
**UNDER THE ISTRIAN SUN: NAVIGATING
INTERNATIONAL LAW SOLUTIONS FOR THE SLOVENIA-
CROATIA MARITIME BORDER DISPUTE**

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ABSTRACT

Twenty-eight years after Slovenia and Croatia exited the Federation of Yugoslavia on the eve of its bloody civil war, the two countries are still plagued by a maritime border dispute in the northern Adriatic Sea.¹ Given that the countries were not in conflict with each other during the war, and given their similar goals for integration into the greater European and international communities, it is perplexing that they have not been able to resolve this dispute. The Bay of Piran (or, Piran Bay), located in the narrow Gulf of Trieste at the land border of the two countries and having a unique, heavily indented geography, is ground zero of this dispute.² The pivotal issues are sovereign control of the bay itself and access for Slovenian vessels to international waters, a concept that is foreclosed under traditional law of the sea maritime border principles given the constraints of the bay and Slovenia's miniscule coastline.³

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¹ See, e.g., Sven Milekic & Maja Zivanovic, *Border Disputes Still Bedevil Ex-Yugoslav States*, BALKAN INSIGHT (July 3, 2017), <https://balkaninsight.com/2017/07/03/border-disputes-still-bedevel-most-ex-yugoslav-states-07-01-2017-1/>; Marja Novak, *Slovenia to Sue Fellow EU Member Croatia Over Border Ruling*, REUTERS, June 18, 2018, <https://www.reuters.com/article/us-slovenia-croatia-border/slovenia-to-sue-fellow-eu-member-croatia-over-border-ruling-idUSKBN1JE1PP>; Slovenian Press Agency (STA), *Slovenia, Croatia Attend ECJ for Border Arbitration Hearing*, TOTAL SLOVENIA NEWS (July 13, 2019, 11:39 AM), <https://www.total-slovenia-news.com/politics/4090-slovenia-croatia-attend-ecj-for-border-arbitration-hearing>.

² See Figure 1 *infra* note 76.

³ See, e.g., *Slovenia – Croatia Boundary Dispute*, MARBDY CONSULTING (Oct. 15, 2018), <http://www.marbdy.com/slovenia-croatia-arbitration/>.

This article serves as an update to this 28-year saga, a basic introduction to the particulars of the dispute, and a critique of the legal theories and institutions attempting to resolve it. The recent historical and geographical setting of Piran Bay is followed by a primer on the maritime terminology and legal issues at play and how they apply to the region's unique geography. While the distinctive history and geography has indeed made this dispute more complex than meets the eye, it is at the confluence of three variables where this dispute persists and a solution must reside: international legal institution and process effectiveness; the regional leverage and legitimacy those institutions can impress on the parties; and finally, the adherence of both parties to the rule of law.

Part I of this article provides historical and geographic background. Part II provides a brief summary of the disintegration of Yugoslavia. Part III lays out the basic law of the sea principles used to establish maritime borders and legal divisions within the sea. Part IV overlays those principles onto the Bay of Piran problem set by explaining the unique nature of this maritime dispute and outlining its legal and geopolitical history. Part V discusses the most recent effort to break the Piran Bay stalemate and why and how other forums for resolving the dispute were suboptimal or ineffective. Finally, part VI shores up part IV's discussion to conclude that global legal forums are not the optimal venue for this conflict and that such issues should more appropriately be handled by a regional institution that would better inspire faith in its legitimacy and command compliance by both parties.

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I. HISTORICAL AND GEOGRAPHICAL BACKGROUND

It has been 28 years since Slovenia and Croatia declared independence while the former country of Yugoslavia contemporaneously fractured into a bloody civil war.⁴ Slovenia and Croatia broke away relatively simultaneously.⁵ Although they were not at loggerheads with each other during that time, both countries currently identify independently of each other, each having their own national priorities arising from their unique challenges both before and after Yugoslavia’s disintegration. However, Slovenia and Croatia have been engaged in a non-violent conflict ever since the disintegration of Yugoslavia over their maritime border and division of the Piran Bay in the northern Adriatic Sea. With ultimately common goals, one may wonder why the two countries cannot seem to get along when it comes to the bay.⁶

Indeed, Slovenia and Croatia might be said to not understand each other, given their different journeys to statehood. For one, the level of violence and loss of life for Slovenia paled in comparison to its southeastern neighbor during both countries’ unilateral secessions from the mother country.⁷ Croatia’s inextricable involvement with the Bosnia conflict, the virtual ground-zero of the Yugoslavia war, is something Slovenia did not endure.⁸ Croatia also borders four of the former republics of Yugoslavia, while Slovenia only borders one (Croatia).

⁴ See generally, CHRISTOPHER BENNETT, YUGOSLAVIA’S BLOODY COLLAPSE: CAUSES, COURSE, AND CONSEQUENCES (1995). Mr. Bennett provides a thorough and insightful account of the history of the collapse of Yugoslavia. He challenges early assumptions often made about the Yugoslav civil war through his account, which was authored as the war was ending. I often refer to Mr. Bennett’s book for historical reference and perspective.

⁵ See *id.*, at 154-157.

⁶ See Vasilka Sancin, *Slovenia-Croatia Border Dispute: From ‘Drnovsek-Racan’ to ‘Pahor-Kosor’ Agreement*, 2 EUR. PERSP. 93, 95 (2010) (explaining how the identical strategic goals of resolving their border dispute and Croatia’s accession into EU served as impetus for moving forward with an agreement).

⁷ See *The Conflicts*, U.N. INT’L CRIM. TRIB. FOR FORMER YUGOSLAVIA (last visited Oct. 25, 2019), <http://www.icty.org/en/about/what-former-yugoslavia/conflicts>.

⁸ See *id.*

While Bosnia is peaceful today, the country at the center of Yugoslavia's meltdown is now plagued with rule of law challenges, largely due to the fact that the country is carved into several sections as mandated by the Dayton Accords at the end of the war.⁹ While a peace was achieved, it is an underdeveloped, fractured peace.¹⁰ This is an area where Slovenia and Croatia look more similar to each other as they head in a different direction than Bosnia.¹¹ Since their independence, both countries have joined the European Union: Slovenia joined in 2004 while Croatia joined in 2013.¹² Both have also joined NATO: Slovenia joined in 2004 while Croatia joined in 2009.¹³ Both countries have seen an explosion in tourism and, but for the limits of their small size and competition with nearby tourist meccas *du jour*, they would be international tourism household names on the magnitude of other larger European Union countries.

Slovenia and Croatia sport beautiful coastlines, dotted with idyllic Italian-influenced towns on the Adriatic Sea, just to the south and east of Italy. While the most charming of these cities in Slovenia, such as Izola and Piran, are on par with those of its Croatian neighbor, Croatia has indeed hit it big on the international tourist scene with its gems of the Adriatic coast, Split and, more remarkably, Dubrovnik.¹⁴

⁹ See e.g., Julian Borger, *Bosnia's Bitter, Flawed Peace Deal, 20 Years On*, THE GUARDIAN (Nov. 10, 2015, 12:36 PM), <https://www.theguardian.com/global/2015/nov/10/bosnia-bitter-flawed-peace-deal-dayton-agreement-20-years-on>; see also Edward Morgan-Jones, Neophytos Loizides & Djordje Stefanovic, *20 Years Later, This is What Bosnians Think About the Dayton Peace Accords*, WASH. POST (Dec. 14, 2015), <https://www.washingtonpost.com/news/monkey-cage/wp/2015/12/14/20-years-later-this-is-what-bosnians-think-about-the-dayton-peace-accords/>.

¹⁰ See *id.*; see also, *Map of Bosnia-Herzegovina Agreed Upon at the Dayton Agreement*, NAT'L ARCHIVES CATALOG (Jan. 1, 1996), <https://catalog.archives.gov/id/6503320>; Mladen Klemenčić & Anton Gosar, *The Problems of the Italo-Croato-Slovene Border Delimitation in the Northern Adriatic*, 52 GEOJOURNAL 129, 135 (2000) (explaining how Croatia's rigid position regarding its borders with Slovenia may be a side-effect of its difficult border fight with Bosnia).

¹¹ See Klemenčić & Gosar, *supra* note 10, at 131 (discussing how Slovenia and Croatia are the most successful of the breakaway republics of the former Yugoslavia).

¹² *Countries*, EUR. UNION (Aug. 10, 2019), https://europa.eu/european-union/about-eu/countries_en#tab-0-1.

¹³ *Member countries*, N. ATL. TREATY ORG. (May 14, 2019, 3:53 PM), https://www.nato.int/cps/en/natohq/topics_52044.htm.

¹⁴ See *Croatia No.1 for Rise in Popularity on TripAdvisor in 2019*, CROATIA WEEK (June 3, 2019), <https://www.croatiaweek.com/croatia-no-1-for-rise-in-popularity-on-tripadvisor-in-2019/> (highlighting growing popularity of Croatia's coastline); see also DAVOR VIDAS, THE U.N. CONVENTION ON THE LAW OF THE SEA, THE EUROPEAN UNION AND THE RULE OF LAW: WHAT IS GOING ON IN THE ADRIATIC SEA? 10 (2008) (describing how the country was gaining popularity because of its coastal region and reducing the image that it was a recently war-torn region).

Aside from the name recognition of Croatia's Adriatic Sea jewels, one of the reasons that Croatia's coastline is more internationally known than Slovenia's is its sheer size. Croatia's unique claw-like shape helps create an Adriatic coastline over 1,100 miles long, whereas Slovenia's is a mere 29 miles, making it one of the smallest coastlines of any nation that borders water.¹⁵ Indeed, with Croatia's long coastline to its south and Italy's seemingly unending coastline starting to Slovenia's north, it almost appears that Slovenia was squeezed out of the Adriatic Sea and given a small coastline as a nominal consolation prize. Speaking of Italy, both Slovenian Istria and the northernmost part of Croatia's coast (both parts of a peninsula called Istria, most of which is in Croatian territory) are sources of Italian pride, as this entire coastline was once part of Italy.¹⁶ This, along with the fact that most residents of this area speak Italian as a second language, explains the Italian influence over – and trappings of – the coast.¹⁷

This meeting of Italy, Slovenia, and Croatia has caused a remarkably persistent maritime border dispute.¹⁸ Although Slovenia and Croatia have coexisted peacefully since their independence, they have been locked in a bitter maritime border dispute for the past 28 years.¹⁹ The dispute is centered around the Bay of Piran, located at the intersection of Slovenia and Croatia's Adriatic coasts.²⁰ Ever since Yugoslavia's dissolution, the two countries have disagreed on their maritime border and how to divide the bay. Embedded in these two issues is Slovenia's access to the international waters; Slovenia, as a "geographically disadvantaged state," points to the law of the sea to support its demand.²¹ Due to the unique triangulation of Slovenia, Croatia, and Italy, the varying national interests and goals of Slovenia and Croatia, and their intricate history, the border dispute has defied bilateral negotiations as well as international structures designed to help solve it.²²

¹⁵ See U.N. INT'L CRIM. TRIB. FOR FORMER YUGOSLAVIA, *supra* note 7.

