European and International Law

Border Dispute in the Adriatic Sea between Croatia and Slovenia

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Abstract: This Article represents an overview of long-running border dispute between two neighboring states – Republic of Croatia and Republic of Slovenia in the maritime area of the Northern Adriatic. Despite more than two decades of unsuccessful efforts, including several documents controversial on one or both sides, there are still some disputable points waiting for the final settlement. It is expected to be reached by the Arbitration Tribunal established by the Arbitration Agreement between Croatia and Slovenia, signed in 2009. Without any doubt, this Agreement represents a step forward in their mutual efforts toward peaceful solution, but also contains few open questions to be resolved by the Arbitration Tribunal. In this Article the author presents brief overview of long-time efforts that led to the conclusion of the Arbitration Agreement, as well as the main components that has to be considered – strong political demands in relation to preserve territorial integrities of both states and – at the end – to accomplish a peaceful solution in accordance to the rules of international law.

Keywords: international law of the sea; border dispute; Arbitration Agreement; Arbitration Tribunal

1. Introduction

The current borders between Croatia and Slovenia were set in 1992 by so-called Badinter Commission. It was established as part of the European Commission's contributions to resolving Yugoslav crises in early 1990s, in the time when the country was breaking apart. In its Opinion No. 3 Commission stated that internal boundaries [between adjacent former republics of Yugoslavia, now all independent states] may not be altered except by agreement freely arrived at. Except where otherwise is agreed, the former boundaries become frontiers protected by

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international law. This conclusion follows from the principle of respect for the territorial *status quo* and, in particular, from the principle of *uti possideti iuris.*" Proclamation of this principle in the process of dissolution of the former Yugoslavia was reasonable and expected, but not applicable on the issue of maritime delimitation. The application of *uti possidetis iuris* demands previous the maritime (or any other) delimitation, but the former Yugoslavia, as a predecessor state, has never introduced borders on the maritime areas of Adriatic between former Yugoslav republics.

Croatia and Slovenia started negotiations in 1992, as a part of an overall boundary delimitation, but the final agreement is still not reached. Despite more than two decades of unsuccessful efforts, including several documents controversial on one or even both sides, there are still disputable points waiting for the final settlement. This settlement is expected to be reached by the Arbitration tribunal (hereinafter: Tribunal) provided by the Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Slovenia (hereinafter: Arbitration Agreement), signed in Stockholm in 2009.

Without any doubt, this Agreement represents a step forward in their mutual efforts toward peaceful solution. On the other side, reactions on the Arbitration Agreement from the media, public and scientific community were different, not often confirmative on both sides, because of some debatable questions to be resolved by the Tribunal.

2. Initial Efforts and Disagreements

In 1993 Slovenian Parliament issued a document called "Memorandum on the Bay of Piran" (hereinafter: Memorandum). Piran bay is located in the northern part of the Adriatic Sea, and its shores are shared by Croatia and Slovenia. It measures approximately 19 square kilometers in size not visible on most maps of Europe. In period of more than two decades this small part of the sea has been introduced as an area of a border dispute between these two countries, since their declarations of independence in June 1991.

Memorandum confirms claims for: a) preservation of integrity of the Bay of Piran under Slovenian sovereignty and jurisdiction; b) its access to the high seas according to admissible criteria of international law and c) respecting the specific situation of Slovenia."

These claims are incompatible with the present international law of the sea. Slovenian claim to the entire waters inside the Bay as its internal waters has no legal ground for the simple reason that a considerable part of the coast in the Bay, including one entrance to it, represents the land territory of Croatia. (Degan, 2007, p. 620) Respecting the fact that final frontier of the state on the sea is not low-water line along the coast but the outermost line of the territorial sea, it was difficult to find Slovenian claim for the sovereignty over the entire Piran Bay in conformity with international law.

