritime dispute is unique and different from any previous case, and the situation in Bay of Piran concerns, partly, also the delimitation of internal waters, which has never been tried by an international court. Since the internal waters of a coastal State is treated equally as land territory, two states cannot exercise jurisdiction over the same area. The reasoning of the tribunal may be seen as a new precedent, since maritime delimitations, in treaty law (i.e. UNCLOS) only refers to the territorial sea and not the internal waters. Hence, the tribunal was not able to make reference to the provisions of the convention, but it did use the same methodology that is used in cases concerning maritime border delimitations of the territorial sea[339]. However, the delimitation was made in light of the actual situation at the day of independence of the both States from the SFRY in 1991, i.e. in accordance with the principle of Uti Possidetis.

5.1.1.2 Maritime Border Delimitation within the Bay

As for the delimitation of the territorial sea between the two States, they had completely different interpretations of UNCLOS, article 15. Croatia heavily relied on the first paragraph which states that delimitations are to be made in accordance with the principle of equidistance. An equidistance line would have been very positive for Croatia, since it would have provided a much larger proportion of the bay, nearing a fifty-fifty delimitation. Slovenia on the other hand, did not have much to gain if it simply would have accepted the primary equidistance line. Being already 'boxed-in' between the territorial seas of Italy and Croatia, it needed to provide the tribunal with evidence to support its claims over the bay. In order to do so, Slovenia leaned on the second paragraph of article 15 in UNCLOS, which states that the equidistance line cannot be applied in bays that have a historical title and/or relevant circumstances attached to the case[340].

The tribunal found Slovenia's claims as convincing enough, in relation to the submitted evidence in this particular matter. One interesting aspect of the dispute is the presence of a marine biology station on the Slovenian side. The institute had conducted marine scientific research in the bay and surrounding area, without objection from Croatia, despite the awareness of it. Slovenia has also *de facto* exercised jurisdiction within the bay, since 1991, also without any significant opposition from Croatia. Furthermore, on the Slovene side of the border, significant population exists, whereas the Croatian side is sparsely populated, with a small group of fishermen active in and around the bay. It may be said that Croatia's inactivity and small interest in the bay, in the years leading up to the arbitration turned out to have negative consequences, since the representatives were not in the position to present any special circumstances which would turn the final verdict in favour of Croatia.

[339] UNCLOS article 15.
[340] Section 2.2.1, 'Slovenia's Claims'.

When analysing the special and relevant circumstances, it shall be said that the tribunal's take on the coastal configuration of the two States, would heavily benefit Croatia, should a plain equidistance line be applied. But to the fact that Croatia had not engaged in any major activity within the bay, and within its proximity, it would have resulted in an inequitable delimitation for the Slovene side. Parallels can be drawn with the ICJ 1969 North Sea Continental Shelf Case, where it was found that maritime border delimitations must be balanced between States that have different coastal configurations. Indeed, Slovenia's coast is concave (inward-going), whilst Croatia's is convex (outward-going). Thus, Croatia would gain more, and Slovenia less maritime territory, through the application of an equidistance line. But as mentioned, only assessing the coastal configuration does not always produce a proportionate result. Should the tribunal not have made adjustments to the primary equidistance line, Slovenia's maritime territory would have been 'boxed-in' or 'cut-off' from the high seas, due to the 'sandwich-effect'[341]. Thus, the tribunal managed to reach a more equitable solution and through this uphold reasoning from previous case law.

Nonetheless, it shall be pointed out that the tribunal's approach to the maritime delimitation dispute between the two States is somewhat unclear, in relation to the ICJ 1969 North Sea Continental Shelf Case. The latter concerned the delimitation of a CS and not the territorial sea, which is the case in the Slovenian-Croatian dispute. The tribunal found that natural prolongation can also be applied in cases regarding the territorial sea[342]. No further explanation as to why this is can be found in the final award. Also, international maritime law states that a continental shelf constitutes a natural prolongation of the land territory[343]. However, the territorial sea is inherent to a sovereign State due to it having a coast[344]. Even though dispute settlement mechanisms do not have to refer only to international treaty law, but also to case law, it remains unclear if 'natural prolongation' can be applied to the territorial sea or not. No international principle does explicitly say so and the reason for this is most likely due to the fact that there are clear provisions and rules on how the territorial sea is to be measured and delimited. Furthermore, case law after the North Sea Continental Shelf does not provide any aid on the matter either. No indications can be found as to if the right to a territorial sea of a State is explicitly due to natural prolongation.

In the view of Dr Robin Cleverly[345], member of the Slovenian team during the arbitration, believes that the outcome of the delimitation within the bay was balanced. In his view, Slovenia's claim for full sovereignty over the whole Bay of Piran, was not tenable. Equally, Croatia's claim for a fifty-fifty delimitation of the bay was also not reasonable, since the special circumstances of Slovenia were much convincing in the tribunal's view.

[341] Section 3.2.5.1, 'Configuration of Coasts (North Sea Continental Shelf Case)' for definition of the 'Sandwich-effect'.
[342] The *Croatia/Slovenia* Arbitration Award 318, para 1008.
[343] UNCLOS article 76(1).
[344] Section 4.1.2, 'Maritime Sovereignty in the Territorial Sea'.
[345] Personal communication with Dr Robin Cleverly [E-mail], Director, Marbdy Consulting Ltd (Somerset, UK, 21 November 2020).

In conclusion, the two States did rely on article 15 of UNCLOS, but on different paragraphs. Croatia insisted on the use of an equidistance line, with no regard to any special circumstances, most likely due to a lack of any that would strengthen its claims. Slovenia on the other hand, successfully managed to present several circumstances which the tribunal took into account. It became evident that the land area was of significant importance to many Slovene citizens living in the area, and the State as a whole. Also, the fact that Croatia remained passive in exercising any activities and powers in the area both pre- and post-independence, seems to have had a negative effect in the final award for Croatia.

5.1.2 A Maritime Junction to the High Seas

An interesting aspect in the final award, was the fact that the tribunal did grant Slovenia a maritime junction from its territorial sea to the high seas, across the maritime space of Croatia, due to navigational interests. This is a unique precedent[346], since such interests of a State have received relatively little importance in previous case law. However, this precedent should be considered as controversial. The answer as to why Slovenia has wanted a maritime junction to the high seas, can be found in the history of the two States post-independence. Slovenia left the SFRY relatively intact, whereas Croatia was drawn into an independence war (1991-1995). Slovenia also managed to integrate into the European-Atlantic Cooperation much quicker than Croatia. Hence, it may be said that the concerns of Slovenia, i.e. its navigational, security and economic interests were, to some extent, endangered and subject to rules and regulations imposed by Croatian authorities. However, both States were members of both the EU and NATO throughout the duration of the proceedings at the PCA. Over the past decades, the issues that Slovenia faced post-independence have greatly diminished, since the security risks in the area are to be considered as low. In general, the bilateral relations are considered as friendly between the two nations, citizens of both States hold good relations and they also share a common history and struggle for independence[347]. Therefore, the fact that Slovenia was granted a maritime junction to the high seas should not be considered as straight forward, since vessels would still have enjoyed the right of innocent passage through Croatian territorial waters.

It shall be pointed out that in the Drnovšek-Račan Agreement[348], the two States agreed that Slovenia would be granted a corridor to the high seas.[349] However, the agreement was never ratified by Croatia, and the status and existence of the 'junction' remained unclear until the final award by the Arbitration Tribunal. In general, the fact that Slovenia was granted a connection between its territorial sea and the high seas does not differ significantly from the rights it held prior to the award. Slovenian-flagged vessels still enjoyed the right of innocent passage through the territorial waters of Croatia. Nonetheless, the principle of innocent

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[346] A view also shared by Tanaka 267.

[347] Sandra Fabijanić Gargo, *'The Concept of 'Junction Area' – Sui Generis - Solution to Reconciling the Integrity of Territorial Sea and 'Freedoms of Communication?'* Pécs Journal of International and European Law - 2020/I, University of Rijeka 91 <http://ceere.eu/pjiel/wp-content/uploads/2020/05/pjiel-2020-1-sandra-fabijanic-gagro.pdf> accessed 28 November 2020.