¹⁶ See Andrea Angelini, *Not Just Dante: Italian Speaking Countries in the World – Part One*, ITALICS MAG. (Aug. 28, 2018), <https://italicsmag.com/2018/08/28/italian-language-countries-world/>.

¹⁷ See *id.*

¹⁸ See Klemenčič & Gosar, *supra* note 10, at 135 (explaining how a thorny and lingering land border dispute is also ongoing between Slovenia and Croatia, and while the land border issue is not as contentious as the maritime dispute, the land border has an impact on the how the maritime border issue plays out).

¹⁹ See Milekic & Zivanovic, *supra* note 1.

²⁰ See Figure 1 *infra* note 76.

²¹ See Vidas, *supra* note 14, at 30-32 & 17 n.46 (referring to "Memorandum o Piranskem zalivu" [Memorandum on the Bay of Piran] in which Slovenia proclaimed itself part of the "group of so-called geographically disadvantaged states, which due to their geographical situation can claim no exclusive economic zones of their own."]. See *also* Klemenčič & Gosar, *supra* note 10, at 132.

²² See Thomas Bickl, *Reconstructing the Intractable: The Croatia-Slovenia Border Dispute and Its Implications for EU Enlargement*, 54 CROAT. POL. SCI. REV. 7, 30 (2017).

Given everything Slovenia and Croatia have gone through since their independence, it is a shame that this border dispute has not yet been solved. Perhaps it is time to concede that international law and institutions such as the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), and the Permanent Court of Arbitration (PCA) have, to date, been ineffective in solving this complex border issue. These complex issues may become the “new normal” and may involve more intricate issues than this type. While it is true that geopolitical and historical issues dominate this dispute, these issues must be resolved within the constraints of the law of the sea and its institutions and processes.

To be sure, the Piran Bay dispute is fertile ground for historical, political, and cultural analysis. As the numerous references cited throughout this article demonstrate, this dispute provides plentiful fodder to international political scientists. Indeed, this article explores some of those issues – with all of the due diligence demanded by the topic– but it also provides helpful context to the reader. Make no mistake, the geopolitical issues involved must fit into the template of international law. After all, the pronouncements of the international legal institutions are part of the equation, and in the interest of civility and good neighborly relations, so too must those institutions be part of the final answer of that equation. Thus, it is critical that those legal institutions and processes are effective. This effectiveness is more easily achieved when the institutions are local to the problem and carry the perceived legitimacy and leverage that are byproducts of their regional proximity. Finally, in the interest of rule of law, the parties must consent and adhere to those pronouncements. In short, if you want to reap the benefits of membership and participation in political and judicial organizations and their processes, you simply must play by their rules.

This article does not purport to magically solve the Piran Bay dispute but it does draw some conclusions after embarking on a broad but basic analysis that should help the average reader visualize and understand the legal quarrel that has plagued this small corner of the world. In the end, it suggests that the time is overripe for Slovenia and Croatia to pursue a regional solution given the 28 years of futility in breaking the impasse. As of the date of this article, a regional solution is the best method of resolving this dispute. It arguably should have been there in the first place.

Thomas Bickl’s paper is perhaps the most thoroughly researched, recent account of the Piran Bay dispute cited in this article. Other resources provide thorough historical and technical background about the Slovenia-Croatia dispute; however, this article is indispensable for those desiring to learn the more detailed account about the road to the current arbitration process, from a political scientist perspective.

II. “YUGOSLAVIA’S BLOODY COLLAPSE”²³

Yugoslavia’s dissolution in the early 1990s is often misunderstood. For those who were not familiar with the erstwhile country and watched it collapse from afar, it was easy to conclude that the war was inevitable.²⁴ The assumption frequently went something like this: the country’s various ethnic groups possessed a deep historical animus and had been at each other’s throats for centuries.²⁵ It was further assumed that the communist regime of Tito was all that held the nation together, and that once he died, the country was preordained to collapse in a bloody war. While Tito’s regime did lend a degree of stability to the ethnic mosaic of the country, most of these assumptions are overstated if not completely misguided.²⁶ In reality, Tito ruled over a time that saw increasing harmony among the ethnicities as evidenced by an uptick of inter-ethnic marriages and by the fact that there were more citizens who identified as Yugoslavs, rather than Slovenes, Croats, Bosnians, or Serbs.²⁷ Of the various ethnicities, the Slovenes and Croats possessed the least animus against each other in the sense that their home republics (later nations) were never engaged in armed conflict between each other before, during, or after the Yugoslavian war.²⁸

The ethnic harmony of Yugoslavs, coupled with the irresistible and naturally beautiful assets of their country such as the seaside region of Istria, made for an interesting dichotomy during the conflict. For while war raged along the Croatian and Bosnian border a mere 3-4 hour drive away, tourists continued to flock to the seaside resorts and campgrounds of Istria.²⁹ True, many of the international tourists naturally opted to avoid the region during the conflict. But the Slovenian and Croatian predilection to head to the seaside throughout it all kept the Istrian economy from suffering the economic hemorrhage of the rest of the nation.³⁰ Further, since parts of the beautiful Croatian coast such as the Dalmatian regional gems of Dubrovnik and Split were indeed directly impacted by the war, Istria to the north was the go-to seaside option. Yugoslavian logic

²³ See BENNETT, *supra* note 4. This section’s title was adopted from title of Christopher Bennett’s book cited in note 4 and elsewhere in this article.

²⁴ See BENNETT, *supra* note 4, at viii, 5-7.

²⁵ See *id.*

²⁶ See *id.*

²⁷ See *id.* at 8.

²⁸ See Stephen R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT’L L. 590, 596 (1996).

²⁹ See *id.* at 232.

³⁰ See *id.*; see also Klemenčić and Gosar, *supra* note 10, at 131 (highlighting the economic cooperation between Slovenia and Croatia, even during the war, which helped keep the local Istrian economy afloat).

went something like this: it is summer, and Istria is safe; therefore, we are going to the Istrian seaside for our vacation!³¹

Due to their different regional experiences through Yugoslavia's tumultuous times, a Venus and Mars analogy could easily apply to Slovenia and Croatia.³² Throughout it all, Slovenia has been the more economically advantaged state; in fact, Slovenia has been the most affluent state of former Yugoslavia.³³ Slovenia was also impacted by far less violence as it departed Yugoslavia, whereas Croatia was inextricably involved in the conflict along the Bosnian and Serbian borders for the duration of the war. Both these differences facilitated a smoother accession for Slovenia into EU and NATO, whereas the economic and security shortcomings of Croatia were often its albatross.³⁴ Slovenia and Croatia lacked shared experiences which in turn shaped their unique DNA as countries. Slovenia had the easier path to independence, while Croatia was blessed with the longer, more beautiful coastline. That Slovenia might not understand Croatia in the Venus-Mars analogy did not dissuade Slovenians from vacationing under the Istrian sun, and they still do today. However, the countries' lack of shared experience translates to a lack of governmental cooperation. Hence Slovenia and Croatia are indeed Venus and Mars and are still at odds with each other about the Istrian region land and maritime borders to this day. Yet both Slovenians and Croatians still love Istria and cohabitate in the vacation spot peacefully.

III. LAW OF THE SEA: THE PROPERTY LAW OF THE WATER

A. *Regulation of the Sea: UNCLOS*

The waters of the world need to be regulated, and the primary source for such regulation is the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS").³⁵ UNCLOS evolved through three iterations, the most recent of

³¹ Much of the regional detail in this article is derived from the author's personal observations having lived in the region and traveled there extensively.

³² The Venus and Mars analogy originated from the Venus and Mars painting by Sandro Botticelli which is often analyzed as representing that love (Venus) is patient and outlasts war (Mars). John Gray, PhD, later used the analogy in his relationship advice counseling techniques and books, the flagship of which was titled "Men are from Mars, Women are from Venus." JOHN GRAY, *MEN ARE FROM MARS, WOMEN ARE FROM VENUS* (1992).

³³ See BENNETT, *supra* note 4, at 102 (indicating that in the years leading up to Yugoslavia's dissolution, Slovenia's per capita wealth was double that of the rest of Yugoslavia).

³⁴ See Levi Winchester, *Croatia One Step Closer to Euro and Could Ditch Kuna by 2023 as New Currency Plan Launched*, EXPRESS (July 5, 2019), <https://www.express.co.uk/finance/city/1149537/croatia-euro-kuna-currency-eurozone-european-exchange> (discussing Croatia's path to adopting the Euro currency now that concerns about the strength of their economy have been assuaged).

³⁵ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S 397 [hereinafter UNCLOS].

which is referred to as UNCLOS III, which entered into force in 1994.³⁶ Aimed at establishing a standard method of determining a coastal state's rights with respect to its adjacent waters, UNCLOS III introduced several principles, known as "legal divisions," that are now custom Law of the Sea terminology such as "baselines," "internal waters," "territorial sea," "contiguous zone," "high seas," "continental shelf," and "exclusive economic zone."³⁷ In terms of determining, or "delimiting" the maritime boundaries between states, the earlier UNCLOS I gave a nod towards a customary international law concept known as the "equidistance principle."³⁸ The process of determining the legal status of the territorial sea of countries with opposite or adjacent coasts is known as "delimitation."³⁹ Thus, a coastal state's territorial seas and other maritime legal divisions listed above are outcomes of the equation involving the factors of baseline and equidistance. It is this junction of maritime boundaries and legal divisions that contributes to the law of the sea riddle that is Slovenia and Croatia.

B. *Coastal States' Water Sovereignty Rights*

The UNCLOS maritime legal divisions are mostly known as "waters" or "zones." They comprise of distances in the continuing direction of the water ("seaward") past a coastal state's coastline in which the state has defined sovereign possessory rights.⁴⁰ A "baseline" establishes the standard start point from which these distances are measured and is typically measured from the low water line along the coast.⁴¹ Exceptions are made for the "craggier" coastlines with pronounced indents or coastlines that are dotted with barrier-type islands. In those cases, the baseline can be drawn from a straight line on the outer coast of those fringe islands or from the most extended points of those jagged coasts.⁴² In the Bay of Piran scenario, the pronounced indent of the bay helps add to the difficulties in determining Slovenia and Croatia's maritime boundaries and corresponding zones.

The "internal water" zones identify the waters inside the baseline.⁴³ Coastal states have full sovereignty over these zones and foreign vessels can only enter them with the sovereign state's permission.⁴⁴ Exceptions usually exist for states

³⁶ See *The United Nations Convention on the Law of the Sea*, U.N. DIVISION FOR OCEAN AFFAIRS & L. SEA (last visited Oct. 27, 2019), https://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm#Third%20Conference.

³⁷ UNCLOS, *supra* note 35, arts. 2-8, 33, 48, 55, 86-87.

³⁸ *Id.* art. 15.

³⁹ *Id.*

⁴⁰ See JOHN NORTON MOORE & ROBERT F. TURNER, NATIONAL SECURITY LAW, (Carolina Academic Press, Second Edition, 2005), 720-23.

⁴¹ *Id.* art 5.

⁴² *Id.* art 6.

⁴³ *Id.* art. 8.