Furthermore, the access to the high seas through the Croatian or Italian territorial sea for Slovenian ships is not disputable. In accordance with the Article 17 of the UN Convention of the Law of the Sea (hereinafter: UNCLOS) ships of all states, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea. The problem in this particular case (which will be recovered again in 2009) was Slovenia's discontent just with the right of innocent passage through the territorial sea of neighbouring states – Croatia and Italy. (Degan, 2007, p. 620)

Slovenia claims physical contact with the high seas. But, it has to be emphasized that such claim collides with the seaward projection from the Croatian coast in western Istria. Geographical conditions do not provide any grounds for that, unless Croatia accepts to make real territorial concession on mainland to Slovenia. Moreover, even if Croatia grants Slovenia to extend its territorial sea to the point to "touch" the high seas, Slovenian territorial sea would then extend over the limit of 12 miles. Geographically, Slovenia cost is approximately 15,5 nautical miles from the high seas (Vidas, 2009, p. 26), and there are no conditions to proclaim straight baseline, in accordance to the UNCLOS, Article 7.

Nevertheless, even without physical contact to the high seas, Slovenia reiterates territorial exit to the high seas, its own continental shelf and exclusive economic zone,[1] which was actually proclaimed in October 2005. According to the provision of Ecological Protection Zone and Continental Shelf of the Republic of Slovenia Act,[2] continental shelf of Slovenia comprises seabed and subsoil in underwater areas, extending beyond its territorial sea to the border in compliance with

[1] Note verbale from the Permanent Mission of the Republic of Slovenia to the UN addressed to the Secretary-General of the UN. (2005). *Law of the Sea Bulletin*, No. 58, p. 20.

[2] Official Gazette of the Republic of Slovenia, No. 93/2005. Text of the Ecological Protection Zone and Continental Shelf of the Republic of Slovenia Act is published in English at *Law of the Sea Bulletin*. (2006). No. 60, pp. 56-57.

international law.[1] Slovenia also declared ecological protection zone. It encompasses the area outside the territorial sea of Slovenia.[2]

These provisions are quite legally confusing because alleged Slovenian maritime zones are broadened in front of Croatian coast, far away from Slovenian territorial sea and "*in spite of the fact that land territory of Slovenia stops at the northern coast of the Piran Bay, which is far from the area of the high seas in the Adriatic*" (Degan, 2007, p. 621). These particular areas are in and above the Croatian continental shelf, both extended from a single point.

Slovenia did not introduce such claims earlier. In contrary – in its Memorandum of 1993 Slovenia clearly stated that it considered itself a state in geographically disadvantaged position with reference to its inability to proclaim the exclusive economic zones.[3] Furthermore, in 2001 Slovenia passed its first Maritime Code;[4] it did not include the provision on the right to declare exclusive economic zones. But, in 2003 Slovenia amended its Maritime Code, changed a position and stipulated the provision on possibility to exercise its sovereign rights, jurisdiction and control over the sea surface, marine water column, seabed and subsoil beyond the limits of national sovereignty in accordance with international law.[5]

It has to be mentioned again that Slovenia does not have physical contact between its territorial sea and the high seas, which is the requirement to hold continental shelf and to proclaim exclusive economic zone.

Opposing Slovenian claim for the entire Bay, Croatia requested for the median (equidistant) line to be applied, in accordance to UNCLOS provision, Article 15. But, the notion from the Memorandum of "respecting the specific situation of Slovenia", hints at historic and special circumstances that, according to the international law of the sea, could justify a departure from median line inside the Piran bay, asking for the implementation of the provision for the so-called historical bays. By fulfilling conditions for the proclamation of historical bay

[1] Article 2(3).
[2] Article 3(1) and (2).
[3] Note verbale from the Permanent Mission of the Republic of Croatia to the UN addressed to the Secretary-General of the UN. (2005), *Law of the Sea Bulletin*, No. 57, p. 126.
[4] Official Gazette of the Republic of Slovenia, No. 26/2001.
[5] Official Gazette of the Republic of Slovenia, No. 2/2004.