[348] Section 1.1.1, *'Border Dispute with the Republic of Slovenia'* 3.

[349] Drnovšek-Račan Agreement article 4(2).

passage can, in many ways, be considered as 'the right of a controlled passage', since vessels have to comply with the regulations of the coastal State. Due to the junction, Slovenian vessels are no longer subject to regulations and legal regimes of Croatia, and thus, it has complete freedom of navigation and communication to and from the high seas.

5.1.3 The EU aspect

Since Croatia has resisted to implement the outcome of the Arbitration Tribunal, the border dispute is still on-going. Slovenia submitted a complaint to the CJEU in 2018 due to the issue. However, it shall be said that the actions of the European Commission did not go unnoticed. The then-President of the Commission Jean-Claude Juncker said that the conflict was a 'European problem' and not just a dispute between two member States. Six months later, the EU announced that it would remain neutral in the issue. The drastic turn was criticized, since there is a belief that the dispute had become too politicized.[350]

Some words need to be said regarding the unwillingness of the EU to settle the issue. The CJEU primary focus is to interpret EU law[351], and the ad hoc Arbitration Tribunal of the PCA is not a body of the EU. In general, the EU and the CJEU are not, and do not consider themselves to be a dispute settlement mechanism (i.e. international courts), in that sense that they can decide in cases concerning international maritime law. The European Commission decided to remain neutral on the issue. Such a reasoning should be welcoming, since the dispute is between two member States. It would be highly controversial to see an institutional body of the EU decide in the matter, since it could potentially be seen as if the Union is taking a stand and showing support for one member State and not the other. It could potentially harm the reputation of the EU within the international community and also among the citizens of the EU in the member States. However, even though this is a more political aspect than it is legal, it seems as if the Commission did not know how to address the issue properly, which resulted in the contradicting statements by the then-President of the Commission. Nonetheless, the dispute itself is not unsolvable through legal means and/or bilateral agreements, but it seems to be a question that is rather politically and emotionally charged for both Slovenia and Croatia.

5.1.4 Answer to the first research question

It may be said that neither State received what they claimed in the arbitration, when the PCA Final Award was finally presented. Slovenia did claim full sovereignty over the bay, whereas Croatia claimed a fifty-fifty split. The tribunal followed the 'three-step approach', previously applied in cases concerning maritime border delimitations. To this, a primary equidistance line within the Bay of Piran was drawn, followed by the assessment of the special circumstances provided by the two parties. As for the PCA Final Award itself, there are some controversies that surround the outcome. It shall be said that international law is not always as waterproof as national legislation is. Hence, these gaps within international law are usually to

[350] Müller (n 33).

[351] European Union, '*Court of Justice of the EU (CJEU)*' <https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en> accessed 28 November 2020.

be solved in light of available treaties, previous case law and doctrine. The fact that controversial remarks can be found, the tribunal seems to have largely relied on previous State practice of the two States in question.

A clear example in the Arbitration Tribunal's Final Award can be found in the fact that it remained rather consistent to the bilateral 2001 Drnovšek-Račan Agreement, signed by the two States. The fact that the Croatian Parliament decided not to ratify the agreement, did not mean that the provisions of it were not implemented. On the contrary, the regime leading up to the arbitration was very much in line with the provisions of the mentioned agreement. A clear example of this is that the legal regime within the Bay of Piran and Slovenia's right to access the high seas from its territorial sea was not endangered nor prevented by Croatia in the time between 2001 and 2017.

The main issue that remains is to find a suitable solution for both States. The analysis has shown that the main issue for Croatia has been the work and scandals that emerged during the hearings of the Arbitration Tribunal, and not necessarily the results found in the Final Award. Article 15 of UNCLOS has been interpreted differently by the two States. Croatia's claim that the principle of equidistance is the primary rule is faulty and not tenable. Indeed, the principle itself is the starting point in any case concerning maritime delimitation disputes. But previous case law has shown that there are many special and relevant circumstances that the courts have accepted as valid claims. Hence, the outcome of the Final Award is, in large, understandable, and in line with international maritime doctrine.

In conclusion, Croatia's actions both regarding 2001 Drnovšek-Račan Agreement and 2017 Final Award by the Arbitration Tribunal, might lead to more harm than good, due to the risk that Croatia could potentially be considered as an unreliable partner on the international stage. As for the question of a permanent solution for the border delimitation, even though the Final Award did not change much in respect to the actual legal regime that had been taking place within the bay, Croatia does not have much ground to argue a different outcome within the bay itself, since the principle of equidistance does not result in equitable proportions for Slovenia, which is much more dependent on the bay. As for the use of the maritime junction, which Slovenia was granted across the territorial seas of Croatia, it shall be said that the area itself still is regarded as a part of Croatia's maritime space. Slovenia may only use it for the sake of freedom of navigation and communication, and it does not hold any other rights that come with sovereignty, such as the right of exploration and exploitation in the area.

There are no indications that Croatia would change its position in the current matter. It will hold firm to their position that the tribunal's judgement is invalid and the issue will most likely have to be raised in the future. A bilateral agreement between the two States could bring a final settlement and its content would very much have to be in line with the Final Award. Croatia has not officially opposed the actual border delimitation as such, but one major issue for both States are the rights of the fisheries on both sides of the border. There is a possibility that a joint management area could be set up, in which fishing activities could be conducted by parties from both States. Such reasoning has been accepted by international

courts and constitute customary law, thanks to the 1993 '*Greenland/Jan Mayen Case*'[352]. For Slovenia, that would result in a concession, but it would most likely be in the interest of both States, to maintain good neighbourly relations, which in general, are very good today.

5.2 Does Croatia violate the rights of Bosnia and Herzegovina, as a maritime state, to access the high seas through its construction of the Peljesac Bridge?

The maritime border dispute between BiH and Croatia, has not been brought before an arbitration tribunal, as was the case with the dispute between Croatia and Slovenia. The dispute has been on-going since the independence of the two States from the SFRY. In 1999, the Neum Agreement, signed by the former presidents of the two States, aimed to resolve the main problems in connection with the dispute and establish a legal regime in the area which would be suitable for both sides. However, since neither State managed to ratify the agreement, the legal framework within the area remains unclear on many accounts. Nonetheless, it shall be said that the agreement and its provisions, in general, are largely applied in this part of the Adriatic Sea.[353]

5.2.1 Maritime Border Delimitation in the Channel of Mali Ston

The main problem for the BiH side is that the border with Croatia in the Channel of Mali Ston, has never been fully settled. In the 1999 Neum Agreement, the both sides agreed on a proposed future border.[354] But since the agreement failed to be ratified by both States, it is not possible to determine exactly how the official border runs.

5.2.1.1 The Tip of the Klek Peninsula

The dispute is not in its entirety a maritime dispute, since it also concerns the delimitation of the land territory, namely on the Klek Peninsula.[355] The Croatian Dubrovnik-Neretva County claims the tips of the Klek Peninsula, due to historic reasons. However, even if this claim was one of the reasons the Croatian Parliament chose not to ratify the treaty, it should not be considered as a claim of the Republic of Croatia. The State itself has never claimed the tip to be a part of its territory, at the same time as BiH (both prior- and post-independence) has had *de facto* and *de jure* control over the whole peninsula. This is also shown in the '*Act on State Survey and Real Estate Cadastre'*, set up in 1974 by the SFRY. In practice, if Croatia would claim the tip, as per request of one of its counties, it would still not have any major use of it. It would be a completely isolated land territory of Croatia, and it would still only be accessible by road through BiH territory. Therefore, it is reasonable and also suitable to believe that Croatia will never officially claim the tip, since it would be a breach of its own State practice.

[352] Section 3.2.6.1, 'Economic Factors'.
[353] Section 2.3.1, 'Neum Agreement'; Section 2.3.4, 'Aftermath and legal situation post-1999'.
[354] See '*Appendix 4'*.
[355] Section 2.3.2, 'Klek Peninsula'.

