

MARITIME FRONTIERS OF THE REPUBLIC OF CROATIA

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Municipal legislation, bilateral treaties on delimitation and participation in multilateral conventions on the law of the sea, by the former Yugoslav Federation and other coastal States in the Adriatic at the "critical date". Developments in Croatia and other coastal States after 1991.

The basic legal principle: it is the land which confers upon the coastal State a right to waters off its coast. The principle of uti possidetis in its various aspects as a basis to the settlement of territorial disputes on land and maritime areas.

The problems and claims raised in maritime delimitation of Croatia with Slovenia, Italy, Bosnia-Herzegovina and the Federal Republic of Yugoslavia (Serbia and Montenegro).

Key words: frontiers, delimitation, State succession, uti possidetis, historic bays, territorial sea, continental shelf, exclusive economic zone, arbitration, Central American Court, International Court of Justice.

THE LEGAL SITUATION AS OF THE DATE OF STATE SUCCESSION

As a result of the demise of the three Communist Federations in Central and Eastern Europe a number of maritime independent States have appeared or reappeared with a longer or shorter coastline. They are: the Russian Federation, Estonia, Latvia, Lithuania, Moldova, Ukraine, Georgia, Slovenia, Croatia, Bosnia-Herzegovina and the Federal Republic of Yugoslavia ("FRY"). Among them the longest coastline, after the Russian Federation, have Croatia and Ukraine.

The maritime delimitations between States with adjacent or opposite coasts pose some specific problems as compared with the determination of

land frontiers.¹ The purpose of this article is to describe the problems of this kind in the relations between Croatia and its neighbouring coastal States.

In this respect important is the situation as it was at the "critical date" which is the date of the succession of States.² According to the Opinion No.11 of the Arbitration Commission of the International Conference on the Former Yugoslavia of 16 July 1993, that date for Croatia and Slovenia is 8 October 1991, and for the FRY 27 April 1992.³

The former Yugoslav Federation ("SFRY") had at that critical date its internal waters between its coast and the fringe of its islands, encompassed by straight baselines. These straight baselines were traced by its Law on the Coastal Sea, Contiguous Zone and Continental Shelf of 1965.⁴ Their advantage along the Croatian coast - which were necessarily drawn by a unilateral act of the former State - is that since 1965 Italy has never protested against them. Slovenia and the FRY cannot challenge them now

1 See on maritime boundaries and delimitations in general - Davorin RUDOLF: *Međunarodno pravo mora /International Law of the Sea/*, Zagreb 1985, pp.61-75, 107-109, 191-194, 213-216, 224-225, 239-252, 270-291; René-Jean DUPUY - Daniel VIGNES (éd.): *Traité du nouveau droit de la mer*, Paris 1985, (Lucius Cafilisch), pp.375-440; V.Dj.DEGAN: "O granicama na prostorima mora, morskog dna i podzemlja" /On frontiers at sea, seabed and its subsoil/, *Uporedno pomorsko pravo - Comparative Maritime Law* 1991, No.3-4, pp.175-214. See about practice of international courts and tribunals in maritime delimitations - V.D.DEGAN: "Equitable Principles in Maritime Delimitations", *Le droit international à l'heure de sa codification*, Etudes en l'honneur de Roberto Ago, vol.II, Milano (Giuffrè) 1987, pp.107-137; Prosper WEIL: *Perspectives du droit de la délimitation maritime*, Paris 1988, *passim*; V.D.DEGAN: "Kriteriji razgraničenja morskih prostora između država" /Criteria of delimitation of maritime spaces between States/, *Uporedno pomorsko pravo i pomorska kupoprodaja* 1983, No.100, pp.43-86; "Razgraničenja morskih prostora u međunarodnoj sudskoj i arbitražnoj praksi" /Maritime delimitations in the practice of international courts and tribunals/, *Uporedno pomorsko pravo - Comparative Maritime Law* 1994, No.1-4, pp.33-76.

2 Cf., the 1986 Judgment by the Chamber of the Hague Court on the *Frontier Dispute*, (Burkina Faso/Mali), *I.C.J. Reports* 1986, p.568, para. 30; p.570, para.33; p.597, para.81. The 1992 Judgment by the Chamber of the Court on *Land, Island and Maritime Frontiers*, (El Salvador/Honduras; Nicaragua intervening), discussed even a sequence of critical dates. The first is that of *uti possidetis*, and the subsequent ones arising from ensuing adjudication or a boundary treaty, even if established on the same principle. Cf., *I.C.J. Reports* 1992, p.401, para.67.

3 Cf., *International Legal Materials* 1993, No.6, p. 1589. See on the dilemma about dates of State succession for various successor States of the former SFRY - V.D.DEGAN: "State Succession - Especially in Respect of State Property and Debts", *The Finnish Yearbook of International Law* 1993, pp.180-183; "Kontinuitet i sukcesija država u pogledu državne i društvene imovine" /Continuity and succession of States in respect of State and social property/, *Financijska praksa* 1993, No.5 (Zagreb), pp.438-439.

4 Zakon o obalnom moru, vanjskom morskome pojasu i epikontinentalnom pojasu Jugoslavije "Službeni list SFRJ", No.22/1965. These straight baselines were slightly corrected on the Montenegrin coast by its latter Law of 23 July 1987 ("Službeni list SFRJ", No.49/1987. A new straight baseline was drawn between the cap Mendra near the port of Bar (Antivari) and the cap Platomuni near Budva. This correction has no impact on future delimitations in regard to the opposite Italian coast.

because they were themselves until respectively 1991 and 1992 parts of the SFRY.

From these straight baselines the SFRY extended in 1979 its territorial sea up to 12 nautical miles.⁵ The same breadth of territorial sea has Italy pursuant to its Law of 14 August 1974.

Even more important is the Agreement between the Government of the SFRY and the Government of the Republic Italy on delimitation of the Continental Shelf, signed on 8 January 1968, and entered into force on 21 January 1970.⁶

Italy delimited its territorial sea with the SFRY in the Gulf of Trieste by the Treaty of Osimo, signed on 10 November 1975 and entered into force on 2 April 1977.⁷ Thus Italy had all its maritime frontiers with Yugoslavia fixed. On the contrary, between the former Yugoslavia and Albania no agreement had been concluded on delimitation of either the territorial sea or the continental shelf.

Since 28 January 1966 the former SFRY was a party to all four 1958 Geneva Conventions on the Law of the Sea.⁸ On Article 6 of the Convention on the Continental Shelf it expressed a reservation according to which: in determining its continental shelf, Yugoslavia recognizes no "special circumstances" which should influence that delimitation.

The Assembly of the SFRY ratified the 1982 UN Law of the Sea Convention on 27 November 1985. The instruments of ratification were deposited with the UN Secretary-General on 5 May 1986. This Convention entered into force for all its contracting States only on 16 November 1994. At that date the SFRY no longer existed.

Since 17 December 1964 Italy is a party to the 1958 Geneva Convention on the High Seas and to that on the Territorial Sea and the Contiguous Zone, but not to that on the Continental Shelf. Albania is since 7 December 1964 a party only to the conventions on the High Seas and on the Continental Shelf.

5 Cf., Zakon o izmjenama Zakona o obalnom moru, vanjskom morskom pojasu i epikontinentalnom pojasu Jugoslavije (čl.5), "Službeni list SFRJ", No.13/1979.

6 Cf., Sporazum između Vlade Socijalističke Federativne Republike Jugoslavije i Vlade Republike Italije o razgraničenju epikontinentalnog pojasa između dvije zemlje, "Službeni list SFRJ, Međunarodni ugovori i drugi sporazumi", No.28/1970.

7 "Službeni list SFRJ, Međunarodni ugovori", No.1/1977.

8 The matter is of: Convention on the Territorial Sea and the Contiguous Zone; Convention on the High Seas; Convention on Fishing and Conservation of the Living Resources of the High Seas; and Convention on the Continental Shelf; all done at Geneva on 29 April 1958.

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Having gained its independence, Croatia enacted its Maritime code on 27 January 1994.⁹ This Code contains in its Articles 33 to 42 provisions on the Croatian exclusive economic zone. However, according to its Article 1042 the *Sabor* (Parliament) of the Republic of Croatia will subsequently proclaim it by its decision. Therefore, at present no coastal State in the Adriatic possesses its exclusive economic zone. Italy is strongly opposed to such proclamations throughout the Mediterranean. Slovenia and Bosnia-Herzegovina are in an unfavourable geographic position that they cannot possess it, nor the continental shelf.

On 3 August 1992 Croatia notified to the UN Secretary General its succession to the three 1958 Geneva Conventions, with the sole exception of the Convention on Fishing and Conservation of the Living Resources of the High Seas. Previously, on 6 July 1992, Slovenia did the same in regard to the conventions on the Territorial Sea and the Contiguous Zone, and on the High Seas.