⁴⁴ *Id.* art. 25.

with major ports. Routes to those ports are typically open for foreign vessels to traverse without prior authorization, save for control measures that the coastal state may implement to ensure the larger vessels heading to port stay safely in a designated sea lane.⁴⁵ Aside from foreign vessels heading into port, the internal waters are, for law of the sea purposes, the legal equivalent of that state's soil.⁴⁶

The "territorial seas" are much like the internal waters in that full sovereignty rights are enjoyed within these waters.⁴⁷ A coastal state's territorial sea cannot extend farther than twelve miles past the baseline, per UNCLOS III.⁴⁸ The only distinction between internal waters and territorial seas is that foreign vessels enjoy the right of "innocent passage" through a state's territorial seas without prior notification or authorization.⁴⁹ Only in limited circumstances of safety issues might a coastal state restrict such passage. Innocent passage can also be inhibited if a foreign vessel is violating some custom of the law of the sea or is otherwise committing an offense that violates the sovereign state's laws.⁵⁰

"Continental shelves" and "exclusive economic zones," often referred to as EEZs, are also worthy of mention, not only because of their limitations in the Bay of Piran discussion, but because of their sometimes-controversial nature. Both concepts involve extensions of a coastal state's possessory rights farther out into its littoral waters. The continental shelf theory was first proposed by the United States President Harry Truman in 1945, then morphed into a customary international law principle, before it was finally codified in UNCLOS I.⁵¹ The lengthy distances—from up to 200 to 350 miles past the baseline—proved controversial and contributed to the necessity of convening UNCLOS III.⁵² The theory is largely promoted by coastal states that either have lengthy shallow water zone past their baselines or no continental shelves at all, to enable their exercise of sovereign control over the natural resources within these extended water zones.⁵³ Similarly, the Exclusive Economic Zone (EEZ) concept was introduced by UNCLOS III in large part to preserve the coastal state's rights and responsibilities for resources in zones which can extend up to 200 miles past the baseline.⁵⁴ Aside from the rights conferred over these zones' natural resources, the zones are more akin to the high seas, allowing for other states' navigation, overflight, cable-laying, and other non-resource related activities.⁵⁵ In the Slovenia-versus-Croatia context, a pre-existing continental shelf agreement

⁴⁵ See MOORE & TURNER, *supra* note 40, at 720-21.

⁴⁶ See *id.*

⁴⁷ UNCLOS, *supra* note 35, art. 2.

⁴⁸ *Id.* art. 3.

⁴⁹ *Id.* arts. 17-19.

⁵⁰ *Id.* arts. 21-22.

⁵¹ See MOORE & TURNER, *supra* note 40, at 721-22.

⁵² See *id.*

⁵³ UNCLOS, *supra* note 35, art. 76. See MOORE & TURNER, *supra* note 40, at 721-22.

⁵⁴ See UNCLOS, *supra* note 35, at 428-29.

⁵⁵ See *id.* at 428-30.

between Italy and Yugoslavia still dictates where Italian territorial waters touch those of Slovenia and Croatia.⁵⁶ However, since there are no EEZs in the northern Adriatic Sea, they are not at issue in the Piran Bay dispute.⁵⁷

Finally, the zone called the “high seas,” also known as “international waters,” is very relevant to the Piran Bay discussion. Basically, the high seas consist of everything else that is not already ascribed a maritime legal division. It is “all parts of the sea that are not included in the territorial sea or in the internal waters of a State.”⁵⁸ In the high seas, vessels of various nations have equal rights; order is only preserved under the “flag state” concept, whereby a state can exercise jurisdiction of vessels flying that state’s flags in the high seas.⁵⁹ With the advent of EEZs, much of what used to be considered high seas now are under some type of legal possessory control by a state, even if that control is just over natural resources of the zone via an EEZ.⁶⁰ However, high seas do still exist and contribute to one of Slovenia’s two primary concerns in the Piran Bay dispute: how can Slovenian flagged vessels access the high seas when Slovenia’s territorial waters do not border them? Slovenia points to a 1958 treaty to assert that, as a geographically disadvantaged state, it has a legal right to have access to the high seas.⁶¹

C. *Territorial Maritime Boundaries: The Equidistance Principle*

The aforementioned zones describe rights and ownership of waters moving seaward from a coastal state’s shores. However, how to delineate or delimit the maritime boundary, or the borderline of adjacent or opposing states is another important function in the maritime water’s calculus. The “Equidistance Principle” is the default method for determining such boundaries.⁶² The equidistance method generates a maritime border, or, an equidistance line, that is the same distance from each state’s borders at each point on the line.⁶³ As a

⁵⁶ Gerald Blake & Duško Topalovič, *Maritime Boundaries of the Adriatic Sea in MARITIME BRIEFING* 1996, at 1, 15-16, 28 (International Boundaries Research Unit, Maritime Briefing No. 8)(discussing how both of the parties to the dispute (and Italy) agree that customary law dictates that the Yugoslavian-Italian treaties still apply to the new republics of Slovenia and Croatia).

⁵⁷ See VIDAS, *supra* note 14, at 9-23 (describing Croatia’s lengthy efforts to establish its own EEZ and how Slovenia’s small coastline and access to the Adriatic Sea prevented establishment of an EEZ).

⁵⁸ UNCLOS, *supra* note 35, at 82.

⁵⁹ See MOORE & TURNER, *supra* note 40, at 723.

⁶⁰ See *id.*

⁶¹ See Klemenčić and Gosar, *supra* note 10, at 132 (referring to Article 12 of the 1958 Convention on Territorial Waters’ treaty language that proposed, “an outlet to the open sea (territorial waters) is essential for a country”).

⁶² Abdul Ghafur Hamid, *Refining the Maritime Boundary Delimitation Methodology: The Search for Predictability and Certainty*, 27 *IJUM L.J.* 35, 38, 60-61 (2019).

⁶³ UNCLOS *supra* note 35, at 403.

result, the line is not always perfectly straight; it is not simply vectored at an azimuth from the shoreline border between the two states. Exceptions to the equidistance rule can exist where there are special circumstances that necessitate an equitable solution, rather than the strict adherence to the equidistance principle.⁶⁴ Coastal states can also arrive at an alternative solution via mutual agreement.⁶⁵ The equidistance principle has had its own ebbs and flows in terms of the scope of its acceptance and application, both in custom and codification. However, the current pronouncement of the principle can be found in Article 15, UNCLOS III:

Article 15: 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. 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.⁶⁶

IV. THE BAY OF PIRAN: A LAW OF THE SEA CONUNDRUM⁶⁷

In diagramming the dispute of the Bay of Piran (also known as Gulf of Piran, or Piran Bay) and applying applicable law of the sea principles, a good starting point is the question of where the Slovenia-Croatia maritime border should be drawn. By working through the unique mechanics of this particular maritime border, it becomes clear how border determination has a profound effect on the other maritime legal divisions of Slovenia, Croatia, and Italy, such as their territorial seas, EEZs, continental shelves, and access to the high seas.

The Bay of Piran is a deeply indented yet relatively small bay in the Adriatic Sea at the coastal border of Slovenia and Croatia.⁶⁸ It is situated in the northwestern portion of Istria, a peninsula largely falling in Croatian territory but shared with Slovenia and Italy. At the gateway of the massive Croatian Adriatic coastline, Istria is the go-to local seaside vacation destination for Slovenians and Croatians; Germans, Russians, and other Europeans frequent

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Section title adopted from article by Matej Avbelj & Jernej Letnar Čeranič, *The Conundrum of the Piran Bay: Slovenia v. Croatia – The Case of Maritime Delimitation*, 5 U. PA J. INT'L L. & POL'Y 1, 1 (2003).

⁶⁸ See Klemenčič & Gosar, *supra* note 10, at 132, map 1.

Istria as well.⁶⁹ Croatian Istria's temperate coastal air, self-contained mountain ridge, and mix of limestone white soil and iron-rich red soil provide for its own vibrant wine and Italian-influenced cuisine culture. Istria is famous for its truffles, and but for Istria's small size, it would rank among the world's leading truffle producers.⁷⁰

On the Slovenian side of the Piran Bay is the popular tourist destination city of Piran, popular for its classic Italian ambience, and the glitzier neighboring resort town of Portoroz, where fun seaside activities occur.⁷¹ The Croatian side of the bay, just past the Croatian border on the northern sector of Istria, is more sparsely populated.⁷² Savudrija and Umag, the two Croatian towns that are closest to the Piran Bay, also enjoy their share of vacationers and tourism, but a more low-key version than the casinos and nightlife of Portoroz on the opposite side of the bay.⁷³ The bay's "bookends" are Cape Medona on the Slovenian side and Cape Savudrija on the Croatian side.⁷⁴ Due to the larger population centers on the Slovenian side, the bay has predominantly been used by Slovenians for fishing and recreation.⁷⁵

⁶⁹ CROATIAN BUREAU OF STATISTICS, TOURIST ARRIVALS AND NIGHTS IN 2018 (2019), https://www.dzs.hr/Hrv_Eng/publication/2018/04-03-02_01_2018.htm.

⁷⁰ See *Truffles in Croatia: The Gourmet's Golden Egg*, LONELY PLANET (Oct. 26, 2010), <https://www.lonelyplanet.com/croatia/istria/travel-tips-and-articles/truffles-in-croatia-the-gourmets-golden-egg/40625c8c-8a11-5710-a052-1479d27733b0>, (describing Istria's vibrant truffle industry and noting Croatia's production of the world's largest white truffle that was recognized in the Guinness Book of World Records in 1999).

⁷¹ See Blake & Topalovič, *supra* note 56, at 33 (highlighting the lack of towns or industry on the Croatian side of the bay and the industry and fishing activity in the towns on the Slovenian side).

⁷² See *id.*

⁷³ Author's observations from personal experience in the region.

⁷⁴ See VIDAS, *supra* note 14, at 27-28 (indicating the geographical outline of the Gulf of Trieste and the Bay of Piran in the greater Adriatic Sea on Figure 1 included in note 76).

⁷⁵ See Blake & Topalovič, *supra* note 56, at 30 (explaining how in the most northern part of the Adriatic Sea, the opposing baselines of former Yugoslavia (now Slovenia and Istrian peninsula of Croatia) and Italy were not wide enough to afford either country their fullest allocated 12 nautical miles of territorial sea).

Figure 1. Map of Piran Bay with Coastal Cities⁷⁶

⁷⁶ VIDAS, *supra* note 14, at 27, map 2.

Due to the relatively small gulf formed between Croatia, Slovenia, and Italy in the northern Adriatic, the territorial seas of these countries abut each other.⁷⁷ There are no EEZs here and the high seas zone starts just south of this three-country intersection. This lack of international waters created by such tight quarters is a major factor in the Slovenia-Croatia bay dispute.⁷⁸ The land border between Slovenia and Croatia in this region has also been disputed, complicating issues in terms of forums that are available to resolve the overall dispute.⁷⁹ While the land border dispute is the least of this region's worries, where that border physically touches the water in the Piran Bay—in the bay's southeastern corner—is an extremely pivotal factor in the evaluation of border delimitation and the resultant maritime zones.