Furthermore, the Badinter Commission, set up by the EC in 1991[356], concluded in 'Opinion 3' that the borders[357] between the former socialist States would remain the same now that they were independent, in accordance with the principle of Uti Possidetis. Croatia relied on the Badinter Commission's report during the Independence War (1991-1995) to justify its right to the whole territory that once constituted the Socialist Republic of Croatia. Hence, the land borders have very much remained the same post-independence. Any changes to the land borders can only be done through bilateral agreements between relevant States. If Croatia was to officially claim the tip of the Klek Peninsula, it could have other implications for this State, for instance along its eastern border with Serbia along the Danube River. Governments (both former and present) of Croatia have been very much aware of this. Hence, it is unreasonable, in the context of the Croatian Constitution[358], to believe that the sovereignty and territorial integrity of Croatia would be endangered, since Croatia's official position has been that the whole Klek Peninsula is a part of BiH.

In conclusion, it may be said that any potential claims of the Republic of Croatia related to the peninsula would, with great certainty, not be accepted by any international court. The main reason is that BiH has had the *de facto* and *de jure* control over the whole peninsula, and such a claim would be in breach of the Badinter Commission and the principle of Uti Possidetis.

5.2.1.2 The status of the Veliki and Mali Školj islets?

As for the two islets in the Channel of Mali Ston[359], the SFRY '*Act on State Survey and Real Estate Cadastre'* declared them to be a part of the then-Socialist Republic of BiH. Nonetheless, in contrast to the issue concerning the tip of the Klek Peninsula, Croatia is unofficially claiming[360] the two as a part of Croatian territory. In the Neum Agreement, it was decided that the maritime border between the two States would be drawn in accordance with the principle of equidistance[361]. Such delimitation resulted in the two islets falling within the

[356] Section 2.3.1, 'Neum Agreement'; Section 4.3, 'Uti Possidetis'.

[357] As for the term *'border'*, in the context of the Badinter Commission, it shall be noted that the Commission stated in 'Opinion 3' that the borders would remain the same. However, even if the land borders between the socialist republics were clearly defined during the rule of the SFRY, the maritime borders between them were never defined by the State. Hence, all maritime areas, adjacent to the coast of then-Socialist Republics Slovenia, Croatia, BiH and Montenegro, were considered as Yugoslav internal and territorial waters. Therefore, sovereignty over the maritime areas rested with the State itself and not with the socialist republics.

[358] Constitution of the Republic of Croatia article 2.

[359] Section 2.3.3, 'Veliki and Mali Školj'.

[360] It shall be noted that the claims of Croatia concerning the two islets have not been straight forward. They are uninhabited and do hold any permanent population. Geographically, they are much closer to BiH, and according to the provisional equidistance line, drawn in the negotiations leading to the Neum Agreement (1999), they are also located within the territorial sea of BiH. Objections were raised by the Croatian Dubrovnik-Neretva County, which claim the islets to be Croatian. Hence, official bodies and institutions of the Republic of Croatia have claimed the islets. However, no Government of Croatia has, thus far, officially declared if the State claims the islets or not. Therefore, the conclusion that may be drawn is that it is an domestic matter which Croatia will have to declare its position in the future.

[361] Section 3.2.3, 'The Principle of Equidistance'.

territorial sea of BiH. The islets are in the ownership of a Croat family, who are citizens of BiH[362]. In their view, the islets constitute the territory of BiH.

The status of the islets, as to which State they belong to is an important question, since it would determine how the maritime border would be drawn between the two States. In the 1999 Neum Agreement, the provisional equidistance line was drawn as a median line across the Channel of Mali Ston, between the mainland of Croatia and BiH. However, if Croatia was to officially declare a claim over the Veliki and Mali Školj, it could potentially change the current equidistance line, since they would fall within the internal waters of Croatia. Thus, the maritime border would run very close to the coast of BiH, since it would have to be drawn between the islets and the Klek Peninsula, and not in the middle of the Channel of Mali Ston.

It is important to note that in the 1999 Neum Agreement, it was decided that the islets would be given 'no-effect'.[363] Hence, they do not generate any additional territorial sea for BiH[364]. This is in line with UNCLOS, since the islets do not, and cannot sustain any economic life of its own, nor any human habitation.[365] Even though they are a natural formation, surrounded by waters, they would most likely be considered as 'rocks'.[366] Hence, the delimitation made in 1999, can be considered to be in line with previous case law, i.e. the ICJ 1999 '*Eritrea/Yemen Case'* and the ICJ 1985 '*Libya/Malta Case'*.

Croatia's unofficial stance could be interpreted as if it would like to wait for the proper time to define the status of the Veliki and Mali Školj. By neither officially claiming them, nor declaring them as BiH territory, it could give Croatia a better starting point in future negotiations as to whom the islets should belong to. Nonetheless, BiH has consistently considered them to be a part of its territory and it is a historical fact that they were recognized as such both according to the 1974 SFRY cadastre and the current BiH cadaster. Hence, it will not be tenable for Croatia to then claim the islets, since it would very much go against the principle of Uti Possidetis and the Badinter Commission's Report which are of crucial importance for this State. In such case, Croatia would have to present sufficient and convincing evidence that special circumstances exist, and as for now, the chances of any available can be considered as none. Whereas for BiH, which has held the *de facto* and *de jure* control over the islets, at the same time as the owners of them consider that all historic

[362] Zoran Šagolj, 'Vlasnik spornih otoka u Malostonskom zaljevu: Mi jesmo Hrvati, ali Mali i Veliki školj pripadaju BiH. Dubrovačka republika to je područje prodala za svoju slobodu Turcima, a naši preci su ga kupili' (*Slobodna Dalmacija*, 9 July 2017) <https://slobodnadalmacija.hr/vijesti/hrvatska/vlasnik-spornih-otoka-u-malostonskom-zaljevu-mi-jesmo-hrvati-ali-mali-i-veliki-skolj-pripadaju-bih-dubrovacka-republika-to-je-podrucje-prodala-za-svoju-slobodu-turcima-a-nasi-preci-su-ga-kupili-495874> accessed 27 November 2020. The Putica family are the officially the owners of the two islets, and they are Croat citizens of BiH. In their view, the islets are part of the BiH, since their ancestors bought the land during the withdrawal of the Ottoman Empire. They agree that the islets were written in the SFRY Cadastre as a part of the Čapljina Municipality, Socialist Republic of BiH in 1974.

[363] Section 3.2.5.4, 'Presence of islands'.

[364] The islets are not visible in 'Appendix 4', but it is possible to see that the equidistance line is drawn straight across the Channel of Mali Ston, with no regard to other marine features.

[365] UNCLOS article 121(3).

[366] UNCLOS article 121(1).

documentation shows that the two Školjs should belong to BiH, it may be said that they would in any case fall into the possessions of this State.

5.2.2 Peljesac Bridge and the water under it

In recent years, the on-going construction of the Croatian Peljesac Bridge[367] has been a major issue for the bilateral relations between the two States. Croatia claims that the construction is an infrastructural project of national importance, which it frankly is, since it aims to connect two parts of Croatian land territory that are separated by BiH territory. On the other hand, since the maritime border in the Channel of Mali Ston is not defined, BiH claims that the two States need to address the issue first before Croatia can build the bridge.

According to Croatia, one major motivating factor for the construction of the bridge, are the provisions of the 1999 Neum Agreement, which aimed to allow undisturbed flow of traffic to and from the two parts of Croatia via BiH. However, this specific provision has never been implemented, since border control is still exercised. The geo-political situation has also changed, since Croatia has become a member of the EU, which BiH is not. The implementation of EU border regulations has led to significantly more time-consuming border checks, especially during touristic seasons, which adds up traffic congestions in the area. The construction of the bridge would bypass BiH territory, and road travel between two parts of Croatia would not be subject to border regulations.

However, every vessel going to and from Neum, BiH, would have to pass under the bridge, which requires certain infrastructural characteristics in order to avoid a 'cut-off' effect for BiH. Currently, the height of the bridge is set to be 55 m, which would allow a variety of vessel sizes to pass under it. Furthermore, Croatia also argues that the bridge is being built completely within Croatian territory. BiH argues that the waters that flow under the bridge are not defined as to whom they belong and that Croatia's claims cannot be tenable until the two sides agree on a final maritime border delimitation.