Finally, on 14 September 1995 Croatia notified its succession in regard to the 1982 UN Law of the Sea Convention.¹⁰ At present all coastal States of the Adriatic are parties to that Convention, with the sole exception of Albania.¹¹

THE APPLICABLE LEGAL RULES

To such situations involving the drawing of maritime boundaries by new States in the process of State succession a number of legal principles apply. Most of these principles have been ascertained in the practice of international courts and tribunals and so far they have not been a matter of codification through conventions. Some of them apply to any maritime delimitation whatsoever.¹²

The first legal principle of a very broad character is that "the land

9 Pomorski zakonik, "Narodne novine, Službeni list Republike Hrvatske", No.17/1994.

10 Cf., "Narodne novine, Međunarodni ugovori", No.11/1995: It was wrong to claim in that act that Croatia has been a "party" to this Convention as from 8 October 1991. That is because the Convention itself entered into force only on 16 November 1994. Until then all States which had ratified it or acceded to it, or notified their succession to it, had the status of "contracting States". See Article 2, paragraph 1 (f) and (g) of the 1969 Vienna Convention on the Law of Treaties. By the same act Croatia adhered to the Agreement relating to the implementation of Part XI of that Convention.

11 Parties to the Convention are among other States: the FRY and Bosnia-Herzegovina since its entering into force on 16 November 1994; Italy since 13 January 1995; Croatia since 5 April 1995; and Slovenia since 16 June 1995.

12 See on adjacency or contiguity as the legal title in the law of the sea - Gilbert APOLLIS: *L'emprise maritime de l'Etat côtier*, Paris 1981, pp.33-82; and especially in maritime delimitations - Prosper WEIL, *op.cit.*, n.1, pp.55-61.

dominates the sea",¹³ or in other words:

"...it is the land which confers upon the coastal State a right to the waters off its coast..."¹⁴

Therefore, no claim of a State is lawful which seeks a portion of the sea which is not adjacent to the coast under its sovereignty. The maritime areas are but an accessory to the coast and they cannot as such be an object of occupation, cession or sales.¹⁵

The foregoing also means that what is important for maritime delimitation is to exactly know the point where the land frontier between two neighbouring States intersects the coastline. From that point is drawn the maritime boundary of their territorial sea and continental shelf, as well as of their contiguous zone or exclusive economic zone if they proclaimed them.

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As to the settlement of territorial disputes on the land, the practice of international courts and tribunals has attached a great importance to the principle of *uti possidetis*.¹⁶ This means that an internal demarcation of

13 Cf., Judgment of the International Court of Justice of 20 February 1969 on *North Sea Continental Shelf Cases* (Germany v. Denmark and the Netherlands), *I.C.J. Reports 1969*, p.52, par.96. This principle was subsequently confirmed by the following decisions of the Hague Court: the Judgment of 19 December 1978 on the *Aegean Sea Continental Shelf* (Greece v. Turkey), *Reports 1978*, p.37, par.86; the Judgment of 24 February 1982 on *Continental Shelf* (Libya v. Tunisia), *Reports 1982*, p.67, par.73; and the Judgment of the Chamber of the Court of 12 October 1984 on the *Gulf of Maine Area* case (Canada v. the United States), *Reports 1984*, pp.313-314, par.157.

14 Cf., Judgment of the Hague Court of 18 December 1951 in *Fisheries case* (United Kingdom/Norway), *I.C.J. Reports 1951*, p.133. Much before that Judgment, the Permanent Court of Arbitration invoked in its Award of 14 March 1908 in *Grisbadarna case* (Norway/Sweden): "principes fondamentaux du droit des gens, tant ancien que moderne, d'après lesquels le territoire maritime est une dépendance nécessaire d'un territoire terrestre", *Reports of International Arbitral Awards*, United Nations, vol.XI, p.159. That principle was confirmed in the Decision of the *Beagle Channel Arbitration* (Argentina/Chile) of 22 April 1977, *International Legal Materials 1977*, No.3, pp.672-673, par.107; etc.

15 In the spirit of this rule the Hague Court defined in its Judgment of 1969 "as the most important of all rules of law relating to the continental shelf"; that of its non-encroachment on the natural prolongation of the land territory under the sea of the other State (*I.C.J. Reports 1969*, p.22, para.19; p.47, para.85(c)). That legal rule did not prove to be very useful in actual delimitations of the continental shelf.

16 Cf., Hildebrando ACCIOLY: *Tratado de derecho internacional público*, 2.a edição, Vol.II, Rio de Janeiro 1956, pp.128-130; Georg SCHWARZENBERGER: *International Law*, Vol.I, International Law as Applied by International Courts and Tribunals, Third Edition, London 1957, pp.21, 304-305; D.P. O'CONNELL: *International Law*, Vol.One, London 1965, pp.491-492; A.O. CUKWURAH: *The Settlement of Boundary Disputes in International Law*, Manchester 1967, pp.112-116, 190-199; Charles ROUSSEAU: *Droit international public*, Tome III, Les compétences, Paris 1977, pp.238-240; Benedetto CONFORTI: *Diritto internazionale*, Quarta edizione, Napoli 1992, p.112; NGUYEN Quoc Dinh, Patrick DAILLIER, Alain PELLET: *Droit international public*, 5e édition, Paris 1994, pp.461-463, 496 et 502.

boundary lines within the predecessor State valid at the critical date, or a delimitation with territories of a third State in force at the same date, is accepted as a basis for all kinds of settlements of territorial disputes between the respective neighbouring States.

The Chamber of the International Court of Justice has proclaimed the principle of *uti possidetis*, in its Judgment of 22 December 1986 in the *Frontier Dispute* (Burkina Faso/Republic of Mali), to be of general scope:

"...It is a general principle, which is logically connected with the phenomenon of obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power."¹⁷

It should however be stressed that the said principle is not a peremptory norm of general international law (*jus cogens*). The newly independent States which have previously been parts of a colonial empire - or other new States arisen from the dissolution of the predecessor State - can determine their boundaries at their free will. That is however subject to the strict condition of reaching a free and equal agreement on new boundaries.

But whenever an agreement to the contrary is not reached, the principle of *uti possidetis* imposes as obligatory. It therefore suffices that one of neighbouring States declines the claim of the other for the change of former internal or international boundaries for this principle to become immediately applicable.

In these circumstances, the Chamber of the Hague Court has accorded pre-eminence of the legal title from this principle at a fixed date even over effective possession as a basis of sovereignty,¹⁸ and over the principle of self-determination of "peoples" in Africa.¹⁹

There were, however, attempts to prove the inapplicability of the principle of *uti possidetis* on maritime delimitations between newly independent States in Africa. In a dispute on delimitation of maritime frontier with Senegal, Guinea-Bissau pleaded the absence of such cases on the succession of States in practice. The agreements between former colonial powers on

¹⁷ *I.C.J. Reports 1986*, p.565, para.20.

¹⁸ "...The first aspect, emphasized by the Latin genitive *juris*, is found in the pre-eminence accorded to legal title over effective possession as a basis of sovereignty..." *Ibid.*, p.566, para.23.

¹⁹ "...The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples." *Ibid.*, p.567, para.25.

maritime frontiers were extremely rare and, unlike land frontiers, by these agreements were fixed boundaries only in some domains, like fishery rights or exploitation of natural resources.

By its Award of 31 July 1989 the Arbitral Tribunal dismissed these arguments and decided that an Agreement on maritime boundary concluded on 26 April 1960 by an exchange of letters between France and Portugal, was obligatory for Guinea-Bissau.²⁰ That for following reasons:

"...La délimitation du domaine de validité spatiale de l'Etat peut concerner la surface terrestre, les eaux fluviales ou lacustres, la mer, le sous-sol ou l'atmosphère. Dans tous les cas, le but des traités est le même: déterminer d'une manière stable et permanente le domaine de validité spatiale des normes juridiques de l'Etat. D'un point de vue juridique il n'existe aucune raison d'établir des régimes différents selon l'élément matériel où la limite est fixée..."²¹

Such treaties on maritime boundaries to which the *uti possidetis* principle applies, were concluded sometimes by the predecessor State with a third State. In case of the former Yugoslav Federation the matter is of the already cited Agreement with Italy of 1968 on delimitation of the Continental Shelf, as well as the 1975 Treaty of Osimo by which a boundary of territorial sea was drawn in the Gulf of Trieste.

However, quite exceptional, and to our knowledge non-existent, are enactments of a predecessor State, or of a former Colonial Power, by which were drawn maritime boundaries between member States of a former Federation or sub-divisions of the larger colonial possessions. That is because the competence in maritime areas is as a rule reserved for the central State authority. This situation resulted in a regime *sui generis* in the Gulf of Fonseca, of which will be some more word below.