A. *Settling Border Disputes*

Having laid out the basic geography of the Piran Bay dispute, a quick primer on the factors that contribute to legitimizing a border dispute solution is in order. The most common bases for states to make territorial claims are: effective control of the disputed territory; historical right to the title of the questioned land or water; *uti possidetis*; geography; and cultural homogeneity.⁸⁰ In *Territorial Disputes at the International Court of Justice*, Brian Taylor Sumner argued that for territorial claims cases considered by the ICJ, treaty law, *uti possidetis*, and effective control are the three that hold the most sway.⁸¹ As the Slovenia-Croatia dispute is sketched out, one can see the earmarks of all three of these factors being asserted by the two parties.

B. *The Equidistance Principle: To Slovenia's Disadvantage?*

Enter the equidistance principle. Using the traditional method for establishing a maritime border does not provide a perfect solution for both countries, but is arguably more disadvantageous for Slovenia. That is because the equidistance line would extend directly to Slovenia's territorial waters limit, boxing Slovenia in between the territorial waters of Italy to its west and of Croatia to its south.⁸² While sharing maritime borders with friendly nations does not seem like a bad thing, the inconvenience to Slovenia in this arrangement is that it would not have direct access to international waters (or high seas)—it would literally be boxed

⁷⁷ See *id.*

⁷⁸ See *id.*

⁷⁹ See *infra* note 160.

⁸⁰ See Brian Taylor Sumner, *Territorial Disputes at the International Court of Justice*, 53 DUKE L.J. 1779, 1780 (2004) (discussing trends in border dispute adjudication at the ICJ and the prevailing factors used to resolve such disputes).

⁸¹ See *id.*

⁸² See Avbelj & Černič, *supra* note 67, at 4 (explaining (and illustrating with a corresponding map) how the default delimitation method boxes Slovenia's territorial waters between those of Italy and Croatia).

in. Access to the laissez-faire world of the international waters is obviously a desired asset of any coastal state.

Can Slovenian vessels still travel to those high seas via “innocent passage” of Croatian territorial waters? Of course they can.⁸³ However, traveling across Croatia’s territorial waters for Slovenia is the equivalent of cutting across one’s good friend and next-door neighbor’s lawn: it may be okay for now, but what if neighborly relations turn icy in the future? Does one really want to wear out the good graces of a friendly neighbor by taking multiple trips across their lawn? In truth, one would rather not have to impose on their neighbor, in good times or bad, if at all possible. If there were a direct way to reach the same area by staying on one’s own property, that would be optimal. That is the predicament in which Slovenia and Croatia find themselves.

C. *Slovenia’s Proposal: Fishing for an Equitable Option?*

Although the equidistance principle puts Slovenia at a greater disadvantage in terms of access to high seas, that delimitation method is not a perfect solution for either country in terms of physical division of the bay. Slovenia’s optimal solution is to have the entire bay deemed to be its internal or territorial waters.⁸⁴ Slovenia’s argument is that Piran Bay is a historical bay that it has consistently administered, patrolled, fished, and held out as under Slovenian control.⁸⁵ Further, the population of the Slovenian cities and towns abutting the bay is far greater than that of its Croatian counterparts across the water.⁸⁶ Finally, having the entire Piran Bay as its own would aid Slovenia’s effort for direct access to the high seas. Even though Slovenian waters would still not border international waters if Slovenia were granted full sovereignty rights over the entire bay, it would at least get it closer.⁸⁷ Thus, from Slovenia’s perspective, the equidistance principle would not only frustrate its attempt for direct access to the high seas but would sacrifice a portion of a body of water (the bay) that it deems to be its own.

To solve its international waters access dilemma, Slovenia proposes a corridor to be carved out of Croatia’s territorial waters, enabling direct access to international waters from Slovenia’s territorial sea boundary.⁸⁸ However, this arrangement would split Croatia’s territorial sea zone directly to the west of Istria into two noncontiguous parts. The portion seaward of the Slovenian corridor would be in the shape of a triangle: on one side it would border Italian

⁸³ See *id.* at 16-17.

⁸⁴ See *id.* at 5-6, 8.

⁸⁵ See *id.* at 6, 8.

⁸⁶ See *id.* at 9.

⁸⁷ See Blake & Topalovič, *supra* note 56, at 30. See also VIDAS, *supra* note 14, at 37-38 (both articles describing the expansive view of the territorial sea Slovenia was seeking, far greater than it would have been granted via traditional maritime delimitation principles, even if it were granted full sovereignty of the Piran Bay).

⁸⁸ See *id.* at 8.

territorial waters; on the second side it would border Slovenia's corridor to the high seas; on the third side, it would border Slovenian territorial waters.⁸⁹ Conceptually, however, it would undoubtedly be a unique 'island' territorial sea zone, completely detached from any other waters over which Croatia exercises total sovereign control. Under the Slovenian proposal, the corridor itself would be considered high seas, or international waters.⁹⁰ The proposal would not establish a corridor of Slovenia's territorial waters to reach the high seas; rather, it would create an extension of the high seas to allow them to border Slovenia's territorial waters in this narrow aperture.

D. *Croatia's Position: Piran Bay is not a 'Truffling' Matter*

For Croatia's part, the equidistance principle would suffice in the sense that it would allow Croatia to retain control over at least part of the Piran Bay. However, Croatia would much prefer to just split the bay in half, making each side of the bay that respective coastal state's territorial waters.⁹¹ Objectively, that might be viewed as an untenable and inconvenient result, with the administrative hassles of having a territorial border line split a bay that is only 3 miles wide at its widest point.⁹² Predictably, Croatia is completely uncomfortable with Slovenia claiming the entire bay, as it is difficult to imagine a country bordering water but having minimal to no rights over that water, even up to its shoreline.⁹³

Whatever the outcome of the Piran Bay delimitation, Croatia strongly desires to maintain a shared border between its territorial sea and that of Italy.⁹⁴ For perspective, Slovenia and Croatia already share such a border with Italy as the close quarters in the northern Adriatic Sea do not allow for EEZ establishment, much less any measurable international waters zone. Croatia's interest in retaining a common territorial sea border with Italy originally stemmed from its desire to retain a direct border with a European Union country, in this case Italy.⁹⁵ The reason behind this desire is perhaps anachronistic; that is, the thought process was that direct contact with the EU would bode well for Croatia joining the union.⁹⁶ In 2004, Slovenia, on Croatia's northern border entered the EU, and Croatia itself joined the union in 2013. Presently, Croatia's persistent desire to border Italy has more to do with the perceived credibility associated with bordering a more established, longer-term member of the EU and one that holds

⁸⁹ See Damir Arnaut, *Stormy Waters on the Way to the High Seas: The Case of the Territorial Sea Delimitation Between Croatia and Slovenia*, 8 *OCEAN & COASTAL L.J.* 21, 39 (2002).

⁹⁰ See Avbelj & Čerňič, *supra* note 67, at 11.

⁹¹ *Id.* at 10.

⁹² See Arnaut, *supra* note 89, at 27.

⁹³ See Avbelj & Čerňič, *supra* note 67, at 10.

⁹⁴ See *id.*

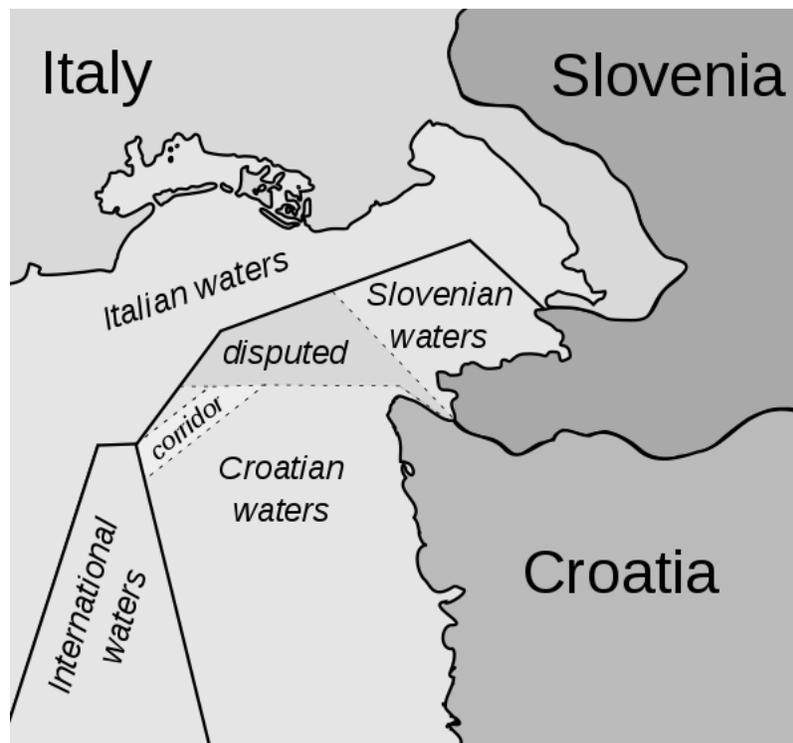
⁹⁵ See Klemenčič & Gosar, *supra* note 10, at 4.

⁹⁶ See *id.* at 130-131.

a lot of regional power due to its size-dominance in the Adriatic. Regardless of motive, that Croatia now borders its EU neighbor Slovenia has not quelled its desire to maintain maritime contact with Italy.

The detached triangular territorial sea zone carved out as a byproduct of Slovenia's corridor proposal would enable Croatia to maintain a maritime border with Italy.⁹⁷ Indeed, the Slovenian corridor is drawn narrowly to achieve that purpose; otherwise Slovenia would simply propose the entire zone as a corridor, cutting off Croatia's border with Italy. However, the Slovenian corridor proposal results in the inconvenience of having the border with Italy be created by this awkwardly placed, isolated, triangular territorial sea zone. Croatian vessels would have to traverse the high seas corridor to get back to their territorial waters, an inconvenience they would rather avoid.⁹⁸

Figure 2. Map Showing Slovenian Corridor Proposal⁹⁹



⁹⁷ See Avbelj and Černič, *supra* note 67, at 11.

⁹⁸ See *id.* at 17.

⁹⁹ Map Illustration by Renata Rakič, *The Arbitrage Debacle: A View from Slovenia*, TOTAL CROATIA NEWS, (July 27, 2015), <https://www.total-croatia-news.com/politics/320-the-arbitrage-debacle-a-view-from-slovenia>. See also STA, *Slovenia, Croatia Attend ECJ for Border Arbitration Hearing*, TOTAL SLOVENIA NEWS, (July 13, 2019), <https://www.total-slovenia-news.com/politics/4090-slovenia-croatia-attend-ecj-for-border-arbitration-hearing>.