Treaty law, i.e. UNCLOS, does not provide one specific and binding rule as to how a maritime border delimitation can be done between the territorial seas of two states. On the contrary, there are several options that need to be interpreted.[368] Article 15(1) sets out that a median equidistance line shall be drawn across a body of water, but the second paragraph of the same article sets out that the principle of equidistance shall not be applied if special circumstances are available. For special circumstances, previous case law provide some interesting aspects and guidance that could be applied in the Channel of Mali Ston. The Arbitration Tribunal concluded in the '*Slovenia/Croatia Case'* from 2017, with inspiration from the 1969 '*North Sea Continental Shelf Case',* that for navigational interests[369], the territorial sea of one State can be naturally prolonged in such way that it connects to the high

[367] Section 2.3.5, 'Peljesac Bridge'.
[368] Section 3.2.3, 'The Principle of Equidistance'.
[369] Section 3.2.6.5, 'Navigational Interests'.

seas[370]. However, even though the Slovenia/Croatia Case is a precedence, it is not necessarily considered as international customary law. Furthermore, the geographical features are different in the area of Neum. They are different to the extent that BiH can be considered as a geographically disadvantaged State[371], since its territorial sea is located deep within what Croatia has declared to be its internal waters.

Frankly, the bridge is a relatively normal infrastructural project, regulated within national legislation and Croatia does have the right to connect its territories though the project. A similar case can be found in Scandinavia, where the Danish-Swedish Øresund Bridge and the Danish Great Belt Fixed Link across the Danish straits, encloses the Baltic Sea from the North Sea.[372] The construction of the Great Belt Fixed Link was opposed by Finland, however, it was never tried in an international court since the two States resolved the matter through a bilateral agreement[373]. A bilateral agreement between BiH and Croatia could resolve the matter, in which the rights of BiH as a coastal State, could be settled by ensuring that BiH's navigation and communication interests are secured. Nonetheless, any agreement would also have to address the question as to which State the waters below the bridge belong to.

5.2.3 Croatia's use of straight baselines

Croatia uses a system of straight baselines[374], due to the presence of many islands and irregularities in its coast line. Coastal States may use either normal or straight baselines, or a combination of both. However, it is possible to assume that Croatia has applied straight baselines in breach of international maritime law. The maritime area between the baseline and the coast of Croatia constitute internal waters. According to UNCLOS, article 7(6), a coastal State's use of straight baselines may not cut-off the territorial sea of another coastal State. Hence, by declaring the waters in the Channel of Mali Ston as Croatian internal waters, the only sea exit to international waters is cut off for BiH.

In a legal context, this status which Croatia grants its waters can be viewed as problematic. The freedom of innocent passage is only applicable in the territorial waters of a coastal State. However, through the use of straight baselines, by default, a vessel en route to Neum, BiH, must pass through the internal waters of Croatia where the principle of innocent passage does not have to be tolerated. Therefore, it may be said that the rights of BiH, as a coastal State, are being limited by Croatia.

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[370] Section 2.2.3, 'The Arbitration Tribunal's Final Award'.

[371] 'Geographically disadvantaged States' are those States that can be considered as to having an unfavourable geographical position when compared to e.g. its neighbours. In the case of BiH, its territorial sea is located deep within the proclaimed internal waters of Croatia. Hence, the access to international waters from BiH is dependant of the legal regime in both the internal and territorial waters of Croatia.

[372] Martti Koskenniemi, '*Passage through the Great Belt Case (Finland v Denmark)*' (December 2006) in Rüdiger Wolfrum (ed), Max Planck Encyclopedias of International Law (online edn) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e193> accessed 27 November 2020.

[373] Tanaka 130.

[374] Section 2.3.4, 'Aftermath and legal situation post-1999'.

There are similarities between this dispute and the dispute between Croatia and Slovenia. Slovenia's territorial sea was not connected to the high seas, which was the reason as to why Slovenia was granted a maritime junction across the territorial sea of Croatia.[375] Whether or not a similar solution could be applicable in the dispute between BiH and Croatia is debatable. In other words, that BiH would be granted a maritime junction from its territorial waters to the high seas, across the internal and territorial seas of Croatia. One major problem is that BiH waters are located deep within the internal waters of Croatia. A junction would have to be geographically long in distance, in comparison with the Slovenian maritime junction. It shall also be said that case law concerning maritime corridors is rather sparse, but it is possible to assume that the outcome of the PCA 2007 Arbitration Award could have significant impact on legal developments in and around Neum.

To add further confusion, according to Croatia, the straits located between the territorial sea of BiH and the high seas, hold the status of international straits.[376] The legal regime in international straits is as such that vessels of a foreign State may pass through it, since they enjoy the right of 'non-suspendable passage'[377]. Thus, if a vessel is en route to or from Neum, BiH, they would be able to use the Croatian straits for international navigation. It shall be mentioned that this has been the *de facto* regime in this part of the Adriatic Sea. However, the question that remains is if BiH should be content with this solution, since it has more or less turned into State practice of both States, or if BiH should opt for a junction, similar to the one Slovenia gained in the PCA Arbitration. BiH may demand a junction, and in light of mentioned case law, it could potentially acquire one. However, Croatia would most likely oppose the move, equally as it has done in the northern Adriatic Sea, in order to be consistent with its State practice. Nonetheless, if BiH would be granted a maritime junction to the high seas, it would be plausible that such reasoning could become a part of customary law.

It is possible to put this specific question into an EU perspective. Croatia is a member of the Union, whereas BiH is not. In the hypothetical scenario where BiH would potentially be subject to EU sanctions, it would have implications for this State. Croatian internal waters are, equally, the internal waters of the EU. Therefore, sanctions against BiH would result in a situation where BiH vessels and persons would not be able to pass through Croatian maritime spaces, no matter what political views Croatia would hold. It shall be said that there are currently no such plans from the EU, but it is one concern that the political leaders of BiH would have to bear in mind in future negotiations with Croatia.

5.2.4 International Arbitration

Under what circumstances the dispute will be resolved and settled is an important part of the overall issue. An international arbitration, similar to the Slovenia/Croatia Arbitration, could

[375] See 'Appendix 2'.
[376] Section 2.3.5, 'Peljesac Bridge'; Šabić, Borić, (n 5) 5.
[377] TSC 1958 article 16(4); UNCLOS 1982 article 45(1)(b); *'Corfu Channel Case'* (UK v. Albania) (Judgement) [1949] ICJ Rep.

be one solution. However, it shall be noted that an international arbitration would require the consent of both States, which is easier said than done. The first arbitration did not result in a positive outcome for Croatia, whereas BiH would most likely be very successful in its claims. Furthermore, it is important to understand the State structure of BiH. After the independence war in BiH, political power was divided by the three ethnic groups within the country. Representatives of the three major ethnic groups (legally referred to as 'constituent peoples') would have to give their consent and approval in order for the dispute to be settled in an international arbitration. Currently, political representatives of the Croats in BiH hold close relations to Croatia. Due to this, it is hard to project that BiH would be able to officially bring the matter to arbitration. Moreover, the fact that the dispute has been on-going for decades, it seems as if neither State would opt for such proceedings[378]. Another and more plausible settlement could be reached through a bilateral agreement. The most provisions of the 1999 Neum Agreement, despite that it has not been ratified, has constituted *modus vivendi* and has been followed by both States. It is possible that the two States could renegotiate the agreement in a direction which would resolve the remaining issues. A bilateral agreement could perhaps be a better solution, since it would allow the States to compromise and agree to a settlement which would be in the interest of both neighbours.

5.2.5 Answer to the second research question

The 1999 Neum Agreement, which aimed to resolve the maritime dispute between the two States has never been ratified. It is not possible to see any indications that so will be the case in a foreseeable future, at least not in its current form, since the parliaments of both States oppose such a move. However, the provisions of the agreement has more or less become modus vivendi and is largely respected by both States, to the extent that it can be seen as State practice. Furthermore, the construction of the Croatian Peljesac Bridge has given the dispute another dimension. Croatia seems to be in breach of treaty law, since its internal waters are currently cutting off the territorial sea of BiH from the high seas. It remains unclear if the bridge is being constructed over Croatian or BiH maritime territory. Available case law does speak in favour of BiH, since its territorial waters could be, through natural prolongation, extended. Thus, the rights of BiH as a coastal State can today be viewed as violated by Croatia. The core issue is the fact that the maritime border between the two States has remained unsettled and it is not possible to say where the border geographically runs. Whether or not this is a reason to stop the construction of the bridge depends on who is asked the question. Croatia argues that the border has been settled through State practice, since the Neum Agreement is largely implemented, whereas BiH argues that the border cannot be considered as settled since the agreement has never been ratified. The concerns of BiH should not be waved so simply, since previous treaty and case law could benefit BiH more than Croatia. Furthermore, since the agreement itself is not ratified, there are no guarantees that the projected border is in line with international maritime law.