Nevertheless, even if a treaty with a third State or an internal enactment on maritime delimitation exists, it does not give the title of sovereignty by virtue of the principle of *uti possidetis* in all possible circumstances.

As stressed above, the respective States are always free to agree otherwise. On the other hand, the principle according to which it is the land which confers upon the coastal State a right to the waters off its coast, could overrule such a previous delimitation.

Supposedly, the former Yugoslav Federal bodies conferred by an act their federal prerogatives in the Bay of Pirano only on Croatian, or only on Slovene police and other local authorities. In these circumstances, that

²⁰ That Agreement defined the maritime boundary between the Republic of Senegal (at that time an autonomous State within the French *Communauté*) and the Portuguese Province of Guinea.

²¹ Cf., *Revue générale de droit international public* 1990, No.1, p.253.

would not be a sufficient title that the other coastal State in that Bay remains without areas of its territorial sea adjacent to its coast. In such a situation, the respective coastal State could lawfully decline the effects of the principle of *uti possidetis*.

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Having all the above in view, the rules on land and maritime delimitations in the process of State succession are best summarized in Opinion No.3 of the Arbitration Commission of the Conference on Yugoslavia of 11 January 1992.

As for the question put by Serbia: "Are the internally drawn demarcation lines between Croatia and Serbia, and between Serbia and Bosnia and Herzegovina, frontiers in terms of international public law?", the Commission has in its answer in four points resolved all the problems that may arise:

"First - All external frontiers must be respected in line with the principle stated in the United Nations Charter, in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)) and in the Helsinki Final Act, a principle which also underlines Article 11 of the Vienna Convention of 23 August 1978 on the Succession of States in Respect of Treaties."²²

Therefore, this principle also imposes a duty on third neighbouring States, in case of a dissolution of a predecessor State, to respect the frontiers between them and the respective successor States. Hence, this is also a legal obligation of Italy, Austria, Hungary, Rumania, Bulgaria, Greece and Albania to respect the frontiers as these existed at the date of the succession of States with Slovenia, Croatia, the FRY, and with Macedonia.

"Second - The boundaries between Croatia and Serbia, between Bosnia-Herzegovina and Serbia, and possibly between other adjacent independent States may not be altered except by agreement freely arrived at."

The above principle confirms the conclusion that there are no unilateral drawings of borderlines by a new State on whatever ground. Consequently, even the principle *uti possidetis* is not the rule of *jus cogens*.

²² That provision on Boundary regimes, provides: "A succession of States does not as such affect: - (a) a boundary established by a treaty; or (b) obligations and rights established by a treaty and relating to the regime of a boundary." Of similar scope is Article 62 of the 1969 Vienna Convention on the Law of Treaties. According to its paragraph 2 (a), a fundamental change of circumstances "may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if a treaty establishes a boundary..."

"**Third** - Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial status quo and, in particular, from the principle of *uti possidetis*. *Uti possidetis*, though initially applied in settling decolonization issues in America and Africa, is today recognized as a general principle, as stated by the International Court of Justice in its Judgment of 22 December 1986 in the case between Burkina Faso and Mali (*Frontier Dispute*, (1986) ICJ Reports 554 at 566)....

The principle applies all the more readily to the Republics since the second and fourth paragraphs of Article 5 of the Constitution of the SFRY stipulated that the Republics' territories and boundaries could not be altered without their consent."

Although the second paragraph does not seem to be of particular importance in the light of the dualistic approach adopted by the Arbitration Commission on the relationship between international law and the law of the Former Yugoslav Federation, it can be of some use in case that a former Republic should now aspire to change boundaries with another Republic, as they were at the date of State succession.

"**Fourth** - According to a well established principle of international law the alteration of existing frontiers or boundaries by force is not capable of producing any legal effect. This principle is to be found, for instance, in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)) and in the Helsinki Final Act; it was cited by the Hague Conference on 7 September 1991 and is enshrined in the draft Convention of 4 November 1991 drawn up by the Conference on Yugoslavia."²³

The latest statement is but a positive expression of the above rule that the boundaries between two independent States may not be altered except by an agreement freely arrived at. Unilateralism by the successor States cannot be a valid legal basis for settlement of territorial disputes of any kind.

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It follows that the principle of *uti possidetis* respects two kinds of former boundaries. The first are international frontiers between the predecessor State and a third State (or between two former colonial empires

23 Cf., *International Legal Materials* 1992, No.6, p.1500.

in Latin America and Africa). Such a situation is involved in the first above quoted paragraph in Opinion No.3 of the Arbitration Commission when relating to "all external frontiers".

Of equal importance for delimitations are the internal boundaries or "demarcation lines" between entities within the predecessor State, or within a larger colonial possession, which become independent States. To this kind of boundaries relate the second and the third above quoted paragraphs. Since a situation like this is relevant to the delimitation between Croatia and other successor States of the former SFRY, it should be discussed in some more detail.

In this respect the principle of *uti possidetis* is not the same as the acquisitive prescription, which is a mode of acquisition of a *terra nullius*, or even of the creation of a historic title over waters in a bay which should otherwise be a part of the high seas. Such a title appears as a result of "the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States)",²⁴ or in other words, which is generally acquiesced by other States.

The key aspect of the principle of *uti possidetis* is, however, the denial of the possibility of *terra nullius*.²⁵ Therefore, in application of this principle there is no possibility of prescription in occupation of a territory without title. Subject to above conditions, the principle of *uti possidetis* can itself be a basis for a valid title of sovereignty.

In the above cited Judgment of the Chamber of the Hague Court of 1986 on the *Frontier Dispute* (Burkina Faso/Mali), the following was said, especially in regard to "the critical date":

"...International law - and consequently the principle of *uti possidetis* - applies to the new State (as a State) not with retroactive effect, but immediately and from the moment onwards. It applies to the State *as it is*, i.e. to the "photograph" of the territorial situation then existing. The principle of *uti possidetis* freezes the territorial title; it stops the clock, but does not put back the hands... French law - especially legislation enacted by France for its colonies and *territoires d'outre mer* - may play a role not in itself... but only as one factual element among others, or as evidence indicative of what has been called "colonial heritage", i.e. the "photograph of the territory" at the critical date."²⁶

This statement was in a way supplemented by a dictum from the 1992

²⁴ Cf., the Arbitral Award by Max Huber in *Island of Palmas Case* (the Netherlands/U.S.A.) of 4 April 1928, *Reports of International Arbitral Awards*, vol.II, pp.839, 867-868.

²⁵ Cf., *I.C.J. Reports 1992*, p.387, para.42; p.558, para.333; and pp.564-566, para.343-347

²⁶ *I.C.J. Reports 1986*, p.568, para.30.

Judgment by the Chamber of the Court on *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras, Nicaragua intervening):

"...when the principle of the *uti possidetis juris* is involved, the *jus* referred to is not international law but the constitutional or administrative law of the pre-independence sovereign, in this case Spanish colonial law; and it is perfectly possible that that law itself gave no clear and definite answer to the appurtenance of marginal areas... For this reason, it is particularly appropriate to examine the conduct of the new States... during the period immediately after independence. Claims then made, and the reaction - or lack of reaction - to them may throw light on the contemporary appreciation of what the situation in 1821 had been, or should be taken to have been..."²⁷

Generally speaking, the circumstances in which the principle of *uti possidetis* is applied in a settlement of territorial disputes vary very much in practice.

The lapse of time between the "critical date" of the acquisition of independence and the date of establishing the delimitation lines by a judicial body can create tremendous problems of evidence. Hence, on the basis of *uti possidetis* as in 1821 the frontier was traced between Guatemala and Honduras by the Arbitral Award issued on 23 January 1933.²⁸ The same was the legal basis of the Judgment in the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras, which was issued on 11 September 1992, 172 years after the acquisition of independence of States in Central America.²⁹

The Judgment by the Chamber of the Hague Court on the *Frontier Dispute* between Burkina Faso and Mali of 22 December 1986 offers in some aspects even a more peculiar situation. In former times both States were colonies within the French West Africa. Mali gained its independence in 1960 under the name of the Federation of Mali, succeeding the Sudanese Republic which had emerged, in 1959 from an overseas territory called French Sudan.

Upper Volta came into being in 1919 but was then abolished in 1932, and again reconstituted by a law of 4 September 1947, which stated that the boundaries of "the re-established territory of Upper Volta" were to be "those of the former colony of Upper Volta on 5 September 1932". It was

27 *I.C.J. Reports 1992*, p.559, para.333.