E. *Applying International Law Principles*

1. Treaties

A unique problem facing the republics of the former Yugoslavia is that there were initially no treaties or agreements with neighboring countries to dictate where their borders should be, because these republics were not countries. When it existed as a singular state, the Federal Socialist Republic of Yugoslavia managed the delineation of its own territorial waters.¹⁰⁰ The land boundaries of Slovenia and Croatia meant nothing in that equation. When Yugoslavia fragmented along individual republic lines, the region was presented with the challenge of drawing maritime boundaries for the first time. The only points of reference were the republics' land border lines at the time of their independence, drawn from the point those borders touched the water, in deference of the default *uti possidetis juris* rule.¹⁰¹ However, since the republics were part of a greater federation, nominal disagreements in the exact land border delimitations between republics in the federation were not of utmost priority to resolve. Thus, it should be no surprise that Slovenia and Croatia's yesteryear intransigence about their administrative borders has resulted in critical issues with regard to the establishment of post-independence maritime borders.¹⁰²

Among the relevant treaties or agreements affecting the Piran Bay and the greater Gulf of Trieste that did exist or were later developed, the Osimo Treaty, the Drnovsek-Racan agreement, and the Pahor-Kosor agreement are most noteworthy. Italy and Yugoslavia entered into the Osimo Treaty of 1975 to resolve both land and maritime border inconsistencies between the two nations.¹⁰³ The two states shared a land border and had opposing baselines in the northern Adriatic Sea's Gulf of Trieste.¹⁰⁴ The small Gulf of Trieste area between Italy and the opposing Slovenian coastline of Yugoslavia result in extremely tight quarters, so much so that in some areas there is not enough room for the opposing countries to allow territorial waters out to their full, permissible 12-mile limit.¹⁰⁵ Due to the northern Adriatic Sea's shallow depth and ample resources, both countries desired continental shelf designation for their waters, especially as the area widened going south.¹⁰⁶ The Osimo agreement ironed all of this out, establishing abutting territorial seas boundaries for Italy and Yugoslavia seaward of the Slovenian coastline, and a continental shelf delimitation agreement between Italy and Yugoslavia seaward of the Croatian coastline.¹⁰⁷ A byproduct of the Osimo agreement was that there were no

¹⁰⁰ See Avbelj & Černič, *supra* note 67, at 2, 4.

¹⁰¹ See *id.* at 3.

¹⁰² See Blake & Topalovič, *supra* note 56, at 19-28.

¹⁰³ See *id.* at 16.

¹⁰⁴ See *id.*

¹⁰⁵ See *id.* at 30.

¹⁰⁶ See Klemenčič & Gosar, *supra* note 10, at 129.

¹⁰⁷ See Blake & Topalovič, *supra* note 56, at 15-16.

international waters beyond the Slovenian territorial seas; the Slovenian (then Yugoslavian) waters simply abutted those of Italy, precipitating a key component of the future Piran Bay dispute.¹⁰⁸

The 2001 Drnovsek-Racan agreement, named after the Slovenian and Croatian prime ministers at the time, was an attempt to arrive at a mutually agreeable solution for the Piran Bay.¹⁰⁹ The agreement introduced a compromise that would have given Slovenia roughly 80% of the Piran Bay and expanded Slovenia's territorial waters past the bay.¹¹⁰ The written agreement introduced a proposed corridor in the shape of a chimney that would have given Slovenia its desired direct access to international waters. The corridor would have had the status of high seas, disabling either nation from making a sovereign claim to it or staking a higher claim in its resources.¹¹¹ The agreement was signed by both parties, but was not ratified by the Croatian parliament due to public opposition.¹¹²

Finally, the 2009 Pahor-Kosor agreement, named after the Slovenian and Croatian prime ministers at the time, was an agreement that ultimately primed the Piran Bay dispute for arbitration.¹¹³ Facilitated by the Swedish Presidency of the Council of the EU, the agreement was approved by both governments in 2010.¹¹⁴ The EU facilitation provided the natural leverage for two countries seeking the continued good graces of the organization; Slovenia as a member, and Croatia as a prospective member.¹¹⁵ Slovenia's agreement to terminate the blockade of Croatia's attempt to join the EU, a byproduct of the Pahor-Kosor agreement, is a prime example of how such leverage pushed deliberations forward.¹¹⁶

Aside from these three noteworthy treaties, which both contributed to the status quo of the maritime delimitations of Slovenia and Croatia and provided a framework for future solutions, the European Union (EU) has also been involved in the Slovenia-Croatia disagreement. The European Union (EU) is a treaty-based organization of which both coastal states are now members. The EU's appropriateness as a venue to solve their maritime crisis will be discussed further. Having established that there was no preexisting treaty that addressed

¹⁰⁸ See *id.* at 30.

¹⁰⁹ See Sancin, *supra* note 6, at 96-97.

¹¹⁰ See Avbelj & Černič, *supra* note 68, at 7; See also VIDAS, *supra* note 14, at 37-38.

¹¹¹ See Avbelj & Černič, *supra* note 68, at 10.

¹¹² See *id.* at 7, 12.

¹¹³ See Sancin, *supra* note 6, at 99-100.

¹¹⁴ See *id.* at 100 (noting that the agreement was signed in Stockholm by both Prime Ministers in 2009 and ratified by Croatia in 2009 and Slovenia in 2010).

¹¹⁵ See generally *id.* (highlighting that each country's goals allowed for strategic engagement with EU facilitation).

¹¹⁶ See *id.* at 99-100 (noting that Slovenia lifted its blockade after Croatia's Prime Minister sent a letter to the Swedish Presidency of the Council of the EU that made certain concessions desired by Slovenia).

the Slovenia and Croatia land or water boundary and that the Osimo, Drnovsek-Racan, and Pahor-Kosor treaties did not completely resolve their dispute, a look into the other predominant border determinants is in order.

2. *Uti Possidetis Juris*: A Yugoslavian Ante Bellum Conundrum

The legal concept that proposes an entity in possession of something has superior rights to it, *uti possidetis juris*, applies to the Slovenia-Croatia paradigm by way of its interpretation that a newly independent state's previous administrative boundaries as a republic will be adopted as its new sovereign borders.¹¹⁷ This rule gained traction during the decolonization of Latin America and Africa, but its precepts have been visibly used more in modern-day situations, such as the dissolution of the Soviet Union.¹¹⁸ The rule is still applied in modern times because it provides clarity in terms of how the borders will be arrayed, it is simple to apply, and it has been crystallized into customary international law.¹¹⁹ Modern writings, however, have criticized the inclination to lean back on *uti possidetis juris* when delimiting borders between newly emerged countries because there is potential for flashpoints to arise from applying such a rigid rule to a multi-ethnic society.¹²⁰

Uti possidetis juris, its history, and its appropriateness for modern day boundary determinations is apparent when applied to the modern republics situated within the borders of what was once Yugoslavia. For starters, the Badinter Commission approved the application of this delimitation theory to former Yugoslavia when newly independent state borders were adopted from former republic borders within Yugoslavia.¹²¹ Predictably, there was trouble—most notably in the crisis-ridden border regions of Croatia, Bosnia, and Serbia. Even though a preexisting nation may have long accepted its pre-colonization borders as the appropriate delimitation with other countries, administrative boundaries between republics, such as those in the Federation of Yugoslavia, were likely not taken as seriously pre-independence. After all, sovereign border crossings were not established between neighboring former-Yugoslav republics. However, in establishing boundaries post-independence, terrain and resources

¹¹⁷ See Avbelj & Černič, *supra* note 67, at 3 & n.2 (discussing the historical use of *uti possidetis juris* as requiring newly independent states to use their pre-colonization borders).

¹¹⁸ See *id.* at n.3; see also Rein Mullerson, *New Developments in the Former USSR and Yugoslavia*, 33 Va. J. Int'l L. 299 (1993).

¹¹⁹ See Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 A.J.I.L. 590, 590-591 (1996) (asserting these factors as arguments for continued relevance of *uti possidetis* in recent dissolutions of Soviet Union, Yugoslavia, and Czechoslovakia).

¹²⁰ See *id.* at 591 (noting applying the concept to dissolution of Yugoslavia left certain individuals vulnerable after new states' borders were delineated).

¹²¹ See *id.* at 613 (noting that Banditer Committee found *uti possidetis juris* an appropriate principle to apply to former Yugoslavia republics).

formerly shared between the republics –including the Piran Bay– took on additional importance. Further, those who consider *uti possidetis juris* an acceptable theory to apply to Slovenia and Croatia’s independence delimitation are confronted with an observation: the only reason it makes sense now is that these two republics did not resort to armed violence to settle their differences over the borders.¹²² The other complicating factor is that, while *uti possidetis juris* was originally used to delimit the *land* boundaries between the two republics, the maritime boundaries were never delimited in this way.¹²³

In short, strict application of *uti possidetis juris* does little to solve the tensions regarding the land or maritime boundaries in dispute between Slovenia and Croatia. One may be inclined to write this situation off as a geographic and historic anomaly. However, assuming the Slovenia-Croatia conundrum is a one of a kind situation may be a perilous assumption in a world where dozens of states have achieved their independence relatively recently and are struggling to find their identity amongst and between their like, but different neighbors.

3. Effective Control: A Slovenian Fishing Expedition?

Effective control, somewhat related to the historic title theory of Piran Bay ownership as asserted by Slovenia, is the third legal border dispute theory thought to be determinative in ICJ border delimitation jurisprudence.¹²⁴ As the modern-day counterpart to the common law doctrine of adverse possession, effective control is the idea that possession or occupation of a disputed land is one of the strongest, if not the most determinative factors, in establishing ownership.¹²⁵ While historically there may not be as much precedence for applying the effective control theory to disputed waters as opposed to land, it is perhaps the best comparison we have with respect to determining the extent to which a certain state’s degree of control over an area (such as Piran Bay) influences its right of ownership.¹²⁶

An assessment of the effective control concept reveals that both Slovenia and Croatia have disputes about the use of the water, from the fishing of the waters that originate from each country to the patrolling of the bay by police.¹²⁷ Slovenia contends that the sheer population dominance of Slovenian settlements

¹²² See *id.* at 596 (comparing Croatia-Slovenia border dispute with border disputes between Serbia, Croatia, and Bosnia, where states resorted to force and “*uti possidetis* remained a mirage”).

¹²³ See Avbelj & Černič, *supra* note 67, at 2.

¹²⁴ See Sumner, *supra* note 80, at 1779-80 (highlighting effective control as one of the categories in which international border claims can be brought before the ICJ).

¹²⁵ See *id.* at 1787 (asserting that effective control is the “shibboleth . . . of a strong territorial claim”).

¹²⁶ See *id.*

¹²⁷ See Avbelj & Černič, *supra* note 67, at 7, 13.

on the bay justifies its ownership.¹²⁸ To bolster its argument, Slovenia points to evidence that the Cape of Savrudija on the Croatian side of the bay historically belonged to Slovenia and that Slovenian settlements still exist there.¹²⁹ The strong suit of Slovenia's effective control argument is that Slovenians do constitute an overwhelming majority of the Bay's population, and that they have historically, whether Croatia appreciates it or not, maintained a consistent economic and police presence in the bay.¹³⁰

However, historical title notwithstanding, international law tends to disagree with Slovenia's claim of sovereign rights over the entire bay.¹³¹ UNCLOS Article 2 codifies the customary law notion that land territory drives the delineation of sovereign waters.¹³² Thus, if Slovenia were to claim the entire Bay, it would have sovereign rights of waters all the way up to the Croatian shoreline. Such a position would not be supported by international law and it is difficult to fathom what special circumstance Slovenia could assert to warrant a favorable ruling. Although Slovenia's effective control argument has merits with respect to *parts* of the Bay, their historic title claim for the entire bay is a nonstarter.