[378] View shared by Dr Robin Cleverly [E-mail], Director, Marbdy Consulting Ltd (Somerset, UK, 21 November 2020).

Nevertheless, the construction of the bridge itself should be regarded as an infrastructural project. Its current size characteristics with a height of 55 m, which have partly been changed due to objections from BiH, would still allow relatively large vessels to pass under it en route to Neum. The prospects of any harbour construction Neum are slim, and BiH will remain dependent of the Croatian harbour in Ploce for a significant amount of time.

5.3 Should the maritime border between Croatia and Montenegro, in the proximity of the Bay of Kotor, be drawn in accordance with the principle of equidistance or the principle of equity?

In order to answer the third and last research question, it is important to understand the current legal regime taking place in the proximity of the Bay of Kotor. In 2002, the *'Temporary Protocol between Republic of Croatia and Federal Republic of Yugoslavia (Serbia and Montenegro)'* was signed by the governments of the two neighbours. As the name states, it is only meant to be temporary, until both parties reach a new agreement which would resolve the dispute. Nonetheless, it is important to bear in mind that the provisions of the temporary agreement have been largely implemented. Also, the current bilateral relations between the two States are considered as good. Both are members of NATO. Hence, the already co-operate in security issues.

5.3.1 Who owns the Prevlaka Peninsula?

The Prevlaka Peninsula is a very narrow land strip which, according to the temporary protocol, falls within the boundaries of the Republic of Croatia. It is located at the north-western entrance of the Bay of Kotor.[379] Due to the principle 'land dominates the sea', the peninsula produces Croatian territorial sea at the entrance itself. During the rule of the SFRY, this was a none-issue. However, post-independence of both States, the question as to what legal status the peninsula hold is up for debate. In the temporary protocol, it is only mentioned that the peninsula would temporarily be considered to fall under the jurisdiction of Croatia[380].

The current *modus vivendi*, concerning the peninsula has left Montenegro largely displeased, since the entrance of the bay is shared between the two States. The question is if the current legal regime is in line with the Badinter Commission's report[381]. The peninsula itself was a part of the former Socialist Republic of Croatia prior to independence and as the land borders were to remain the same post-independence, it could be said that the temporary protocol is not in line with the Commission's report.

During future negotiations, the issue concerning the ownership of the peninsula will have to be discussed. Thus, it may be said that Prevlaka Peninsula legal status is currently unclear, and neither State can officially say that they hold undivided sovereignty and jurisdiction over the land. However, it is hard to ignore the fact that the peninsula has been a part of Croatia consistently both prior and after independence (although 'temporarily'). On the other hand,

[379] Section 2.4, 'The Prevlaka Peninsula'.
[380] Arnaut 156.
[381] Section 2.3.1, 'Neum Agreement'.

Montenegro will find it hard to put claims on the peninsula, since both States have remained consistent with the Badinter Commission Report from 1991. Furthermore, the principle of Uti possidetis[382], which has had significant influence over other disputes between the ex-Yugoslav State, would also speak in favour of Croatia. The fact that the peninsula was demilitarised and under UN control in the period between 1992-2002 does not change the circumstances to an extent that it will be tenable to see the peninsula be transferred under the control of Montenegro.

5.3.2 The Legal Regime at the Entrance of the Bay of Kotor

According to the Temporary Protocol, regarding the legal regime over waters that surround the peninsula, and ultimately the entrance of the bay, is shared between the two States. Joint controls are enforced and it is possible to say that an informal condominium has been in force since 2002 in the area. The maritime border has its starting-point of the western coast of the bay. This is also the main issue for Montenegro, since the State claims complete control over the entrance. On the other hand, Croatia claims that the bay should partly be considered as theirs.[383]

Croatia is right in the sense that their control of the peninsula produces territorial sea over which it holds sovereignty, and it is in line with UNCLOS. Be that as it may, it is important to look at the wider picture in the area. Montenegro holds over 100 km of coast within the bay, a significant proportion of its population resides here and there are several Montenegrin harbours within it. Practically all vessels passing through the entrance are en route to or from a Montenegrin harbour. The dispute holds similarities with the Slovenian/Croatian dispute in the Bay of Piran[384], where Croatia was in a disadvantaged position, since the bay was found by the PCA to be of greater economic, security and navigational importance to Slovenia.

The temporary delimitation at the entrance has been done in accordance with the principle of equidistance, article 15(1), UNCLOS. The fact that Croatia and Montenegro hold land territory adjacent to the waters that flow through the entrance of the bay, generate territorial sea for both States. Therefore, it is possible to conclude that the temporary delimitation is in line with UNCLOS and international maritime law in general. However, in any bilateral negotiations or international arbitration concerning a final delimitation, the question of 'special circumstances' will have to be raised. As mentioned, Montenegro opposes the present solution, and the State wants to see it revised. Depending on what claims Montenegro will present in a future negotiation or even an arbitrational tribunal, a change of the provisional equidistance line currently in place, could be legally made.

Under article 15(2), UNCLOS, a State can present relevant/special circumstances, which would allow a change of a provisional delimitation. As stated above, Montenegro holds major interests in the bay that may be considered to be of national importance. Croatia will find it

[382] Section 4.3, 'Uti Possidetis'.
[383] Arnaut 159.
[384] Sectio 2.4.2, 'The Bay of Kotor'.

hard to make any convincing claims within the bay itself. However, any claim for territorial sea at the entrance of the bay will have to be respected by Montenegro. The coastal configuration of both States in the area are such, that it allows both to hold some type of maritime control at the entrance itself. Hence, it is important to differentiate (1) the maritime border and (2) the legal regime at the entrance of the bay. Changes to the border can geographically only be done by moving it closer to the coast to Croatia, since the ratio of coastal lengths of the two States are in favour of Montenegro. However, changing the border from what was agreed in the temporary protocol would mean that the Prevlaka Peninsula would not produce any territorial sea for Croatia whatsoever[385]. Therefore, any further changes of the border in the direction of Croatian land territory should not be seen as viable. As for the legal regime, it shall be said that Montenegro has historically cited security and navigational concerns, as to why Croatia cannot hold half the entrance. However, the geopolitical situation has changed in the region, since both States view each other as good neighbours and both are members of NATO. The fact that the two were at war during the 1990s and that the bilateral relations were damaged by the turn of the century, cannot be considered as a relevant circumstance in the present context.

Moreover, in the territorial sea of a State, foreign vessels enjoy the right of innocent passage.[386] Since the Montenegrin harbours are located inside the bay, to which almost all vessels are bound to and from, it would still be able to navigate in and out of the bay due to the principle. Nonetheless, as one of two coastal States, Croatia would still have the right to enforce its jurisdiction and sovereignty at the entrance. Vessels would also have to comply with Croatian regulations.

One possible outcome in future negotiations between the two States, could include a clause where authorities of both States jointly exercise control over the entrance of the bay. Frankly, according to the Temporary Protocol, this is the official legal regime and it has operated as *modus vivendi* from 2002 and onwards. It is difficult to expect that Croatia will make concessions and grant unrestricted access at the entrance of the bay, even though practically all vessels passing are en route to or from Montenegro. There are two major reasons for this. Firstly, Croatian land territory is located right next to the entrance, and Croatia will want to uphold security and sovereignty over its maritime territory. Secondly, changing the provisional equidistance line would not benefit Croatia, since the line would be drawn too close to its land territory, which would generate less territorial sea than it already has in the area.