28 See - *Reports of International Arbitral Awards*, (RIAA), vol.II, pp.131ff.

29 On the basis of *uti possidetis* as in 1810 the territorial dispute was settled between Bolivia and Peru by an Arbitral Award of 9 July 1909 (RIAA, vol.XI, pp.139ff), as well as that between Columbia and Venezuela by the Award of 24 March 1922 (*ibid.* vol.I, pp.223ff).

this reconstituted Upper Volta which subsequently obtained independence in 1960 and took the name of Burkina Faso in 1984.

That dispute was settled on the basis of *uti possidetis* as of 5 September 1932.

Also should be in this framework mentioned the Judgment of the Hague Court of 3 February 1994 on *Territorial Dispute* between Libya and Chad. The Court established the fact that the boundary between these two States is defined by the Treaty of Friendship and Good Neighbourliness of 10 August 1955 between Libya itself and the French Republic. The party to that Treaty became Chad in succession to France since its independence, which occurred on 11 August 1960. The Court found *inter alia* that:

"...in this case, it is Libya, an original party to the Treaty, rather than a successor State, that contests the resolution of the territorial or boundary question. Hence there is no need for the Court to explore matters which have been discussed at length before it such as the principle of *uti possidetis* and the applicability of the Decision adopted by the Organization of African Unity at Cairo in 1964."³⁰

Notwithstanding the above statement, also observed in this case was *uti possidetis* as existing on 11 August 1960, the date of independence of Chad.

The above problem of the lapse of time seems to be not so acute in case of successor States of the three former Communist Federations in Central and Eastern Europe. Most of these States are eager to settle all problems of their delimitations with the neighbouring successor States as soon as possible and on the basis of *uti possidetis* as existing in 1991 or 1992.

On the other hand, in emancipation of new States in Latin America and Africa, prior to their independence these former colonies enjoyed very little or no autonomy at all, and usually had no local self-governing bodies distinct from colonial administration. Unlike them, the three Communist Federations have recently dissolved into their constitutive parts within their actual frontiers. Besides, before their independence all these entities possessed their own legislative, judicial and executive power. In the former Yugoslavia the Republics and Autonomous Provinces had their own local police forces.

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Having all above in mind, and in particular the former arbitral and judicial decisions in application of the principle of *uti possidetis*, the

30 Cf., *I.C.J. Reports 1994*, p.38, para.75.

following hierarchy of these former acts could be established as relevant at the date of succession of States:

1. Among them the most important are acts issued by the supreme authority of the predecessor State. In case of the dispute between Burkina Faso and Mali, it was said that: "...from the beginning of the century up to the entry into force of the French Constitution of 27 October 1946, the territorial administration of French West Africa was centralized. It was headed by a governor-general, and was divided into colonies: the power to create or abolish these belonged to the executive in Paris...".³¹

In case of the former Yugoslav Federation, of such relevance would be the provisions of the latest 1974 Federal Constitution, and then the acts of competent Federal bodies according to that Constitution, in respect to the delimitation among Republics on one part, and them and Autonomous Provinces on the other.³²

In case that there were several acts of this kind, of decisive importance is the latest one issued by the supreme authority if derogating those preceding it. The acts of the supreme State authority have pre-eminence over the acts of central executive, military or other power.³³

If such an act has described the demarcation line with geographic coordinates and annexed a map as its integral part, there should not be any dispute on borderlines. Acts of this kind are, however, rare in practice and disputes are even then possible on their interpretation, especially if the description of the delimitation line does not fully correspond to the physical situation on the ground.

2. Only in absence of acts of the supreme authority, important for delimitation can be agreements of local authorities within former territorial entities on their delimitation. They are supposed to be of particular importance if concluded between member States of a demised Federation

31 *Ibid.*, p.569, para.31. Although highly centralized, the Spanish Colonial administration in Central America was up to 1821 even more complicated. Beside being "provinces" (*Alcaldias Mayores, Intendencias*), El Salvador and Honduras were parts of the same Captaincy-General or Kingdom of Guatemala. There were the ecclesiastical jurisdictions, which were supposed to be followed by the territorial jurisdiction of the main civil administrative units. In addition to it, after 1821, the five States became united by the Constitution of 1824 into the Federal Republic of Central America, which lasted until 1839.

32 There was an important restriction prescribed by paragraphs 2 and 4 of Article 5 of that Constitution, that the territories and boundaries of the Republics and Autonomous Provinces could not be altered without their consent. Although no decision in this respect had been made in practice, a decision to this end by the Federal Assembly within the above constitutional restriction should prevail over the same direct agreement between respective Republics and/or Autonomous Provinces.

33 In delimitations between States in South and Central America the matter was of former Spanish Royal Decrees as in force in 1810 and 1823 respectively. In modern times they are usually legislative acts of the predecessor State.

which previously enjoyed a high level of territorial autonomy. Such agreements, if ratified or confirmed by the legislative power of both these entities, prevail over those concluded by executive, police or some other local authorities.

3. In absence of explicit agreements on the local level, the actual demarcation line as existing at the date of succession of States should be ascertained on the basis of the exercise of jurisdiction by local authorities from both sides.³⁴

When the matter specifically concerns the delimitations between two former member States of a Federation, it should be reiterated that neither in these situations is unilateralism a valid title for acquisition of a part of territory. Unilateral exercise of territorial jurisdiction is of legal importance only if there is some evidence that the opposite side has approved its limits, or has not effectively opposed it (*tacitus consensus*). The basis thus lies again in a kind of agreement to be reached at a local level. Therefore, a unilateral exercise of the acts of power in absence of this element of express or tacit consent by the opposite party, is legally irrelevant.

A party which invokes an agreement of this kind in favour of its territorial claims carries a heavy burden to prove the consent by the opposite side. The opposite party can deny the existence of such a tacit agreement either by former acts of refusal or of express protests against acts by the other party, or by effective exercise of powers by the local authorities belonging to its territory. Of importance can be acts of local or communal executive, or police, or other bodies. Essential is, however, the fact that these acts of power were exercised by official bodies and not in excess or in abuse of their normal jurisdiction.

When evidences contradict one another, or if both parties exercised the jurisdiction over the same territory - a situation which is not frequent in practice - the disputed territory should be set apart from the others on which an agreement on delimitation has been reached. The parties could then either agree on an equitable apportionment of that disputed territory among them or to defer the dispute to an arbitral or judicial procedure for a final decision.

It must be stressed again that unilateral acts of power are in themselves

³⁴ In the *Frontier Dispute* (Burkina Faso/Mali) of 1986, the Chamber of the Court took into consideration the "colonial *effectivités*", i.e. "the conduct of administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial period". Cf., *I.C.J.Reports 1986*, p.586, para.63. In the *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras) of 1992, in absence of any legislative materials of the Spanish Crown, the Chamber of the Court took into consideration "formal title-deeds to commons" ("*titiles officiels de terrains communaux*") as being colonial *effectivités*. The matter was of the grants of particular lands to individuals or to Indian Communities as "titles" "in a third municipal-law sense". Cf., *I.C.J.Reports 1992*, p.389, para.45.

never a valid title of sovereignty. The valid title lies in the tacit consent, if one party can at least prove the passivity of the opposite side in relation to its own acts of power. In all other circumstances unilateral acts can be an argument for denial of claim of existence of a tacit agreement by the other party. This seems to be the core of the dispute between Croatia and Slovenia.

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What should be discussed in this context is the probative force of various kinds of cartographic materials in territorial disputes. In a number of cases involving land and maritime delimitation the parties produced to the impartial body a variety of maps or their collections, or sketches of maps, issued before the acquisition of their independence either by official bodies of the former administrative power, or by private publishers. The delimitation lines and toponymy in many of these maps are vague or contradictory. The written and oral judicial procedure is sometimes excessively protracted due to the efforts of the parties to prove the delimitation line on the basis of maps.

On the basis of abundant former practice, the Judgment of the Chamber of the Hague Court of 1986 in the *Frontier Dispute* (Burkina Faso/Mali), has in this respect defined a principle of a broader scope:

"...maps can still have no greater legal value than that of corroborative evidence endorsing a conclusion at which a court has arrived by other means unconnected with maps. In consequence, except when the maps are in the category of a physical expression of the will of the State,³⁵ they cannot in themselves alone be treated as evidence of a frontier, since in that event they would form an irrefutable presumption, tantamount in fact to legal title. The only value they possess is as evidence of an auxiliary or confirmatory kind, and this also means that they cannot be given the character of a rebuttable or *juris tantum* presumption such as to effect a reversal of the onus of proof."³⁶

All the above should apply *mutatis mutandis* to limits of cadastre districts, as evidence of auxiliary or confirmatory kind in determination of land frontiers, especially between Croatia and Slovenia. The practical

³⁵ The Chamber has explained that situation at another place of the same Judgment: "...This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts." *I.C.J. Reports 1986*, p.582, para.54.

³⁶ *Ibid*, p.583, para.56.

advantage of these limits lies in their precision, but nothing more than that.