(which have to be fulfilled cumulatively in any case), costal state could therefore consider such bay as part of its internal waters. These conditions are:[1]

(1) the state must exercise authority over the area in question in order to acquire a historic title to it. Since the shores of the Piran bay are divided between Croatia and Slovenia, this condition is not fulfilled.

(2) the continuity of this exercise of authority must have developed into a usage. As mentioned, during the existence of former Yugoslavia, its sovereignty over the Adriatic has been exercised by federal authorities, without specific delimitation on the sea between former Yugoslav republics. But, in this case both sides find historical, political and administrative arguments to confirm their own exercising of sovereignty. (Avbelj & Černič, 2007, p. 6; Turkalj, 2001, pp. 33-34)

(3) the attitude of foreign states, which may have taken towards the exercise of the other state authority. Some writers assert that the acquiescence of other states is required; others think that the absence of opposition is sufficient.[2] It must be expected that an attempt to exercise sovereignty over the bay on the part of one or some of the riparian state(s) would cause immediate and strong opposition on the part of the other riparian state(s). It would therefore be difficult to imagine that the requirement of toleration by foreign states could in these circumstances be fulfilled.[3] In connection to this particular border dispute, Croatian side has been objected this Slovenian argument from the beginning, by requesting the equidistant line to be applied.

3. The Controversy of the Račan-Drnovšek Draft Agreement

One of the efforts for resolving the problem of maritime delimitation was so-called Račan-Drnovšek Draft Agreement from 2001 (Sancin, 2010, pp. 102-105). The proposal from this document included the division of the Piran bay in a proportion 1/3 to Croatia and 3/4 to Slovenia, as well as Slovenian corridor through the Croatian territorial sea.

This corridor was formed as a “chimney” in a size of more than 46 square miles (Avbelj & Černič, 2007, p. 8). The “chimney area” is considered to be spread in

[1] Juridical Regime of Historic waters including historic bays - Study prepared by the Secretariat. (1962). *Yearbook of the International Law Commission*, Vol. II, par. 80.
[2] *Loc. cit.*
[3] *Ibid.*, par. 148.

front of the Croatian coast and in the part of Croatian territorial sea. This corridor cuts through Croatian territorial sea dividing it into two parts. As a result, a Croatian "triangle" of territorial sea or enclave is to be created next to the Italy-Croatia border. The sea in the corridor is "international" in character. (Klemenčić & Topalović, 2009, p. 317)

However, the Račan-Drnovšek proposal has never entered into the formal procedure before the Croatian Parliament, which was necessary step to be taken for its ratification and to make the consent to be bound by it.[1] Consequently, Slovenian side was informed by high ranking Croatian officials, including the official letter of Croatian Prime Minister, that the solution from the Drat Agreement were not acceptable for Croatia and that the initialled Draft could not have any legal effect and could not constitute the basis for future solutions neither. It was regarded as a stage in the negotiating process and shortly afterwards proved futile and without prosper.[2] Generally, it was judged too generous towards Slovenia, as an example of possible unilateral abandon of Croatian territory (Gržetić & Barić Punda & Filipović, 2010, p. 49). Following failure of the Račan-Drnovšek proposal, negotiations entered a "dead-end-street". (Klemenčić & Topalović, 2009, p. 318)

On the other side, in Slovenia this Draft Agreement remains to be considered as the minimum of what would be acceptable for Slovenia (Turk, 2010), but unilaterally renounced by the Croatian side.[3] They emphasized that Slovenia has a right to maintain direct access to the high seas at least in form of a special corridor (chimney) (Avbelj & Letnar Černič, 2007, p. 8). Slovenian efforts to reach the high seas are also published in "White Paper on the Border between the Republic of Slovenia and the Republic of Croatia". This document contains a part entitled "Slovenia's territorial access to the high seas", and stressed that Slovenia had territorial access to the high seas. Furthermore, it concludes the fact that Slovenia has always had territorial exit to the high seas and also has it today is proved and substantiated by sound and well-grounded arguments based on international law. In Degan's opinion, such legal arguments are so far missing. (Degan, 2007, pp. 621-625)

[1] Since it was considered as a political agreement and refers to the border limitations, therefore it had to be confirmed by the Croatian Parliament. See Article 140 of the Croatian Constitution (Official Gazette of the Republic of Croatia, 56/1990, 135/1997, 8/1998, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010, 85/2010).