5.3.3 Delimitation of the Territorial Sea

As for the delimitation of the territorial sea in the Adriatic between Croatia and Montenegro, it shall be said that a provisional equidistance line was agreed in the Temporary Protocol, in accordance with article 15(1), UNCLOS. The line is measured from the Prevlaka Peninsula and the entrance of the Bay of Piran, stretching out into the Adriatic. Montenegro disputes the

[385] See 'Appendix 5'.

[386] Section 4.2, 'Innocent Passage in the Territorial Sea'.

temporary maritime border, since it claims that a delimitation should be made in accordance with the principle of equity. However, even if Montenegro waited a decade to officially present its maritime claims over the territorial sea, it finally did so in 2014[387]. This move was viewed by Croatia as a breach of the 2002 Temporary Protocol, resulting in a diplomatic protest note being sent to the Montenegrin government.[388] Currently, the two States have over-lapping claims over a maritime area of roughly 1892 km^2.[389] On the other hand, the Government of Montenegro protested in 2015, when Croatia proposed to explore and exploit within the disputed area for oil and gas minerals[390].

In general, maritime border delimitations are first made in accordance with the principle of equidistance.[391] As for Montenegro, it is understandable that they oppose such a delimitation, since it cuts through its coastal front out in the Adriatic due to the geographical position of the Prevlaka Peninsula, which grants Croatia a significantly larger maritime area. The peninsula is very narrow and relatively small, but according to the Temporary Protocol from 2002, it is the starting-point from where the maritime delimitation border is being drawn. It is questionable if an international court would accept this as a final solution, since it does not provide a proportional delimitation. Again, comparisons can be made with the PCA 2017 Slovenia/Croatia Case, where the tribunal concluded that Croatia's coastal configuration is generally south-westwards. But in the Bay of Piran, Croatia's coast turns drastically north-east. The application of a strict equidistance line generated a disproportionate amount of maritime area for Croatia, due to a very small coastal strip.[392] The same reasoning could be applicable in the proximity of the Prevlaka Peninsula, which ultimately will affect the delimitation of their respective territorial seas.

It is clear that both States officially have overlapping maritime claims to the territorial sea since 2014. One question which arises is what the underlying reasons of these recent decisions are. It is well-known that States involved in maritime disputes often tend to exaggerate their claims in order to have a better starting position when involved in international arbitrations. For example, Slovenia did claim sovereignty over the whole Bay of Piran, despite the fact that it was clearly against existing treaty law. It is speculative, but it seems to be a reasonable explanation, since the claim of Montenegro is also unseen of in previous case law. As for the actions of Croatia and the legality to explore and exploit the disputed area, the question will remain unanswered. Nevertheless, the area in which both States have overlapping claims is indeed rich in oil and natural resources. It is possible that the reason as to why Croatia decided to make this move is because it might want to claim economic factors as a special circumstance. Even though this claim is hypothetical, it is not unheard off in the context of international maritime law. A State may claim relevant and/or

[387] Section 2.4.3, 'Border Delimitation of the Territorial Sea'.
[388] Barić Punda, Filipović 83, para 6.
[389] See 'Appenix 6'.
[390] Kajosevic (n 144).
[391] UNCLOS article 15(1).
[392] Section 2.2.3, 'The Arbitration Tribunal's Final Award'.

special circumstances, which can result in a change of the provisional equidistance line.[393] Similarities can be found in the 2002 ICJ '*Cameroon/Nigeria Case*'[394]. However, the ICJ concluded that the Nigerian oil concessions could not pose as a relevant circumstance. Thus, Croatia will most likely not be successful in this specific claim. Besides, Croatia would in any case be likely to remain consistent in its claim that the principle of equidistance should be used also in the question of delimiting the border between the territorial seas of the two States. On that note, both aspects should largely be viewed as a part of a wider political game, but it does change the dimension of the dispute.

In conclusion, it is obvious that the geographically south-eastern position of the peninsula generates a disproportionate amount of maritime area for Croatia. Thus, it is plausible that Montenegro would be successful in its claim that the border delimitation should be made in accordance with the principle of equity, with changes to the provisional line currently in place, since it would result in a more balanced and proportional delimitation.

5.3.4 International Arbitration

The possibilities for the two States to bring the dispute to an international arbitration, to which both parties must give its consent remains unlikely. Mainly, the Government of Croatia does not seem to be positively set for an arbitration[395]. It goes hand in hand with the outcome of the Slovenian/Croatian Arbitration, which Croatia does not accept. Same reason lies behind Croatia's unwillingness to resolve the dispute with BiH at an arbitration tribunal[396]. As for the provisions of the Temporary Protocol between Croatia and Montenegro, they will continue to be applied as a temporary legal regime since it has proved to maintain the security in the area. A future bilateral agreement between the two States could solve most of the legal issues concerning the delimitation of both the land and maritime border. It will most certainly be based on the current Temporary Protocol, but with adjustments, in line with the present security situation at Croatia's southern border. A bilateral agreement would be a better option, since it would allow the neighbours to compromise and agree to a settlement which would be in the interest of the both.

5.3.5 Answer to the third research question

The provisions of the '*Temporary Protocol between Republic of Croatia and Federal Republic of Yugoslavia (Serbia and Montenegro)'* have been largely implemented by both States since 2002. It has become State practice of the neighbours and *modus vivendi*. The implementation of the protocol has transformed a turbulent area into a clam and peaceful one. Nonetheless, it has outplayed its role, since both States are discontent with the current situation, for a variety of reasons. At some point in the future, the dispute will have to be addressed and resolved jointly by both States. As for the research question, it must be seen in

[393] UNCLOS article 15(2).
[394] *'Land and Maritime Boundary between Cameroon and Nigeria'* (Cameroon v. Nigeria) (Judgement) [2002] ICJ Rep 447, para 303; Section 3.2.6.1, 'Economic Factors'.
[395] View shared by Dr Robin Cleverly [E-mail], Director, Marbdy Consulting Ltd (Somerset, UK, 21 November 2020).
[396] Section 5.2.4, 'International Arbitration'.

the context of the entirety of the dispute, since it does not only involve the entrance of the Bay of Kotor, but also the delimitation of the territorial sea between the two States.

Due to the consistent State practice of Croatia concerning the territorial sovereignty over the Prevlaka Peninsula, over which it has held *de facto* control since 2002, Montenegro will have to accept that the peninsula will *de jure* become a part of Croatia. In turn, this will have negative consequences for Montenegro, since the principle 'land dominates the sea' is a well-established principle within the field of international maritime law. Thus, the north-western part of the entrance of the Bay of Kotor will fall under Croatian territorial waters. Nevertheless, the legal regime and framework at the entrance should be negotiated in the spirit of good neighbourly relations, since the bay is of great economic and navigational interest for Montenegro. The current sea-lanes established at the entrance are well-functioning, despite the fact that they are divided between the two States.

As for the delimitation of the territorial sea, Croatia maintains its position that it has had in the two previous disputes, i.e. the principle of equidistance should delimit the border. Frankly, a strict application of the principle would benefit Croatia the most. Furthermore, the disregard of Croatia concerning relevant and special circumstances (perhaps apart from the economic interests it holds in the disputed area), might prove to have negative consequences for Croatia, as it did in the Slovenia/Croatia dispute. Montenegro, on the other hand, could be successful in claiming that the principle of equidistance would result in a disproportionate divide of the territorial sea. Hence, in accordance with previous case law, there are convincing reasons for the temporary equidistance line to be adjusted in a more equitable manner.

6 Conclusion

The eastern coast of the Adriatic Sea has been the scene of decades-long maritime border disputes. The drastic and complex collapse of the SFRY left many border disputes and legal questions unanswered. The successor and new-neighbour States found themselves in broken-down bilateral relations with each other, which resulted in long overdue disputes with no solutions in sight. Nevertheless, attempts have been made to solve the disputes through diplomatic channels. Agreements were signed, but they failed to be ratified by the State parliaments. A peculiarity is that most provisions of the agreements have been implemented in each specific dispute. Hence, the current *modus vivendi* is largely based on what former governments of each State has agreed upon. Croatia is the State with the highest number of border disputes, of which three concerns the maritime borders with its neighbours. The only dispute that was resolved through an international arbitration was with Slovenia. However, Croatia has refused to accept the final judgement in this specific case. The disputes with BiH and Montenegro remain to be sensitive issues for the current and future relations between these States. As of today, it is not possible to see any political will to resolve the disputes. Hence, negotiations are put on hold for the time being.