A review of the three predominant factors in resolving border disputes yields varying indicators as to how this case should be resolved. In terms of treaties, there was no initial treaty or agreement delimiting the Piran Bay between two republics of a federation that would soon achieve statehood. Of the agreements struck in the intervening time, there was reluctance to completely adhere to them. The EU has done little to resolve the issue, choosing instead to remain neutral in this conflict.¹³³ In terms of *uti possidetis juris*, it is obvious the rigid

¹²⁸ See *id.* at 8 (“The coastal region is an area of 44 square kilometers with a population density of almost 80,000 people (232 inhabitants/km), which means that the population density of the area is more than twice the national average.”).

¹²⁹ See *id.* at 8 (noting that maps and historical documents indicated Slovenia's ownership of the Savudrija Peninsula); Arnaut, *supra* note 89, at 37.

¹³⁰ See Avbelj & Černič, *supra* note 82, at 6 (identifying evidence of Slovenia's historic presence in Piran Bay).

¹³¹ See *id.* 14 (noting that customary law seems to support Croatia's argument).

¹³² See *id.* at 13-14 (noting that Croatia's strongest argument derives support from the codification of customary law that a state's territorial sovereignty extends “beyond its land territory to the sea”); see also UNCLOS, *supra* note 35, art. 2 (“The sovereignty of a coastal State extends, beyond its land territory and external waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.”).

¹³³ See Anna Maria Luca, *Slovenia Asks the EU to Intervene in Sea Dispute with Croatia*, BALKAN INSIGHT (Mar. 16, 2018), <https://balkaninsight.com/2018/03/16/slovenia-asks-the-eu-to-interfere-in-sea-dispute-with-croatia-03-16-2018/> [<https://perma.cc/G2C7-NG7H>] (describing Slovenia's attempt to seek EU help in requiring Croatia to comply with the PCA arbitration ruling, which favored Slovenia. Croatia pulled out of arbitration upon discovering ex parte communications between Slovenian representative and arbitration panel judge. Upon judge's recusal, the PCA continued with arbitration and delivered final award in 2017); see also Anja Vladislavljec, *Slovenia Border Dispute*, BALKAN INSIGHT (June 18, 2018),

application of this theory of historical land ownership under the law is incapable of solving this Slovenia-Croatia crisis. Finally, while Slovenia might put forward a convincing effective control argument, international law tends to dispute the all-or-nothing result Slovenia posits under the effective control argument.

In light of the above, it is unsurprising that international arbitration appeared to be the best option for the two countries. A review of the forum they chose and the result achieved are in order.

V. BREAKING THE PIRAN BAY STALEMATE: IS PCA THE BAY'S SAVIOR?

At this juncture, it is helpful to review the timeline of the 28-year Piran Bay dispute between Slovenia and Croatia.¹³⁴ This is provided as a matter of review, but also to fill in any gaps of the tumultuous 28 years of temporary agreements, political maneuverings, and intelligence accusations.

25 June 1991 - Slovenia adopts the Basic Constitutional Charter on Independence, which states that the borders of the republics in the former Yugoslavia are the internationally-recognized borders of the new state. Croatia makes a similar declaration.

11 January 1992 - The Arbitration Commission of the Conference on Yugoslavia (the Badinter Commission) adopts the position that the borders of the former Yugoslav republics are the borders of the newly-emerged countries in the region.

28 April 1997 - Slovenia and Croatia sign the Agreement on Border Transport and Cooperation (SOPS) in a bid to facilitate the movement of people living in border areas (all municipalities within the 10-km belt of the border on both sides). The Croatian parliament ratifies the treaty the same year, Slovenia follows suit in June 2001. Even though the agreement also imposes the fishing regime in the Bay of Piran, incidents involving fishermen would be rife in the years to come.

January 1998 - Two operatives of the Slovenian Intelligence and Security Service (OVS) stray into Croatia in a spy van near the town of Zavrč. Their van is confiscated by the Croatian authorities, including the equipment with intelligence. Croatia does not return the van to Slovenia until 2001.

20 July 2001 - The Slovenian and Croatian governments endorse and initial a draft agreement on the border hammered out by the prime ministers,

<https://balkaninsight.com/2018/06/18/ek-remains-neutral-on-croatia-slovenia-border-arbitration-dispute-06-18-2018/> [<https://perma.cc/SF6A-DN4H>] (discussing the European Commission's decision to stay neutral in Piran Bay dispute after Slovenia asked EU to intervene).

¹³⁴ STA, *A Timeline of the Slovenia-Croatia Border Dispute*, TOTAL SLOVENIA NEWS (Apr. 10, 2019, 12:33 PM) [hereinafter *Timeline of Slovenia-Croatia Dispute*], <https://www.total-slovenia-news.com/politics/3415-a-timeline-of-the-slovenia-croatia-border-dispute> [<https://perma.cc/56PH-YYNY>].

Janez Drnovšek and Ivica Račan. This is the first time that the two countries determine the border at sea. The agreement gives Slovenia 80% of the Bay of Piran and a corridor with access to international waters; Croatia retains contact with Italian territorial waters. The Slovenian parliamentary Foreign Policy Committee confirms the treaty, but the Croatian parliament is staunchly against.

4 September 2002 - Croatian Prime Minister Ivica Račan sends a letter to Slovenia in which Croatia announces it is withdrawing from the Drnovšek-Račan agreement.

3 October 2004 - Croatia implements a protective ecological and fisheries zone in the Adriatic Sea a year after declaring it despite protests from Slovenia and Italy.

10 June 2005 - The governments of Slovenia and Croatia sign the Brijuni Declaration at their first joint meeting, pledging to avoid incidents on the border and to respect the state on the ground as on 25 June 1991.

4 October 2005 - The Slovenian National Assembly passes a law declaring a Slovenian ecological zone and epicontinental belt in the Adriatic which includes a provision that says the demarcation still needs to be agreed at bilateral level.

5 January 2006 - Slovenia declares the whole of the Bay of Piran as its fishing area.

31 August 2006 - In one of the gravest escalations, Slovenia deploys members of a special police force to the area near the Slovenian border village of Hotiza on the north bank of the Mura river in the north-east of the country after Croatia has begun building an embankment and a road towards the Slovenian settlement Brezovec-part or Mirišče without having obtained consent from Slovenia.

June 2007 - Former Slovenian Prime Minister Tone Rop tells a reporter off the record that, prior to the 2004 election, the Slovenian intelligence agency SOVA had intercepted the then opposition leader Janez Janša and Croatian Prime Minister Ivo Sanader as they were plotting border incidents in the Bay of Piran. Due to the revelations, Rop is later fined by court for disclosure of secret data but later acquitted by a higher court.

26 August 2007 - The Slovenian and Croatian prime ministers, Janez Janša and Ivo Sanader, reach an informal agreement in principle at their meeting in Slovenia's Bled to put the border issue to the International Court of Justice in The Hague.

4 November 2009 - Prime Minister Borut Pahor and his Croatian counterpart Jadranka Kosor sign an arbitration agreement in Stockholm, Sweden, under the auspices of the Swedish EU presidency. The treaty sets forth that an arbitration tribunal shall determine the land and sea border,

Slovenia's junction with high seas and a regime for the use of maritime zones.¹³⁵

A. *The Permanent Court of Arbitration*

As the Piran Bay impasse persisted, the state parties agreed in 2009 to resolve their disagreement via arbitration.¹³⁶ For a variety of reasons, the countries chose the Permanent Court of Arbitration (PCA), seated in The Hague, the Netherlands as their dispute resolution venue.¹³⁷ Other options were considered, but jurisdictional restrictions ultimately resulted in the PCA being the best and only option.¹³⁸

The PCA is an intergovernmental arbitral organization consisting of 122 contracting members, including Slovenia and Croatia.¹³⁹ It is not a court, per se, in that it does not exercise compulsory jurisdiction of any type; both parties must consent to its jurisdiction.¹⁴⁰ However, once the PCA rules on a case, its decision is binding on the parties, with no option for appeal.¹⁴¹ Enforcement options are virtually nonexistent, which leads to the continuing impasse between Slovenia and Croatia to this day.

As the dispute headed toward international arbitration it appeared there was a light at the end of the tunnel, however, the case hit a major stumbling block that extended the impasse. In 2015, Croatian media secured evidence of ex parte communications between a Slovenian member of the PCA arbitration panel and an agent for the Slovenian government.¹⁴² Despite the fact that both Slovenians stepped down from their positions in the wake of the communication discovery, Croatia was convinced that the arbitration was irreparably corrupted and

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PERMANENT COURT OF ARBITRATION, <https://pca-cpa.org/en/cases/3/> [<https://perma.cc/48WE-KKBD>] (last visited Oct. 27, 2019).

¹³⁸ See Sancin, *supra* note 6, at 98-101.

¹³⁹ *Contracting Parties*, PERMANENT COURT OF ARBITRATION, <https://pca-cpa.org/en/about/introduction/contracting-parties/> [<https://perma.cc/5UHG-RVVA>] (last visited Oct. 27, 2019).

¹⁴⁰ Arbitration Rules 2012, Permanent Court of Arbitration, arts. 1, ¶¶ 1, 2, 4 (Dec. 17, 2012), <https://pca-cpa.org/wp-content/uploads/sites/6/2015/11/PCA-Arbitration-Rules-2012.pdf>.

¹⁴¹ *Id.*, art. 34.2.

¹⁴² See Marja Novak, *Slovenia to Sue Fellow EU Member Croatia Over Border Ruling*, REUTERS (June 18, 2018, 10:28 AM), <https://www.reuters.com/article/us-slovenia-croatia-border/slovenia-to-sue-fellow-eu-member-croatia-over-border-ruling-idUSKBN1JE1PP> [<https://perma.cc/28CN-7W4N>] (noting that Croatia's 2015 withdrawal from the PCA's arbitration was due to improper exchange between judge and Slovenian government).

withdrew from further PCA participation.¹⁴³ Nevertheless, the PCA decided to go forward with the arbitration process.¹⁴⁴

On June 29, 2017, with only Slovenia still participating in the process, the PCA announced its Piran Bay decision.¹⁴⁵ If one were to reduce the award to winners and losers, Slovenia won – they got almost everything they had hoped to get, save for being awarded the entire bay. The PCA ultimately:

Determined that “the Bay had the legal status of internal waters prior to [Yugoslavia’s] dissolution” and “retained that status after [Slovenia and Croatia’s] independence.”¹⁴⁶ This meant that delimitation of the Bay would entail creating near total sovereign zones within the Bay determined by where that boundary would be set.