The limits of cadastre districts will most often correspond with limits of effective exercise of power by local authorities in an area. When it is, however, clear that one of parties has unilaterally extended the limits of its cadastre district and that other acts of delimitation or of effective exercise of power do not correspond with these limits, they have the same probative value as maps. They only reverse the onus of proof on the party which denies these limits, but are not in themselves the legal title of sovereignty.

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Finally, in cases involving the maritime delimitations in the process of State succession one cannot avoid the discussion of the legal status of the Gulf of Fonseca on the Pacific side of Central American Isthmus.

Two judicial pronouncements have confirmed that the Gulf of Fonseca is a historic bay. The coasts on it have Nicaragua, Honduras and El Salvador. Only Nicaragua and El Salvador have their coasts at its entrance, the width of which between Punta Ampala (El Salvador) and Punta Cosigüina (Nicaragua) is 19.75 nautical miles.

The Chamber of the Hague Court in the *Land, Island and Maritime Frontier Dispute* of 1992 has confirmed the main findings of the Judgment of the Central American Court of Justice of 9 March 1917,³⁷ and translated them into terms of the modern law of the sea.

The Gulf was discovered in 1522 and the Spanish Crown thereafter exercised continuous and peaceful sovereignty over it until the three present riparian States gained their independence in 1821. However, until 1839 the Gulf was under the sway of the Federal Republic of Central America, the member States of which were also Guatemala and Costa Rica.

There is no evidence suggesting that prior to, or in 1821, as far their waters were concerned, anything existed analogous to the boundaries of provincial sway between Nicaragua, Honduras and El Salvador. It was not until June 1900 that Nicaragua and Honduras agreed on a partial maritime boundary between them which stopped short of the waters of the main entrance to the bay. That boundary was recognized by both subsequent Judgments. Other parts of its maritime spaces have remained undivided.

On the basis of these facts, in 1917 the Central American Court ruled that the Gulf was "an historic bay possessed of the characteristics of a

³⁷ The original Spanish text of that Judgment was translated into English and published in *American Journal of International Law* 1917 ("AJIL"), pp.674-730.

closed sea".³⁸ By "closed sea" the Court seemed to mean simply that it is not a part of the high seas, and its waters are not international waters.³⁹

In 1917 the Court recognized the maritime belt of 1 marine league (3 nautical miles) from the coast to fall within the exclusive jurisdiction of each coastal State.⁴⁰ And the Court then took note of existence of the 1900 Honduras and Nicaragua agreed boundary line.

On all other waters of the Gulf of Fonseca the three riparian States of El Salvador, Honduras and Nicaragua were "recognized as co-owners".⁴¹ The legal situation of that Gulf is, therefore, that of condominium, although "that might be more aptly to be called co-imperium", as the Chamber of the Hague Court rightly remarked in 1992.⁴² In 1917 the Central American Court called these waters beyond the three mile zone, somewhat confusingly the "territorial waters". They should now be called joint "internal" or "national" waters.⁴³

The 1917 Judgment has stressed that all waters of the Gulf that "belong to the three States that surround them" are subject to "the right of *uso inocente* over these waters" by "the merchant ships of all nations".⁴⁴ This right of innocent passage relates also and *a fortiori* to the waters outside the maritime belt of 3 miles of exclusive jurisdiction of these three States.

The Chamber of the Hague Court commented in 1992:

"Thus the *ratio decidendi* of the 1917 Judgment appears to be this: there was, at the time of independence, no delimitation between the three countries; and while the absence of delimitation does not always result in community, the undelimited waters of the Gulf remained undivided in a state of community, which entails a condominium or co-ownership of these waters...".⁴⁵

There has been no attempt to divide and delimit these waters according to the principle of *uti possidetis juris* ever since 1821. And as the Chamber concluded in 1992: "...A joint succession of the three States to the maritime areas seems in these circumstance to be the logical outcome of the principle

38 *AJIL*, p.693.

39 *Cf.*, *I.C.J. Reports 1992*, p.591, para.390.

40 *AJIL*, p.694. In addition it recognized the further zone of 9 nautical miles as a zone of rights of inspection and the exercise of police power for fiscal purposes and for national security, *ibid.*

41 *AJIL*, p.716.

42 *Cf.*, *I.C.J. Reports 1992*, p.597, para.399.

43 *Ibid.*, p.592, para.392.

44 *AJIL*, p.715.

45 *I.C.J. Reports 1992*, p.599, para.401.

of *uti possidetis juris* itself."⁴⁶

In 1992 the Chamber of the Hague Court had as its task to determine the legal situation of the maritime areas outside the Gulf of Fonseca, and it had to apply the rules of the modern law of the sea. It confirmed the findings of the 1917 Judgment that the legal situation of the landward side of the closing line at the main entrance of the Gulf is one of joint sovereignty. The 3 mile belt belonging to each of the riparian States is, however, not their "territorial sea" in the modern sense. "That a State cannot have two territorial seas off the same littoral is manifest".⁴⁷

All three coastal States are, however, entitled to their territorial sea, continental shelf and exclusive economic zone outside the Gulf. Outside the straight baseline between Punta Ampala and Punta Cosigüina, El Salvador and Nicaragua have each respectively 3 mile zones of their own territorial sea, continental shelf and exclusive economic zone.

In respect of the rest of that line (13,75 miles):

"...the entitlement to territorial sea, continental shelf and exclusive economic zone seaward of the central portion of the closing line appertains to the three States of the Gulf, El Salvador, Honduras and Nicaragua; and... any delimitation of the relevant maritime areas is to be effected by agreement on the basis of international law".⁴⁸

The Chamber previously found that the parties have not conferred upon it jurisdiction to effect any delimitation of maritime spaces within or outside the Gulf.⁴⁹

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That would be in short the previous jurisprudence which should be taken into account by any impartial international jurisdiction delimiting maritime boundaries of new States in the process of State succession.

THE MARITIME BOUNDARY WITH SLOVENIA

It should be stressed that the legal situation between Croatia and Slovenia is quite different from that of Serbia and the FRY with other successor States until quite recently, and especially with Croatia and Bosnia-Herzegovina. Both Croatia and Slovenia fully recognize to each other and respect the fundamental rights to existence, to equality and to

46 *Ibid.*, p.602, para.405.

47 *Ibid.*, p.607, para.416.

48 *Ibid.*, p.617, para.432 (3).

49 *Ibid.*, p.617, para.432 (2).

sovereignty. They have maintained full diplomatic relations ever since their independence.

Both of them unilaterally assumed some legal commitments as the basis of prompt settlement of all boundary issues. Both proclaimed their independence and sovereignty at the same date of 25 June 1991 within existing frontiers and borderlines with foreign States and with other Yugoslav Republics. Both of them subsequently suspended their declarations of independence for three months. The date of the succession of States in respect of both of them is the same: 8 October 1991.

Subsequently Croatia, as well as Slovenia, assumed some additional legal obligations to the same end. As being a condition for their recognition by the member States of the European Community they undertook to "respect (...) the inviolability of all frontiers which can only be changed by peaceful means and by common agreement". And finally, on becoming participating States of the Conference on Security and Co-operation in Europe they assumed *inter alia* the obligations from the Declaration on Principles in the 1975 Helsinki Final Act, especially those concerning inviolability of frontiers and territorial integrity of other participating States.⁵⁰

These commitments are tantamount to renunciation of any territorial claims and to adoption of the principle of *uti possidetis* as existing on 8 October 1991, as the universal basis for settlement of all their territorial problems.

For this reason, unless proved to the contrary, it would be wrong to presume the existence of a dispute on land frontiers between Croatia and Slovenia. There could only be the matter of a minor disagreement over the course of the boundary between the two former Socialist Republics, which on 8 October 1991 became a frontier protected by international law. At issue is still the point of intersection of that international frontier at the coast of the Bay of Pirano, but no party denies the other party's sovereignty over a fraction of that coast.

Because there were no enactments on maritime delimitations between the coastal Socialist Republics within the former Yugoslav Federation, the principle of *uti possidetis* is of no use in that respect. The new maritime frontier is to be established at sea. However, as already emphasized, both Slovenia and Croatia are parties to the 1958 Geneva Convention on the Territorial Sea and the Continuous Zone (hereafter: "the 1958 Geneva Convention"), as well as of the 1982 UN Law of the Sea Convention (hereafter: "the 1982 Convention").

⁵⁰ Cf., more precise data - V.Đ.DEGAN: "Neka pravna pitanja utvrđivanja granica sa Slovenijom" /Some legal issues of the boundary delimitation with Slovenia/, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 1995, pp.1-2.

In addition, it could be asserted that all impersonal norms provided in one of 1958 Geneva Conventions, which were subsequently enshrined in the 1982 Convention, have transformed into customary rules of general international law.⁵¹ As such they are of universal application and are binding on third States as well.