Equally as the disputes are complex, so are the legal tools within the field of international maritime law. The principles and provisions of international treaties, e.g. UNCLOS, are

formulated to have general application. However, every dispute is unique and holds characteristics that are different from any other dispute. When analysing a maritime border dispute, States often disagree on several aspects, which often are complex. Furthermore, it is not just a border that needs to be agreed upon, but also the legal regimes in specific areas and questions concerning State sovereignty and jurisdiction. Nevertheless, it is possible to see consistency in the State practises of each State. Croatia has generally argued that the principle of equidistance should be used for final delimitations in all disputes. This should not be seen as unusual, since the principle benefits Croatia's claims the most. Furthermore, the principle is a well-established and legitimate tool for delimitations, but it is not the only one. In general, previous case law concerning maritime border delimitations show a variety of special and relevant circumstances that need to be taken into account, before reaching a final solution. Croatia has consistently opposed any claim of its neighbours, which have largely been based on special and relevant circumstances.

The analysis shows that there is a risk that the Western Balkan States could potentially be regarded by other States as unreliable partners in the context of international law, since their bilateral agreements have failed to be ratified. Nevertheless, the BiH/Croatia- and Montenegro/Croatia dispute will most likely have to be resolved through additional and future bilateral negotiations, due to Croatia's current negative opinion concerning international arbitrations. The *modus vivendi* in the disputed areas are already largely based on previous agreements. Hence, the most optimal solutions would have to be based on the 1999 Neum Agreement and the 2002 Temporary Protocol with modifications in line with the interests of each State.

As for the Slovenian/Croatian dispute, the legal regime in the Bay of Piran is already based on the 2017 Final Award of the PCA. In general, the outcome for Croatia was negative, but not in an extreme manner. The maritime junction which Slovenia was granted is a precedent in case law within the legal field of international maritime law. Nevertheless, Croatia still holds full sovereignty and jurisdiction over its territorial sea and Slovenia did not gain any additional rights apart from having the right to pass undisrupted through Croatian waters. Hence, the solution is closely linked with the principle of innocent passage. The analysis found that the Final Award is not entirely uncontroversial, due to the reasoning concerning the natural prolongation of the territorial sea for Slovenia. The concept of natural prolongation has in previous case law only been applied in cases concerning delimitations of the continental shelf. As for the Bay of Piran, even though it was not divided according to the principle of equidistance, Croatia still gained the southern proportion of the bay, despite not having any significant interests in the area. Croatia will either have to accept the judgement at some point in the future or persuade Slovenia to enter bilateral negotiations in order to solve the remaining issues it faces. Currently, what seems to be the main question concerns the small fishing communities on both sides of the border and it would be appropriate to establish a clear legal framework as to how these activities shall be conducted. However, any further changes to the maritime border within the bay should be deemed as unlikely, since it would mean that Slovenia would give up maritime spaces it was granted by an international court. In

turn, that would be seen as a precedent and could negatively affect the international view of the PCA as a maritime settlement mechanism.

As for the BiH/Croatian dispute, the analysis has shown that the construction of the Peljesac Bridge and Croatia's use of straight baselines are not in line with UNCLOS, since the territorial sea of BiH is cut-off from the high seas. Nevertheless, it is largely a question concerning the freedom of navigation for the BiH side, which Croatia has never opposed. Vessels are still able to enter and exit Neum, BiH, through the internal waters of Croatia, despite the fact that innocent passage does not have to be tolerated in internal waters of a State. However, the chances of bringing the dispute to an international arbitration should be seen as very small. The reason for this lies partly in the power share within the State of BiH, which is divided along ethnic lines and consent from all three ethnic groups would be required. Such move is currently unlikely. On the other side, Croatia is also sceptical of entering a second arbitration, primarily due to large costs and negative experience from the Slovenian/Croatian arbitration. The most viable solution would be through a bilateral agreement, which would be largely based on the 1999 Neum Agreement. Croatia would have to change its use of baselines in the Channel of Mali Ston and in the Croatian Straits, in order to be in line with UNCLOS, to which both States are party to. Furthermore, a future agreement will also have to permanently delimit the maritime border under the Peljesac Bridge itself, since the outcome of the PCA 2017 Slovenia/Croatia Arbitration show that the concept of natural prolongation also can be applied in the case of territorial waters. As for the bridge itself, it shall be said that Croatia has the right to connect its two parts of land territory, but the characteristics of the bridge must be as such that it does not hinder or prevent vessels from entering the territorial sea of BiH from international waters.

Lastly, the maritime border dispute between Montenegro and Croatia is on-going, but the provisions of the Temporary Protocol from 2002, concerning the legal regime at the entrance of the Bay of Kotor and the provisional delimitation of the territorial seas, are implemented and respected by both States. Also, the protocol is the only agreement which is officially meant to be temporary when viewing the two other disputes that Croatia is involved in. The name of the protocol clearly states that the dispute will have to be resolved through a new agreement. Regarding the legal regime at the entrance of the bay, the analysis has shown that similarities can be found with the PCA 2017 Slovenia/Croatia dispute. The bay itself, with all its features within it, holds significant importance to Montenegro and this State will most likely remain firm in its claims to gain full control over the entrance of the bay. However, Croatia will argue that the Prevlaka Peninsula, which stretches out along the north-western part of the entrance, must generate territorial sea, which is also in line with UNCLOS. Croatia has the legal right to uphold its sovereignty both over the peninsula itself and over its maritime spaces, even if Montenegro has certain interests over the same. What remains is that the two States must create a framework that will regulate the legal regime at the entrance of the bay, so that Montenegro can have guarantees that Croatia will not at some point in the future hinder or prevent vessels from entering Montenegrin harbours within the bay. However, for the time being, it is reasonable to expect that Croatia will continue to allow innocent passage for vessels travelling in or out of the Bay of Kotor, since it would only harm

the generally good bilateral relations between the two States. As for the delimitation of the territorial sea between the two neighbours, it shall be said that there are overlapping claims since 2014, when Montenegro officially claimed a delimitation according to the principle of equidistance. However, the analysis has concluded that the act can only be seen as a political statement which is not in its entirety based on UNCLOS, to which both States are party to.

The analysis has shown that any future bilateral agreement between the relevant States will have to address several issues. One can only speculate as to what the actual final solutions will be, but it shall be said that previous agreements have influenced and directed the disputes towards a final solution. Due to historic reasons, the States of South-Eastern Europe do view border disputes as rather politically sensitive questions. The reason as to why they have been on-going for several decades primarily lies in the absence of political will to reopen bilateral negotiations. Maritime border delimitations can easily be seen as hard nuts to crack for State politicians and leaders. But from a legal point of view, it shall be said all maritime border disputes are solvable in one way or another. Thanks to existing treaty law, case law and doctrine within the field of international maritime law, the analysis have shown a variety of highly plausible outcomes for what is yet to come along the eastern coast of the Adriatic Sea.

Appendix 1

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Blue: Original flow of the Dragonja River
Light blue: The artificial canal of St. Odoric (which Croatia claims should constitute the border with Slovenia)

Yellow: Slovenia's claimed border with Croatia

[397] The original uploader was No such user at English Wikipedia. / Public domain <https://commons.wikimedia.org/wiki/File:Gulf_of_Piran_sat_borders.png> accessed 20 September 2020.