[2] Note verbale from the Permanent Mission of the Republic of Croatia to the UN addressed to the Secretary-General of the UN. (2005), *Law of the Sea Bulletin*, No. 57, pp. 125-128.

[3] Note verbale from the Permanent Mission of the Republic of Slovenia to the UN addressed to the Secretary-General of the UN. (2005). *Law of the Sea Bulletin*, No. 58, p. 20.

By concluding the Arbitration Agreement in 2009 the elements of Račan-Drnovšek Draft Agreement became interesting once again.

4. Bilateral Efforts toward Arbitration Agreement

During the period from 2001 to 2005 bilateral negotiations pursued between Croatia and Slovenia were not achieved. It was only after a number of incidents in the Piran bay that Foreign Ministers of both states signed a joint declaration on the avoidance of incidents in June 2005. Its purpose was not to solve the border issue, but to ensure respect for the *status quo* as at June 25th 1991 in order to avoid further incidents. (Sancin, 2010, p. 97)

There were some other diplomatic efforts and proposals (all unfortunately – unsuccessful) that have to be mentioned, but also some other unilateral proclamations on both sides that even had provoked considerable tensions between Croatia and Slovenia.

In 2003 Croatia proclaimed its Protected ecological and fishery zone in the Adriatic,[1] which included sea above its continental shelf in the central Adriatic, between the Croatian territorial sea and median line between Croatia and Italy. Proclaimed protected zone was very much equal to the exclusive economic zone as it is defined by the UNCLOS. Although this proclamation was made in accordance with the principles of the international law of the sea, and is not connected by approval of others – it invoked difficulties between Croatia, on one side, and Slovenia and Italy, on the other. Slovenia and Italy have objected Croatia for regardless unilateral action. Using the bodies of the European Union (hereinafter: EU), both states made a political pressure on Croatia to withdraw the proclamation of Protected zone, or – at least – to moderate its application. It was not very difficult to manage, as Croatia was in the same time in the middle of the process of admission to the EU, and since that priority was undisputable. In March 2008 Croatia made a concession and decided not to implement Protected ecological and fishery zone on the members of the EU, until boundary agreement is reached.[2]

Meanwhile, as mentioned before, Slovenia also proclaimed its ecological protection zone and defined its continental shelf. In January 2006 Slovenia also

[1] Official Gazette of the Republic of Croatia, No. 157/2003.
[2] Official Gazette of the Republic of Croatia, No. 31/ 2008.

unilaterally proclaimed a Decree- of the Fisheries Sea Area,[1] which established three zones: A, B and C. Zone A incorporates Slovenian "internal waters", enclosing the Piran bay in its entirety. Zone B embraced part of the sea which Croatia considers as constituent part of its territorial sea, up to the point T6 of the Treaty of Osimo from 1975.[2] The fishing zone B forms the alleged territorial sea of Slovenia alongside the border from the Osimo Treaty, up to point T6, where that line ends at the edge of the high seas in the Adriatic. The above legislative acts disrespect the basic rule that the land dominates the sea and, in particular, the principle of non-encroachment by one state upon areas that are the closest to the coast of another state. (Degan, 2007, p. 621) Finally, the fishing zone C covers the Slovenian ecological zone at the high seas. The Slovenian Foreign Ministry issued a statement where it described the decree as a temporary solution and as being in place only until the two countries either implement the fishing provisions from the bilateral border transport and cooperation agreement or reach a border deal. (Avbelj & Letnar Černič, 2007, p. 8)

In 2007 Slovenia proposed boundary resolution through conciliation proceedings before the Court of Conciliation and Arbitration of the Organization for Security and Cooperation in Europe. Afterwards Croatia proposed the submission of this dispute to the International Tribunal on the Law of the Sea. Both proposals were rejected by other side.