In this light the following claim raised by Slovenia during the bilateral negotiations with Croatia seems to be quite inappropriate:

"...The Republic of Slovenia supports the preservation of integrity of the Bay of Pirano under its sovereignty and jurisdiction, as well as its pass to the high seas according to admissible criteria of international law and respecting the specific situation of the Republic of Slovenia."⁵²

In this wording two different claims were in fact formulated, which must be discussed separately.

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The first claim relates to all maritime areas of the Bay of Pirano. It is in contradiction with the existing law and the provisions of the 1958 Geneva Convention and of the 1982 Convention, on three grounds:

1. In conformity with the above general principle that it is land that confers upon the coastal State a right to the waters off its coast, a rule concerning all bays has been universally recognized from the times immemorial. According to that rule only waters of a bay, the coast of which (including its mouth) belongs to a single State, may be considered as internal waters of that State. This rule is confirmed by paragraph 1 common to Article 7 of the 1958 Geneva Convention and to Article 10 of the 1982 Convention, concerning bays.⁵³

2. The above means *a contrario* that wherever two or more States

51 In this respect the Conclusion 12 of the Resolution on "Problems arising from a succession of codification conventions on a particular subject", adopted by the Institute of International Law at its Lisbon Session on 1st September 1995, confirms as follows: "The repetition in two or more codification conventions of the substance of the same norm may be an important element in establishing the existence of that norm as a customary rule of general international law."

52 Quoted, Vladimir IBLER: "Državna granica na moru između Republike Hrvatske i Republike Slovenije" /Boundary at sea between Croatia and Slovenia/, *Zbornik Pravnog fakulteta u Zagrebu* 1994, No.5-6, p.470.

53 It is said in both texts: "This article relates only to bays the coasts of which belong to a single State". Then follow more specific conditions of geographic nature which should all be fulfilled in the Bay of Pirano if all its coasts belong only to Croatia or only to Slovenia. These provisions were expressly invoked, as expressing general customary law in respect of "single State bays", by the Chamber of the Hague Court. Cf., *Land, Island and Maritime Frontier Dispute, I.C.J. Reports 1992*, p.588, para.383.

possess their fractions of coast, each of them is entitled to its own territorial sea in such a bay. There is no doubt as to the rule on delimitation of the territorial sea in these situations. That rule is enshrined in the same wording in Article 12 (1) of the 1958 Geneva Convention and in Article 15 of the 1982 Convention. In the latter provision it reads as follows:

"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."

This provision - which as a treaty obligation is binding on both Slovenia and Croatia - is of the nature of *jus dispositivum*. It provides the median line as obligatory, with three possible exceptions. The first exception should be the agreement of respective parties to the contrary, which in the case of the Bay of Pirano does not exist. The second exception should be a possible historic title, and the third: "other special circumstances".

3. For the reasons stated above, the historic rights if any, cannot entitle one coastal State to possess all maritime areas in a bay in which two or more States have their coasts. Therefore, the historic title is provided in the above rule on delimitation of the territorial sea only as an exception to the delimitation by median line.

Under all other circumstances the historic title can only create "co-ownership" or co-imperium in favour of all coastal States, on the example of the Gulf of Fonseca.⁵⁴ Any third solution should be in obvious violation of the fundamental legal principle that it is only land which confers upon all coastal States a right to waters off their respective coast. Such solution, as claimed by Slovenia, is neither known in previous practice of international courts and tribunals, nor was adopted by any treaty on maritime delimitations between coastal States.

The question is however: is there any aspect in the precedent of the Gulf of Fonseca that could be invoked in favour of the Slovene claim, and can Slovenia really base its claim on a historic title?

The similarities between the Gulf of Fonseca and the Bay of Pirano

⁵⁴ In its previous Judgment of 30 September 1916, the Central American Court had established the same condominium of coastal States of Costa Rica and Nicaragua over the Bay of San Juan del Norte on the Atlantic side and the Bay Salinas on the Pacific side of the Central American isthmus. Cf., *AJIL* 1917, pp.181-229.

lie only in the fact that there is no evidence in both instances suggesting that for their waters prior to the "critical date" there was anything analogous to boundaries between the territorial entities which subsequently became independent States.

In case of the Gulf of Fonseca there was no attempt by its three coastal States to delimit its waters even after 1821 and until 1900, on any basis whatsoever. As a consequence, the historic title of "co-ownership" appeared until 1917 as "the logical outcome of the principle of *uti possidetis juris* itself".

In case of the Bay of Pirano it is Croatia which ever since the beginning of negotiations in 1992 has insisted on its delimitation by agreement. It is therefore quite obvious that the Bay of Pirano could in such short period as between 1991 and 1995 not become a historic bay, as seen on the example of the Gulf of Fonseca.

A more essential difference is, however, that in the historic bay which is the Gulf of Fonseca, all of its three coastal States have a 3 mile belt of their exclusive rights, while the rest of its waters is jointly "co-owned" by all of them. Slovenia invokes its alleged "historic rights" just to exclude Croatia from any waters in the Bay of Pirano off its coast and to appropriate all its maritime areas for itself alone.

Moreover, an historic title of Slovene sovereignty in the Bay of Pirano could not appear so far in any circumstances. It is only since 8 October 1991 that Slovenia has been a sovereign State, and it is only since that date that an international frontier has appeared in that Bay.⁵⁵

Therefore, the length of time for prescriptive acquisition in favour of a historic right of Slovenia could only begin at the date of its succession of States. It could perhaps consolidate during fifty or so years onwards of undisturbed exercise of its sovereignty. That is certainly not the case because Croatia is from the beginning persistent in opposing Slovene exclusive rights over that Bay, which could not be created for other reasons as explained above.

4. Finally, in application of the above legal rule on delimitation of the territorial sea, Slovenia could probably be successful to obtain in a judicial

⁵⁵ The Bay of Pirano belonged previously as a whole: to the Republic of Venice until its end in 1797. Later on it belonged to Austria, France and after 1815 again to Austria. In 1920 it became a part of Italy. According to the 1947 Paris Peace Treaty with Italy it should have been a part of the "Free Territory of Trieste" which never came into existence. It became a part of Yugoslavia on behalf of a Memorandum of Understanding of 1954. Since that time it was shared by the two former Yugoslav Socialist Republics: Croatia and Slovenia. But that was the Federation which through its Federal organs exercised the sovereignty on its "coastal sea", i.e. its internal waters and territorial sea. Cf., Article 281 (10) of the 1974 Federal Constitution.

or arbitral procedure a delimitation line of waters of the Bay of Pirano which would decline from the median line in its favour. An impartial body could take into account as "special circumstances": the entire length of the coastline of Croatia and Slovenia, the fact that on Croatian shore there are no ports, and that its waters in the Bay are not of importance for its fishing industry.

However, even on that account no impartial body could deny Croatia a belt of territorial sea in that Bay beyond the low water line along its coast.

On the basis of the existing law, including the 1958 Geneva Convention and the 1982 Convention, Slovenia has no right to obtain more in the Bay of Pirano.

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The second Slovene claim is of even more intransigent nature. It takes into account the geographic situation of the Bay of Pirano and of all Slovene ports located on its coast in the Gulf of Trieste. All ships navigating to or from these ports must pass through the territorial sea either of Croatia or of Italy. The safety of navigation requires, however, their passage through the Croatian territorial sea near the mouth of that Bay.

Slovenia claims from Croatia a strip of Croatia's own territorial sea reaching the area of the high seas in the Adriatic. The precedent of the Gulf of Fonseca does not give any support to this Slovene claim. The entrance of the Bay of Pirano is not wider than 1.57 nautical miles (2.9 km.). Therefore, even if this entrance remains undelimited, its perpendicular projection opposes at a very short distance the Italian territorial sea.

Slovenia claims, however, a pass to the high seas through the Croatian territorial sea in the south-west direction from the mouth of the Bay of Pirano.

This strip would cut Croatian territorial sea into two parts where it borders with the territorial sea of Italy in the Northern Adriatic. And because Italy, Croatia, Montenegro and Albania are entitled to proclaim their exclusive economic zones and thus to eliminate the regime of the high seas in all the Adriatic, Slovenia could probably later on claim a strip of exclusive economic zone, again at the expense of Croatia.

That Slovene claim is equally in obvious contradiction with the above general principle that it is only land that confers upon a coastal State a right to waters off its coast.

Finally, a question might be posed: whether a judicial decision based on equity could remedy the unfavourable geographic situation of Slovenia?