Appendix 2

398

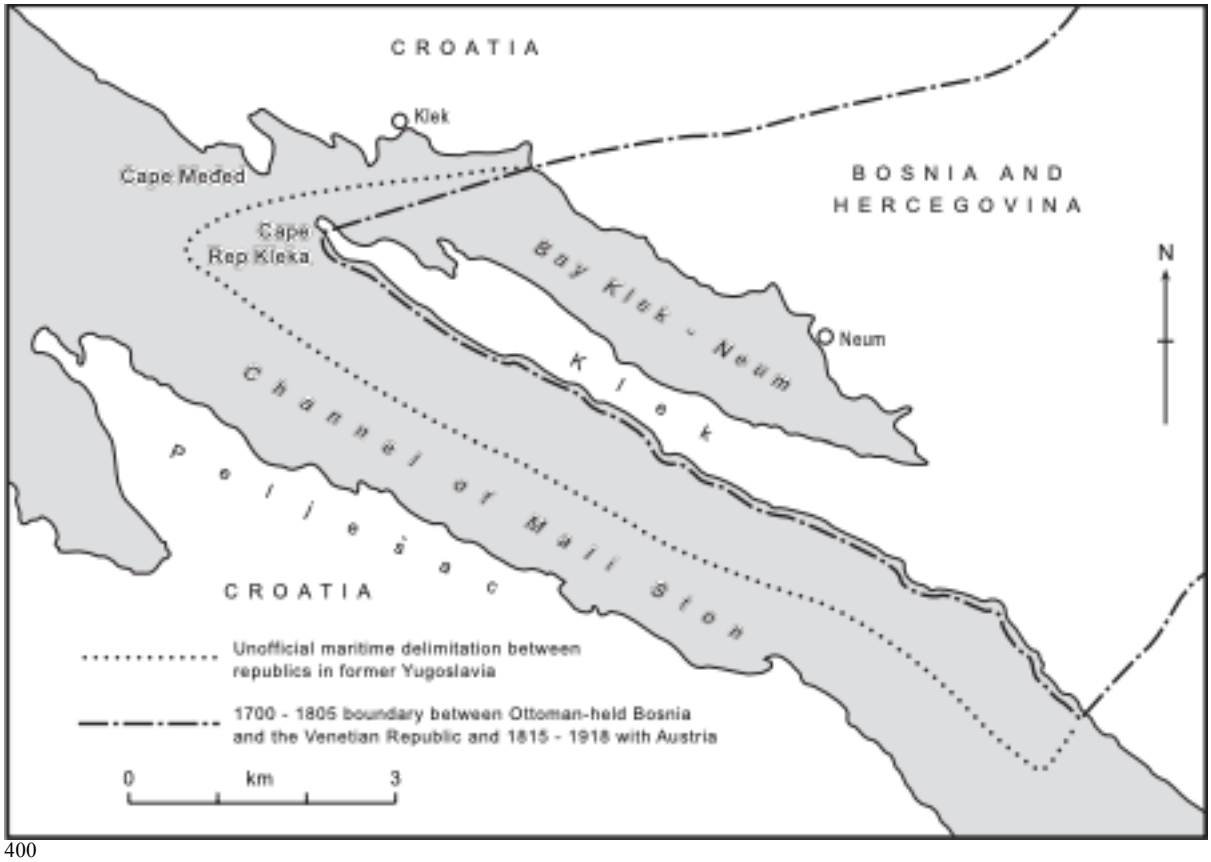
[398] BorderDispute BayOfPiran blank.png: Captain BloodBay-of-Piran maritime-boundary-dispute.jpg: User:AnonMoosderivative work: Themightyquill / CC BY-SA <https://commons.wikimedia.org/wiki/File:Bay-of-Piran_maritime-boundary-dispute.svg> accessed 20 September 2020.

Appendix 3

399

[399] PCA Press Release (n 68) 15.

Appendix 4



400

Dotted line: Maritime delimitation between the State of Bosnia and Herzegovina and the Republic of Croatia according to the Neum Agreement.

Dashed Line: Maritime delimitation between the State of Bosnia and Herzegovina and the Republic of Croatia according to the Croatian Dubrovnik-Neretva County.

Cape Rep Kleka: Claimed by both the State BiH and the Republic of Croatia. De jure part of BiH.

[400] Klemencic (n 38) 99.

Appendix 5

401

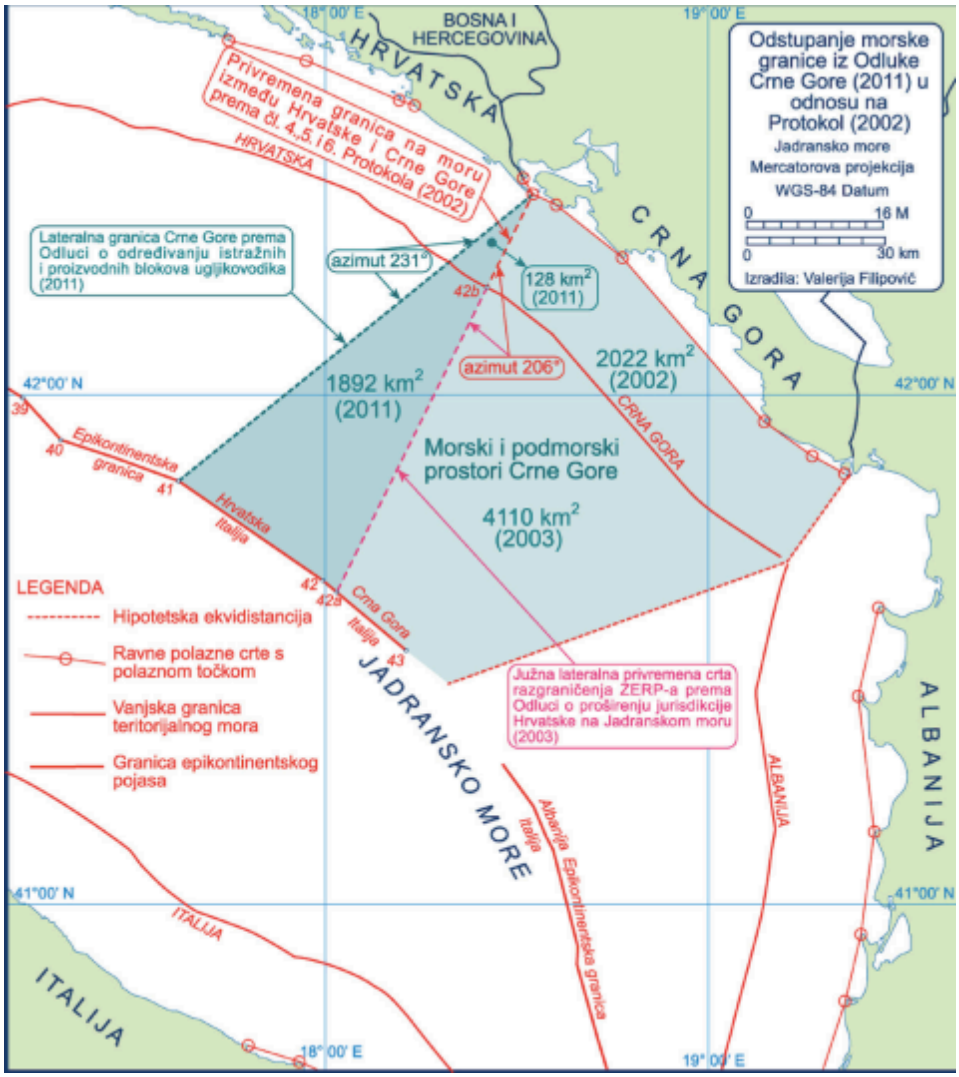
Translation (Cro. to Eng.)

- *'Hrvatska'* Croatia (The Republic of)
- *'Crna Gora'* Montenegro (The State of)
- *'Bokokotorska vrata'* Entrance of the Bay of Kotor

Dashed Red Line: Temporary maritime border between Croatia and Montenegro according to the 2002 *Temporary Protocol between Republic of Croatia and Federal Republic of Yugoslavia (Serbia and Montenegro)*.

[401] Barić Punda, Filipović (n 147) 74.

Appendix 6



402

Translation (Cro. to Eng.)

- *'Hrvatska'* Croatia (The Republic of)
- *'Crna Gora'* Montenegro (The State of)

Dashed Red Line: Temporary maritime border between Croatia and Montenegro according to article 4(5-6) the 2002 *Temporary Protocol between Republic of Croatia and Federal Republic of Yugoslavia (Serbia and Montenegro)*.

Dashed Blue Line: Montenegro's claimed border with Croatia (2011 and 2014). Currently, 1892 km^2 of maritime area is disputed.

[402] Barić Punda, Filipović (n 147) 81.

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