Determined that the mouth of the Bay is a straight line drawn from the tip of Cape Savudrija on the Croatian side to the tip of Cape Medona in Slovenia. In essence, this gives the entire Bay the status of internal waters.¹⁴⁷

Determined that the boundary between Croatia and Slovenia within the bay is a straight line which, essentially, splits the difference between the proposed lines of the two countries. As viewed on the map, this establishes a majority of the bay as Slovenia internal waters, roughly 75%.¹⁴⁸ The court arrived at this conclusion by applying the *uti possidetis effectivités* principle. Distinct from the *uti possidetis juris* principle which reflects possession under the law, *uti possidetis effectivités* is the concept of “state acts manifesting a display of authority on a given territory, or possession as a matter of fact.”¹⁴⁹

As Slovenia requested, the PCA established a corridor from the Slovenian territorial seas to give Slovenia direct access to international waters.¹⁵⁰

Where early proposals were to cast the “junction area” corridor as a high seas zone, the PCA tailored this zone such that it does not neatly fit one category or the other. It retains some earmarks of the high seas yet gives Croatia certain

¹⁴³ *See id.*

¹⁴⁴ *See id.*

¹⁴⁵ Croat./Slovn., Case No. 2012-04, Final Award (Perm. Ct. Arb. 2017), <https://pcacases.com/web/sendAttach/2172>.

¹⁴⁶ *Id.* at 370.

¹⁴⁷ *Id.* at 371.

¹⁴⁸ Final Award map, *infra* note 151.

¹⁴⁹ *Id.* at 273; *see also* FARUK GUNAL, A CASE STUDY OVER THE CONCEPT OF “EFFECTIVITÉS” TO DECIDE SOVEREIGNTY OVER DISPUTED ISLANDS: MALAYSIA/SINGAPORE, 65 (2016) (quoting Territorial Dispute and Maritime Delimitation (Nicar. v. Colom.), Summary of the Judgment, 2 (Nov. 2012). November 2012, p.2.

¹⁵⁰ Croat./Slovn., at 371.

rights such that it does not completely disrupt the continuity of Croatia's territorial seas.¹⁵¹

Figure 3. PCA Maritime Boundary Award¹⁵²



¹⁵¹ *Id.* at 372-73.

¹⁵² *Id.* at 347, Map VI.

While it may seem this award heavily favors Slovenia, Croatia realistically should not have expected a much better result. That Slovenia would be granted a corridor to the high seas seems to be a genuinely reasonable result, and the roughly 75% of the Bay awarded to Slovenia is not drastically different than Croatia's own proposal of splitting the Bay in half. As to Croatia's claim that Slovenia breached the arbitral agreement and by extension tarnished any hope that the PCA could reach a legitimate result, this article will not make any judgment. However, it should be noted that the award was made by an internationally recognized, neutral arbitration panel, and agreement to consent to its jurisdiction implies an obligation, as recognized by all contracting members, to abide by its holding. Further, it is difficult to imagine a much different outcome, regardless of the alleged improprieties or irrespective of forum.

In light of the alternative forums that could potentially have adjudicated this dispute, two are most worthy of discussion. The jurisdictional restrictions or limitations that made them suboptimal venues are also reviewed.

B. *Choice of Venue: Casting too Narrow of a Net?*

1. The ICJ: The Presumptive First Choice?

The International Court of Justice (ICJ) is sometimes referred to as "the World Court," and its self-proclaimed role is to "settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies."¹⁵³ With that mantle, it seems like the ICJ is tailor-made for a dispute such as this: a border disagreement between states. Even though Slovenia and Croatia had agreed in principle to resolve their dispute through ICJ processes in 2007, they ended up electing to use the arbitration process of the PCA instead in 2009.¹⁵⁴

This change of heart primarily hinged on the type of ruling Slovenia was seeking. Recall that Slovenia's desired results were not supported by the default equidistance method in delimiting maritime borders. While the method is codified in UNCLOS and thus is black-letter, binding law for UNCLOS contracting parties, UNCLOS acquiesces to exceptions due to special circumstances.¹⁵⁵ However, it does not define what those exceptions may be,

¹⁵³ *International Court of Justice*, MODEL U.N., <https://outreach.un.org/mun/content/international-court-justice> [<https://perma.cc/UKX3-UMX5>] (last visited Oct. 27, 2019); *The Court*, INT'L CT. JUST., <https://www.icj-cij.org/en/court> [<https://perma.cc/M8NH-4DZA>] (last visited Oct. 27, 2019).

¹⁵⁴ See Bickl, *supra* note 22, at 16, 19 (noting that despite initially submitting dispute to ICJ, parties later drafted an arbitration agreement in 2009).

¹⁵⁵ UNCLOS, *supra* note 35, art. 15 ("The . . . provision does not apply, however, where it is necessary by reason of historical title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.").

and, with no developed case law on the issue, it is difficult if not impossible for a party to derogate from that provision yet confidently aver that the “special circumstance” they have encountered falls within the black letter law of UNCLOS.¹⁵⁶ As such, Slovenia was seeking an *ex aequo et bono*¹⁵⁷ ruling, which was opposed by Croatia. An *ex aequo et bono* ruling is a ruling the ICJ does not have the power to render.¹⁵⁸

2. ITLOS: Adrift on Land Issues?

The International Tribunal for the Law of the Sea (ITLOS) is a creation of UNCLOS III and is one of four dispute resolution mechanisms listed in Article 287.¹⁵⁹ Its jurisdiction is as follows:

The Tribunal has jurisdiction over all disputes concerning the interpretation or application of the Convention, subject to the provisions of article 297 and to the declarations made in accordance with article 298 of the Convention.

Article 297 and declarations made under article 298 of the Convention do not prevent parties from agreeing to submit to the Tribunal a dispute otherwise excluded from the Tribunal’s jurisdiction under these provisions (Convention, article 299).

The Tribunal also has jurisdiction over all disputes and all applications submitted to it pursuant to the provisions of any other agreement conferring jurisdiction on the Tribunal. A number of multilateral agreements conferring jurisdiction on the Tribunal have been concluded to date.¹⁶⁰

Because ITLOS has relevant jurisdictional reach, one may wonder why it was not used to resolve the Piran Bay dispute, particularly because the ITLOS area of specialization is, in fact, the law of the sea. The answer turns on a vibrant, ongoing debate about whether ITLOS can exercise “mixed jurisdiction;” that is, jurisdiction in cases which mix a maritime legal issue covered by UNCLOS and

¹⁵⁶ *Id.*

¹⁵⁷ Black’s Law Dictionary defines this as, “According to what is equitable and good.” *Ex Aequo et Bono*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹⁵⁸ Email from Dr. Vasilka Sancin, Assistant Professor of Law, University of Ljubljana, to author (Jul. 4, 2019, 09:22) (on file with author). Professor Sancin has been, in the capacity of an external consultant to the Ministry of Foreign Affairs of the Republic of Slovenia, involved in the process leading to the conclusion of the Pahor-Kosor agreement. *See, e.g., Vasilka Sancin, Slovenia Wants Changes to Croatia Border Resolution Plan*, EUOBSERVER (May 9, 2009 5:33 PM), <https://euobserver.com/enlargement/28153> [<https://perma.cc/2NQ5-B8EZ>]; Vasilka Sancin, *Stalemate Continues in Croatia-Slovenia Boundary Dispute*, DURHAM U. INT’L BOUNDARIES RES. UNIT (Feb. 2, 2009), https://www.dur.ac.uk/ibru/news/boundary_news/?itemno=7515&rehref=%2Fibru%2Fnews%2F&resubj=Boundary+news+Headlines [<https://perma.cc/Z9FR-ATVU>].

¹⁵⁹ UNCLOS, *supra* note 35, art. 287.

¹⁶⁰ *Jurisdiction, INT’L TRIB. L. SEA*, <https://www.itlos.org/jurisdiction/> [<https://perma.cc/SQ4L-KFUY>] (last visited Oct. 27, 2019).

a dispute not covered by UNCLOS.¹⁶¹ From a strict reading of the jurisdictional statement above, and as stated in Article 288, the Tribunal “shall have jurisdiction over any disputes concerning the interpretation or application of this Convention” seems fairly straightforward.¹⁶² The opposite reading of that Article suggests that if the matter is a *land* boundary dispute, it would not be covered by UNCLOS. Thus, on its face, ITLOS would not have jurisdiction to hear “mixed jurisdiction” cases such as the maritime and land border dispute between Slovenia and Croatia.

However, the proposition that ITLOS cannot exercise mixed jurisdiction over cases is not unanimously accepted.¹⁶³ In *Supplemental Jurisdiction Under UNCLOS*, Peter Tzeng argues that ITLOS should be able to exercise mixed jurisdiction under a supplemental jurisdiction theory, the term itself adopted from United States federal court jurisdiction principles.¹⁶⁴ Mr. Tzeng points out four sources within UNCLOS that allow for ITLOS supplemental jurisdiction.¹⁶⁵ He concludes by suggesting that a way to limit non-UNCLOS issues from flooding ITLOS would be to ensure the non-UNCLOS issue is necessary to the resolution of the UNCLOS issue and can be cast as ancillary to the UNCLOS matter.¹⁶⁶ Such a pragmatic paradigm appears to precisely match the Piran Bay situation. That is, the less contentious and less divided land border issue needs to be resolved in order to fully resolve the maritime border delimitation. However, this is an argument Slovenia chose not to make, opting for the safer bet of the PCA where jurisdictional impediments were less likely to materialize.¹⁶⁷

While the safe bet –jurisdiction-wise– for Slovenia and Croatia ruled out the ICJ and ITLOS, the preceding analysis indicates the two tribunals may want to contemplate jurisdictional and procedural changes to allow them to hear a wider range of disputes and make them an attractive and formidable venue. What seemed at first like tailor-made venues for resolving a state versus state conflict such as the Piran Bay impasse, the ICJ and ITLOS fell uselessly short. Slovenia and Croatia did not cast too narrow of a net in their choice of law and venue. Rather, the part of the jurisdictional “sea” in which they were allowed to cast their net was needlessly small.

¹⁶¹ See Peter Tzeng, *Supplemental Jurisdiction Under UNCLOS*, 38 HOUS. J. INT’L L. 499, 501 (2016) (the “so-called ‘mixed-dispute’ question” involves whether UNCLOS tribunals possess jurisdiction “over a territorial sovereignty dispute in the context of a maritime delimitation dispute”).

¹⁶² UNCLOS, *supra* note 35, art. 288.

¹⁶³ See Tzeng, *supra* note 161, at 501-02, n.14.

¹⁶⁴ *Id.* at 506-13.

¹⁶⁵ *Id.* at 506-07.

¹⁶⁶ *Id.* at 573.

¹⁶⁷ See Email from Vasilka Sancin, *supra* note 158.

VI. FINDINGS AND RECOMMENDATIONS: ALL ROADS POINT TO THE EU

A. *International Law Institutions: 'Effectivités' but not Effective*

An initial observation is that the law of the sea, in general, and UNCLOS, in particular, have established ample structure and process for managing the world's waterways. Yet the very institutions designed to adjudicate maritime disputes have either been ineffective or of little use in the Piran Bay dispute. From the ICJ's inability to entertain a request based on equitable principles to the ITLOS's inability to adjudicate a mixed claim, Slovenia and Croatia's options were limited. The PCA was, at the time, their best and only option.