The Hague Court has in respect of "equitable considerations" in delimitations of continental shelf, stated the following:

"Equity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more that there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline. Equality is to be reckoned within the same plane, and it is not such natural inequalities as these that equity could remedy..."⁵⁶

All these arguments apply *a fortiori* to possible claims of parts of the territorial sea adjacent to the coast of a neighbouring State. If this Slovene claim is supposed to be lawful and equitable, then even Austria, Hungary and other land-locked States would be entitled to their own strips of territorial sea belonging now to Croatia or to Italy, or to both. But in such an event these land-locked States could on the same ground claim a part of the territorial sea actually belonging to Slovenia.

For all the above reasons, this Slovene claim should also be refuted in any impartial procedure.⁵⁷

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There are several similar situations of ports where all ships must pass through the territorial sea belonging to third States. That is the case of the Belgian port of Antwerp since 1863. All waters en route to that port, located at the mouth of the river of Scheldt, belong to the Netherlands. Such is also the case of the Israeli port of Eilat and Jordanian port of Aquaba which are located at the end of the Gulf of Aquaba. The coasts of the Gulf belong, however, to Egypt and Saudi Arabia. And finally, big American ports situated at the Great Lakes - Chicago, Detroit and others - are connected with the high seas by the Canadian St. Lawrence River and St. Lawrence Seaway.

Never to our knowledge did Belgium, Israel, Jordan or the United States claim a fraction of the territorial sea from the Netherlands, Egypt, Saudi Arabia or Canada, respectively. The access to these ports is regulated

⁵⁶ Cf., *North Sea Continental Shelf Cases* (Germany/Denmark and the Netherlands), *I.C.J. Reports 1969*, pp.50-51, para.91.

⁵⁷ Because of its persistence, one should really doubt whether behind it Slovenia claims a part of the Croatian territory in the Northern Istria. As already said, Slovenia like Croatia renounced any territorial claims. But even if it did not do so, due to the Croatian opposition to territorial changes, the principle of *uti possidetis* applies automatically.

by the regime of innocent passage.⁵⁸

In exchange to some similar advantages, Croatia could perhaps agree on some concessions to Slovenia. It could agree for instance on a special regime of passage through its fraction of the territorial sea near the mouth of the Bay of Pirano which can bear more likeness to the regime of the transit passage than to that of the innocent passage. It could in addition design a sea lane in that area. But that is all that Slovenia can expect.⁵⁹

It seems finally that Slovene legal advisers did not convince their political leadership of the unlawfulness of their claims and expectations with respect to maritime delimitation with Croatia. Something similar happened in Serbia in November 1991. Then it was Serbia which proposed three questions for opinions of the Arbitration Commission. When expecting that the Commission will give right to its allegation on "internally drawn demarcation lines between Croatia and Serbia, and between Serbia and Bosnia and Herzegovina" as allegedly being irrelevant in international law, the Serbian leadership proved its ignorance of the principle of *uti possidetis*, and especially of its application in the Judgment of the Hague Court of 1986 on the *Frontier Dispute* between Burkina Faso and Mali.

THE PROBLEMS OF MARITIME DELIMITATIONS WITH ITALY

As stated above, the delimitation line of the continental shelf between these two States has been established along the middle of the Adriatic Sea by the 1968 Agreement between the former SFRY and Italy. And the territorial sea with Croatia in the Northern Adriatic is delimited by the Treaty of Osimo of 1975. Therefore, in this moment there are no open issues of delimitations between these two States, which have the longest coast in the Adriatic.

Italy, however, opposes the proclamation of the exclusive economic zone in all the Mediterranean. It has no legal basis for such opposition and it could not even prevent Egypt and Malta to proclaim it. Almost all coastal States at other enclosed or semi-enclosed seas, like the Black Sea, Baltic, Caribbean, etc, have proclaimed such zones or their exclusive fishing zones

⁵⁸ See Articles 14 to 23 of the 1958 Geneva Convention and Articles 17 to 32 and 34 and 35 of the 1982 Convention.

⁵⁹ Slovenia would certainly not have these problems if in late 1990 it accepted a Croatian offer for a Confederation of at least only these two former Yugoslav Republics. See the text of that Draft Confederal Pact - "Nacrt ugovora o Jugoslavenskoj konfederaciji - Savezu jugoslavenskih republika", *Politička misao* 1991, No.2 (Zagreb), pp.166-175. However, in such an event it could not escape becoming, like Croatia, the victim of a large-scale Serbian aggression and destructions. It was a perfect right of Slovenia to become a fully independent State, and thus *inter alia* to avoid all disasters of the war. But as such it cannot now acquire more rights than the international law provides for all other coastal States in the world which are in the same geographic situation.

up to 200 miles from baselines. Many States non-parties, and even non-signatories, of the 1982 Convention have done it. Therefore, nobody can deny the parties to that Convention to exercise all rights provided in it in their favour.

As already said, the Croatian Maritime Code provides all necessary stipulations on its exclusive economic zone which are in perfect accordance with the 1982 Convention. It is now expected that the Croatian *Sabor* adopts a decision on its formal proclamation.

Upon the Croatian proclamation of the exclusive economic zone the problem of its delimitation will arise, especially with Italy. Unlike the above cited provision on delimitation of territorial sea, Article 74 of the 1982 Convention does not offer any criteria for such delimitation. Its essential paragraph 1 reads as follows:

*"The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."*⁶⁰

Following the above wording, an agreement on delimitation is possible only after all respective States proclaim their exclusive economic zones and after they successfully accomplish negotiations to that end or refer the case to an international court or tribunal for final decision.

Paragraph 4 of Article 74 however provides:

"Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement."

Croatia is right to interpret the Agreement of 1968 on delimitation of continental shelf as "an agreement in force between the States concerned". It is not right to consider that delimitation line as that of the exclusive economic zone, but it should insist on it as the basis for negotiations, or judicial settlement, on the future delimitation of the exclusive economic zone.

Croatia is equally right temporarily to enjoy its sovereign rights and exercise jurisdiction up to the existing limit of the continental shelf, until a new agreement with Italy on delimitation of their exclusive economic zone is reached.

⁶⁰ The Hague Court was right in asserting in its Judgment of 1985 on the *Continental Shelf (Libya/Malta)* as follows: "The Convention sets a goal to be achieved, but is silent as to the method to be followed to achieve it. It restricts itself to setting a standard, and it is left to States themselves or to the courts, to endow this standard with specific content...", *I.C.J. Reports 1985*, pp.30-31, para.28.

In case that Italy, in the meantime, corrects its straight baselines along its Adriatic coast and by that pushes external limits of its territorial sea to the middle of that Sea, Croatia is right to refuse any consequences of such unilateral act for the future delimitation of the exclusive economic zone. On such protest, a unilateral act of Italy of this kind will become inopposable with respect to Croatia's rights. By such act Italy could in any case not trespass the actual limit of the continental shelf. The same relates to Croatia. Those Croatian lawyers who advocate the correction of Croatia's own straight baselines, which exist since 1965 without Italian protests, are unwise.

There are, however, strong reasons for all respective coastal States at the Adriatic to proclaim their exclusive economic zones, thus eliminating the regime of the high seas there.

According to the present general international law of the sea in force, a coastal State has no jurisdiction over foreign tankers and other vessels carrying noxious substances, when navigating in the high seas. It obtains the jurisdiction to take and enforce measures against these ships only after an accident has happened and actual or threatened damage with its harmful consequences has occurred in its territorial sea or its coastline. One accident of that kind is able to destroy all tourist industry at all Adriatic coasts for many years ahead.

Upon proclamation of the exclusive economic zone by Croatia, Italy, the FRY and Albania, according to Article 211 (6) of the 1982 Convention, they could jointly adopt special mandatory measures for the prevention, as well as joint regulations for the protection of pollution, in their respective exclusive economic zones, territorial seas, ports and off-shore terminals. This special regime could apply to all tankers and other ships from entering the Adriatic Sea until their leaving it. The risk of pollution from tankers could not be entirely eliminated by such monitoring, but it would certainly be considerably reduced.

The regime of exclusive economic zone in the Adriatic would be equally favourable for the adoption of joint measures by all coastal States for the purpose of conserving and managing the living natural resources in it. It is a self-evident fact that these resources are now over-exploited and that year by year some precious stocks of fish in the Adriatic Sea are being progressively reduced.

After the proclamation of this zone it would be possible to reach agreements on the allowable catch of the living resources in respective exclusive economic zones of all coastal States, in order to ensure the maintenance and restoration of populations of harvested species at levels, which can produce the maximum sustainable yield on the basis of the best scientific evidence available.

Further on, agreements could be reached on terms, conditions and quotas of the catch of species of fish in exclusive economic zone of each coastal State, subject to payment. But during a transitional period after the proclamation of that zone, the catch could be free of charge for any fisherman from other Adriatic coastal States. In case that this competence has been transferred by Italy to the European Union bodies, Croatia, the FRY and Albania can negotiate with Brussels after Italy's proclamation of this zone.