Later on, as an attempt to submit this dispute to International Court of Justice (hereinafter: ICJ) was signed in August 2007, by which Slovenian-Croatian team of legal experts was appointed. Its mission was to prepare a special agreement for submit this dispute to the Arbitration or to the ICJ. Unfortunately, their work was completed without considerable success, because of inability to make common accord on the main elements of the agreement. (Sancin, 2010, p. 98)

After that, Slovenia put together boundary question with negotiations between Croatia and EU, and in 2008 started to block Croatian further developments on this issue. This blockade of seven negotiation chapters occurred because of Slovenia's belief that Croatia had used some documents that may be served as a legal prejudice of boundary solution in its own favour. Therefore, for the first time in the history of the EU one bilateral border dispute became barrier for the accession of a

[1] Official Gazette of the Republic of Slovenia, No. 2/ 2006.

[2] The Treaty of Osimo was signed on November 10, 1975 by the Socialist Federal Republic of Yugoslavia and the Italian Republic in Osimo, Italy, to definitely divide the Free Territory of Trieste between the two states.

new member state. At certain stage (in the first half of 2009) even European Commission tried to mediate in the border dispute between Croatia and Slovenia by submitted compromising solutions, but these efforts did not gain support on both sides. (Rudolf & Kardum, 2010, p. 8; Sancin, 2010, p. 99)

During that period the emotions were flaring up on both sides; under the pressure and necessity of ensuring national interests, politicians in Croatia strongly concluded that they are not willing to "sell" a part of Croatian territory for the purpose of entering the EU. On the other side, Slovenian politicians did not want to retreat from the positions of what they recognized as their legitimate demands.

But then, after almost two decades of negotiations a new treaty related to the dispute resolution was concluded and Slovenia lifted the blockade to the accession negotiation of Croatia.

5. The Expectations and Critics of the Arbitration Agreement

In November 2009 the Arbitration Agreement was concluded. At the beginning 2013 both sides submitted documents (memorials) to the Arbitration Tribunal in The Hague. November 11th 2013 has been set as the deadline for the submission of counter-memorials. The hearing would be held in the spring 2014.

In accordance with the Article 7 of the Arbitration Agreement, the Tribunal's award will be binding on both states and constitute a definitive settlement of the border dispute. The obligations of the parties are to take all necessary steps to implement such award, which includes revision of the national legislation within the period of six months after the adoption of the award.

The task of the Tribunal is specified in Article 3(1) of the Arbitration Agreement. It is to determine: (a) the course of the maritime and land boundary between Slovenia and Croatia; (b) Slovenia's junction to the high seas; (c) the regime for the use of relevant maritime areas. In accordance with the Article 4 of the Arbitration Agreement the Tribunal shall apply: (a) the rules and principles of international law for the determinations referred to in Article 3(1) (a); (b) international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result by taking into account all relevant circumstances for the determinations referred to in Article 3(1)(b) and (c).

Even the Tribunal shall interpret, understood and apply these provisions of the Arbitration Agreement on its own competence, in public, media and scientific

community of both sides there are considered as the most debatable. In Sancin's opinion, taking into account debates that emerged in both states, seems to be jointly read Articles 3 and 4 of the Arbitration Agreement, which Slovenia, contrary to Croatia, understands as requesting from the Tribunal to determine, among others, the coordinates of Slovenia's junction - in a physical sense of territorial contact - to the high seas by taking into account not only international law, but also a number of other factors and circumstances – amounting in the opinion of Slovenia – to a decision similar to a decision adopted *ex aequo et bono.*

Among other particularities of this Arbitration Agreement, it is in particular in these two aspects that it provides unique solutions, not yet witnessed in the case law of territorial disputes. Sancin emphasized the connection between this Agreement and previous Račan-Drnovšek Draft Agreement as a bit credulous to believe this to be a pure coincidence – they both envisage Slovenia's junction to the high seas. (Sancin, 2010, pp. 107-108)