Once the nations settled on the PCA as the most appropriate venue, the predominant land adjudication theories were not dispositive. Although agreements between Slovenia and Croatia were struck with the backing of pre-existing treaties, a mutually agreeable solution proved elusive.

The tried and true *uti possidetis juris* concept could not adequately appease the fluid nature of the states' pre-independence administrative borders and is particularly useless where no maritime border had ever been drawn. In the absence of clarity in borders by law, the PCA's reliance on *uti possidetis effectivites* indicates a trend of invoking that concept more often in future murky border disputes. Finally, the effective control argument favored Slovenia, but ceding the entire bay to Slovenia when there are Croatian shores involved would be without precedent and untenable. Nevertheless, Slovenia's effective control argument was probably most persuasive in the PCA's ultimate decision to award most of Piran Bay to Slovenia under *uti possidetis effectivites*.

Thus, while the PCA found the *effectivites* variety of the *uti possidetis* concept to be very effective in reaching its decision, that is where effectiveness ended in terms of the ability of international legal institutions to resolve this dispute. With no current resolution between Slovenia and Croatia regarding the bay, it is quite fortuitous that both countries are living side-by-side in relative harmony and are not predisposed to armed violence against each other. This sanctimonious yet harmonious relationship is likely due to the fact that both states are members of the EU and realize that lack of cooperation before the body, much less resorting to violence between themselves, would not serve them well in achieving their goals within the EU community.¹⁶⁸ However, if the international law processes do not improve their effectiveness in resolving border disagreements, the international community can only hope that all future border disputes are as peaceful as the parties of the Piran Bay dispute.

To that end, this case now resides in the EU. Slovenia has filed suit in the European Court of Justice of the European Union (CJEU), not to enforce the PCA agreement, because the CJEU has no enforcement authority of that

¹⁶⁸ See Blake & Topalovič, *supra* note 56 (referring to 'Balkan Syndrome' label that both Slovenia and Croatia have impetus to avoid, as the greater international and European communities often presume former Yugoslavia republics come with instability and historical baggage given recent emergence from violent ethnic conflict).

nature.¹⁶⁹ Rather, Slovenia claims that by refusing to abide by the PCA agreement—a binding agreement on parties—Croatia is preventing Slovenia from exercising its sovereign rights in terms of its rights of access to the Piran Bay and greater Adriatic Sea.¹⁷⁰ Slovenia also points out that such refusal is contrary to good neighborly relations between EU members and, if nothing else, not in the spirit of the rule of law.¹⁷¹ In January 2020, the CJEU ultimately declared it had no jurisdiction to interpret or enforce the PCA award and for the countries to continue to try to work this out between themselves.¹⁷² This oddly has both countries claiming victory in that Croatia believe Slovenia must come to the table while Slovenia interprets the decision as the PCA award stands and Croatia must comply.¹⁷³ A decision by the tribunal is due in November 2019. However, an important detail at this juncture of the dispute is that the recent oral arguments at the CJEU were to decide whether the judicial body has jurisdiction to hear the case. Even if the November ruling favors jurisdiction, argument on the merits of the case will not begin until 2020.

Regardless of whether the CJEU decision will eventually bring much needed closure to this 28-year saga, it is worth asking whether the EU should have an arbitral body equipped to handle such interstate border disputes that the parties could have engaged earlier in the process. For reasons discussed below, such a regional institution would arguably be a more effective option than the PCA. For simplicity's sake, would it not make sense for EU member countries to have a local organization tackle their dispute in the first instance, rather than have the first option be going to a worldwide international tribunal in the Hague? Europe's regional arbitration tribunal—The European Court of Arbitration—does not fall under the EU and is not designed to handle the state vs. state issues such as the Piran Bay dispute.¹⁷⁴

¹⁶⁹ See STA, *Slovenia, Croatia Attend ECJ for Border Arbitration Hearing*, TOTAL SLOVENIA NEWS, (July 13, 2019, 11:39 AM) [hereinafter *Slovenia, Croatia Attend Arbitration Hearing*], <https://www.total-slovenia-news.com/politics/4090-slovenia-croatia-attend-ecj-for-border-arbitration-hearing> [<https://perma.cc/QB75-C2CW>] (noting that the EUCJ is currently deliberating whether it has jurisdiction accept the suit); see also Email from Vasilka Sancin, *supra* note 158.

¹⁷⁰ See *Slovenia, Croatia Attend Hearing*, *supra* note 169 (“[Slovenia’s agent] Menard also reiterated that by not recognizing [sic] the arbitration award, Croatia was violating EU rules and policies.”).

¹⁷¹ See *id.* (highlighting that Slovenia argues that Croatia is violating the rule of law as established under relevant treaty law).

¹⁷² See Case C-457/18, *Slovn. v. Croat.*, 2020 EUR-Lex CELEX LEXIS 65 (Jan. 31, 2020).

¹⁷³ See *id.*

¹⁷⁴ *Arbitration Rules of the European Court of Arbitration*, Preamble ¶¶ 1-4 (2015), <https://cour-europe-arbitrage.org/arbitration-rules/> [<https://perma.cc/LJE9-BAHH>].

B. *Regional Leverage Bolstered by Legitimacy*

Having a regional organization resolve the Piran Bay impasse would appear more legitimate in the eyes of the parties. Not that the ICJ or ITLOS are *per se* illegitimate, but having a dispute mediator that is geographically and politically closer to the issue, that can better understand the regional concerns that are driving the crisis at hand, confers upon that institution more credibility in the eyes of the parties. Slovenia, Croatia, and similarly situated countries should have more confidence in an institution that has been dealing with the European issues *du jour* of the still-developing and growing European Community, rather than an institution that might have been wrestling with sub-Saharan Africa issues one day only to shift gears and try to get a handle on northern Adriatic geopolitics the next. Legitimacy would also be assisted if the parties and members of the adjudicating legal or arbitral tribunal took care to avoid *ex parte* communications, as happened in the PCA case.

In terms of institutional influence, a decision from an EU body would arguably have more leverage against both parties, especially Croatia. Both countries are beholden to the EU because both countries desire the economic and physical security afforded by membership in the greater EU community. But Croatia probably has the most to lose in not fostering good relations with the EU. For although both countries are EU members, Croatia is the most recent entrant and has yet to adopt the Euro currency or achieve Schengen status. Thus, it still has inroads to make before enjoying the full panoply of EU benefits. It would therefore seem logical that Croatia would be less willing to ignore the decision of the regional EU body than it did with the Hague arbitral panel that is only sporadically used anyway. Put simply, the EU would have more leverage on both countries than the PCA or other international tribunal.

C. *Adherence to the Rule of Law*

Finally, the commitment to abide by the legal rulings of the organization that a country is a member of or seeks resolution from is of paramount importance. Consenting to join an organization such as the European Union or agreeing to submit a legal matter to a court or arbitral panel confers upon the parties the benefits those organizations offer. However, with those benefits comes the obligation of the parties to adhere to the rules and pronouncements of those institutions. The simple precept of the rule of law demands as much from the participants. At some point during the Piran Bay dispute, both countries will have to walk away from the table, not necessarily satisfied with the decision rendered, but prepared to abide by said decision. As Slovenia and Croatia enjoy the stability EU membership provides, both parties must acknowledge and understand that such rule of law only materializes due to the consent, adherence, and accountability of member nations.

D. *A European Union Solution*

Throughout all this, the EU has been surprisingly intransigent for a body charged with governing a complex array of states—many who, like Slovenia and Croatia, have inseparable historical and geopolitical baggage that can be expected of countries coming from regions that are rich in complex histories.¹⁷⁵ It is perplexing that the institution with legal authority in this situation has decided to exert no influence in a 28-year long struggle between two member countries. Would one not expect a governing institution to at least take a stand in light of a valid arbitration award? If not, one might at least expect that parent governmental organization take a more active role in helping their member countries resolve their disputes.

In the wake of the Piran Bay dispute, the EU has decided to make bilateral disputes such as Piran Bay a part of EU accession negotiations.¹⁷⁶ However, it has been argued that such a policy would logjam the EU accession process and that the EU would be better served requiring its applicants to resolve such disputes before EU accession is even contemplated.¹⁷⁷ This would not only streamline the accession process, but would also prohibit EU members from using their insider status to influence the process of a dispute between an applicant country and themselves.¹⁷⁸ In essence, the recommended solution is for the EU to avoid miring itself in bilateral disputes and, in doing so, facilitate applicant countries' entry.

From an international legal system functionality perspective, I conclude otherwise. While it may seem optimal to have border disputes resolved before EU accession, that will not solve the instances where a dispute arises before both countries join the EU. It would also foreclose valid and otherwise qualified EU applicants simply because of a border issue or other nominal disagreement. The solution should not be a policy of avoidance. Rather, the European Union, the parent organization of this mosaic of countries, should be equipped with the power to adjudicate or mediate such disputes both during and after EU accession, otherwise it will become a club of only countries with squeaky clean pasts. Worse yet, the organization for which the countries are seeking to join will start appearing like it is ill-equipped to handle the trials and tribulations of them as member countries, once they join.

Further, the legal institutions and processes must also be aligned to help resolve such border disputes. As described throughout this article, the Piran Bay

¹⁷⁵ See Vladislavljec, *supra* note 133.

¹⁷⁶ See Bickl, *supra* note 22, at 9 (noticing recent pattern of accession negotiations involving bilateral issues but noting that, at institutional level, EU maintains that these should not be detrimental to accession process).

¹⁷⁷ See *id.* at 32 (“It takes little imagination to acknowledge that any of those bilateral issues must be solved *ahead* of EU accession to avoid Member States from using their ‘inside-the-club’ status to enforce their position vis-à-vis Candidate Countries through outright blackmailing.” (emphasis in original)).

¹⁷⁸ *Id.*

dispute is loaded with geopolitical overtones, so much so that this article gives these issues minimal attention. The references cited in this article will provide the interested reader with a much more in-depth analysis of the historical, cultural, and geographical underpinnings at play. However, given the overview of the situation herein provided, the lowest common denominator for the crisis is not the historical skeletons in the closet these countries bring. Rather, the non-negotiable element in this equation is whether an organization, such as the European Union, is equipped to help two non-warring members of its organization reach consensus. The EU's ability or inability to do this, whether through its existing structure or a new arbitral panel to resolve internal state vs. state matters will speak a lot about the organizations ability to foster an international community climate based on the rule of law.

The Piran Bay dispute is obviously a very confined dispute, located in a very small corner of the world. Indeed, many have heard of or visited the idyllic Croatian coast, but few have visited the just as attractive but less popular Istrian peninsula. Even fewer have heard about the law of the sea quagmire between Slovenia and Croatia, playing out in this idyllic setting for the past 28 years. The extremely local nature of the dispute contributes to my recommendation that the legal solution for the dispute should also be local. Thus, while Slovenians, Croatians, and other Europeans harmoniously vacation under the Istrian sun, it is high time for the legal institutions of the EU help foster the same harmony between the governments of the two nations.