Subparagraphs (a) and (b) of the Article 3 are mutually connected: it is not possible to determine the course of the maritime boundary separately, without determine Slovenia's junction to the high seas. It is important to clarify that the distance between Slovenian baseline and the high seas exceeds 12 nautical miles. As mentioned before, in accordance with the Article 3 of the UNCLOS 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. It is not within the rights of Croatia and Slovenia to between themselves agree on a breadth of the territorial sea in excess 12 nautical miles limit. (Vidas, 2009, p. 29)

But, in this case the Tribunal will not discus and determine the right of Slovenia to this junction. The task of the Tribunal is to find a way to practically ensure the junction itself. The most unfavourable circumstance from the Arbitration Agreement is the absence of the term "right". (Rudolf & Kardum, 2010, p. 12)

In opinion of Davorin Rudolf's Sr., the Tribunal, with respect to the term "junction", may rule only one way: to determine the strait, a corridor through the Croatian territorial sea. Only this way Slovenia can connect with the high seas. It is not, therefore, for any regime of sailing ships, but of a territorial corridor through the territory undoubtedly belonging to the Croatia. By accepting this Arbitration Agreement, Croatia is the first and only state which has to pay for membership in the EU with its territory (Rudolf, 2009). This is in conformity with some other thoughts in Croatia of having risk to lose a portion of the Croatian territory

(Rudolf & Kardum, 2010, p. 18). Ibler raises a question: is it understandable – even unjustifiable – fear that this mysterious "junction" on some yet unknown way is going to provide decrease of territorial sea of Croatia? (Ibler, 2012, p. 151)

Later on, during ratification process of the treaty, both states adopted and included in their internal acts of ratifications unilateral statements relating to the Arbitration Agreement. In its statement Croatia included the following sentence: "Nothing in the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia shall be understood as Croatia's consent to Slovenia's claim to its territorial contact with the high seas".[1] On the other side, Slovenia opposed with the conclusion that such statement of Croatia has no legal consequence for the Tribunal's procedure. Slovenia emphasized that "the task of the Tribunal is to establish territorial junction of Slovenian territorial sea with the high seas, therefore the right for the contact with the high seas, which Slovenia has on the day of independence on June 25th, 1991."[2] Unilateral declarations do not oblige the Tribunal or other country in this case. The state cannot unilaterally modify or otherwise interpret what is adopted at the same time by both sides in the Arbitration Agreement. If uncertainties in the arbitration proceedings appear, the Arbitration Agreement reserves the right of interpretation only to Tribunal. (Rudolf & Kardum, 2010, p. 16)

Croatia and Slovenia will have to make arbitration ruling in its entirety.

6. Conclusion

The process of drawing borders between neighbouring states usually represents demanding mission. It is also often connected by expression of intensive emotions focused to the preservation of national interests on both sides, and such emotions and confrontations could suppress the effective political and legal dialogue for a long period of time.

In the case of the maritime delimitation in the Adriatic sea between Croatia and Slovenia we have been witnessing one of these situations for more then two decades. Their efforts to arrange mutual borders led to one of the longest dispute in their relationships. On the other side, it must be emphasized that the existence of this border dispute does not influence the concept of "normal inter-relationship"

[1] Official Gazette of the Republic of Croatia – International Treaties, No. 12/2009.
[2] Official Gazette of the Republic of Slovenia – International Treaties, No. 11/2010.

between citizens of both countries, nor permeability of the border between Croatia and Slovenia until Croatia joined the EU in July 2013.

Taking into account many arguments on necessity of preservation national benefits of both sides, as well as the anticipation on the implementation of applicable law and the phrase "junction" by the Arbitration Tribunal, after the award is issued it will be binding for both state parties and will constitute a definitive and final settlement of their dispute. Without any doubt, it will be a positive example of accomplish a peaceful solution of open issues of greatest national significance in accordance to the rules of international law.

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