All these multilateral arrangements are however not possible before the respective coastal States at the Adriatic proclaim their exclusive economic zones and acquire sovereign rights and jurisdiction that the 1982 Convention provides in that zone.

MARITIME BORDER WITH BOSNIA-HERZEGOVINA

Bosnia-Herzegovina has a small strip of coast of some 20 kilometers, mainly including the tourist resort of Neum. That area is absolutely unsuitable for the construction of a maritime port.

During the tragic war in Bosnia-Herzegovina, all foreign initiatives for a prompt cessation of hostilities, and based on a repartition of that States along ethnic lines, were connected with pressures on Croatia to cede parts of its coast either to the self-proclaimed "Serbian Republic" or to a potential Bosnian-Moslem entity. Even in this moment the "Serbian Republic" claims the access to the sea, meaning by that term the acquisition of Croatian coast.⁶¹

Hopefully, these pressures through "peace initiatives" came to an end with the conclusion, within the 1994 Washington Agreements, of two additional agreements between the Republic of Croatia and the Federation of Bosnia-Herzegovina. By the first Agreement Croatia committed itself to lease to the Federation a plot of land within its Port of Ploče which will have the status of a free zone. Ploče is connected by the main railroad with Bosnia-Herzegovina. By the second Agreement the Federation of Bosnia-Herzegovina will grant Croatia unrestricted transit by road through

61 By treaties of Karlowitz (Srijemski Karlovci) of 1699 and of Pasarowitz (Požarevac) of 1718, the Ottoman Empire got two accesses to the sea through its province of Bosnia-Herzegovina. With Neum, it got a southern access at Sutorina in Boka Kotorska, between the town of Igalo and the present frontier with Croatia. After the Second World War, probably in 1947, Montenegro acquired Sutorina from Bosnia-Herzegovina in disrespect of constitutional procedures. It is curious that the "Serbian Republic" does not claim now from the FRY that historic coast of Bosnia-Herzegovina, but is persistent in claiming territory of the former Republic of Dubrovnik which never formed a part of any Serbian State and which has no Serbian population. It is nevertheless clear that by the application of the principle of *uti possidetis* as of 27 April 1992, the FRY, like Croatia, is not obliged to give any territorial concessions even to this Serbian entity within the Republic of Bosnia-Herzegovina.

Neum, between the eastern and western borders of Neum with Croatia.

Otherwise, there are no disputes over the frontier of Bosnia-Herzegovina in its coastal section at the Adriatic Sea.

THE MARITIME DELIMITATIONS WITH THE FEDERAL REPUBLIC OF YUGOSLAVIA

Unlike Slovenia, the FRY has not formally recognized the Republic of Croatia and its frontiers so far, practically recognized by all other States in the world. On the contrary, the former Federal Army occupied the southern coast of Croatia and it kept the city of Dubrovnik besieged for a certain period of time in 1991 and 1992.

There were attempts to set apart that entire region from Croatia and re-create the historic Republic of Dubrovnik which had existed until 1808. At the same time, Montenegro repeated its claim on cape Oštro in the extreme South of Croatia in order to dominate the mouth of Boka Kotorska. The FRY still keeps open the question of borderlines with Croatia in that sector, including the entire region of Konavle, south of Dubrovnik.

Neither Montenegro nor Serbia have rights to Konavle and on the cape Oštro, on any ground. The area is entirely populated by ethnic Croats, without Serbian or other minority groups. In the past it was never a part of a Serbian or Montenegrin State. The Republic of Dubrovnik had bought it from the Bosnian feudal Lord Sandalj Hranić in 1419.⁶²

The undisputable fact is that on 8 October 1991 Konavle, including the cape Oštro, was a part of the former Yugoslav Socialist Republic of Croatia. Therefore, the principle of *uti possidetis* of that date applies.

The point of delimitation between Croatia and Montenegro should be the midpoint in the straight line between the said cape Oštro and the Montenegrin islet of Mamula in the mouth of Boka Kotorska. From that mark in the northern direction, (in the southern part of the gulf), should be drawn a delimitation line of territorial sea. To the south of it, a delimitation line of the territorial sea should be drawn up to the distance of 12 miles, and then a line of delimitation of continental shelf up to its limit with Italy.

After both Croatia and the FRY proclaim their exclusive economic zones, they should reach an agreement on its delimitation. If possible, it would be best that the agreement on delimitation of continental shelf serves all future purposes.

Due to unresolved problems in the State succession, there is a problem

⁶² See historic facts in - Josip LUČIĆ - Stijepo OBAD: *Konavoska prevlaka /Prevlaka in the Konavle/*, Dubrovnik 1994, especially pp.42-150.

of conventions in force between these two States.

The FRY pretends to its full identity with and continuity of the former SFRY. It thus asserts that the old State has not disappeared. As a logical consequence, it claims to be the party of all international agreements of the former Federation. Among them are all four Geneva Conventions of 1958, and the 1982 Convention since its entry into force on 16 November 1994.

No other parties to multilateral conventions nor their depositaries, deny the FRY that status of party to all of them, although very few of third States recognize at the same time its identity and continuity with the former SFRY.

That must be the position of Croatia. Although according to the Opinion No.8 of the Arbitration Commission the SFRY does no longer exist, and according to its Opinion No.10 "the FRY (Serbia and Montenegro) is a new State which cannot be considered the sole successor to the SFRY",⁶³ Croatia is right to interpret the Declaration of the FRY of 27 April 1992 that it as a new State assumed *en bloc* all open multilateral conventions the party of which was at that date the former SFRY.

Therefore, the common conventional basis of Croatia and of the FRY for delimitation of their maritime areas is the following: for the territorial sea, the above cited text common to Article 12 (1) of the 1958 Geneva Convention and to Article 15 of the 1982 Convention; for the exclusive economic zone, the above cited Article 74 of the 1982 Convention; and for continental shelf the same wording in Article 83 of the 1982 Convention and perhaps in some aspects also Article 6 of the 1958 Geneva Convention on the Continental Shelf.

Furthermore, both parties have at their disposal numerous procedures for settlement of disputes provided in Part XV of the 1982 Convention.

The process of negotiations or of an arbitral or judicial settlement will not be easy at all. Croatia should claim a median line for the delimitation of the territorial sea but it cannot expect that a straight line in the same direction should continue in the continental shelf, i.e. in exclusive economic zone.

The special circumstance in the region is a deeply concave shape of the Albanian coast near its land frontier with Montenegro. And as was said in the 1969 Judgment of the Hague Court in the *North Sea Continental Shelf cases*:

"...account (shall be) taken for the purpose of the effects, actual or prospective, of any other continental shelf delimitation between

⁶³ Cf., *International Legal Materials* 1992, No.6, pp.1521-1523, and 1525-1526.

adjacent States in the same region."⁶⁴

To that end, the Arbitral Tribunal on maritime delimitation between Guinea and Guinea-Bissau in its Award of 1985, has taken into account not only the shape of coasts of these two neighbouring States, but also of the West African Coast from the cape Almadies on the Senegalese coast to the cape Schilling on the coast of Sierra Leone.⁶⁵

Therefore, in delimitation of continental shelf and exclusive economic zone, neither can the FRY expect a median line with respect to Albania, nor can Croatia expect it with respect to the FRY.

In all maritime delimitations with adjacent and opposite coastal States, the rights of Croatia can be endangered the most if Bosnia-Herzegovina does not survive as a subject of international law in its actual frontiers.

⁶⁴ *I.C.J. Reports 1969*, p.55, para.101, (C), (3).

⁶⁵ *Cf., Reports of International Arbitral Awards*, vol.XIX, pp.189-190, para.110 and 111.

Sažetak

GRANICE REPUBLIKE HRVATSKE NA MORU

U ovoj raspravi izlažu se propisi unutarnjeg prava bivše SFRJ i drugih obalnih država na Jadranskom moru o njihovim morskim prostorima, zatim njihovi dvostrani sporazumi o morskim razgraničenjima, te njihovo sudjelovanje u mnogostranim konvencijama o pravu mora na "kritični datum". Taj "kritični datum", tj. datum sukcesije, za Hrvatsku i Sloveniju je 8. listopada 1991, a za Saveznu Republiku Jugoslaviju (SRJ) 27. travanj 1992.

Potom se izlaže dalji razvoj prava iz te oblasti u Hrvatskoj i u ostalim jadranskim državama. Hrvatska je u svome Pomorskom zakoniku iz 1994. predvidjela sve propise o svome gospodarskom pojasu ali je ostavljeno Saboru da ga naknadno proglasi. Do danas ga nije proglasila niti jedna obalna država na Jadranu. Sve te države osim Albanije danas su članke Konvencije UN o pravu mora iz 1982.

U pojedinostima se izlaže pravo primjenljivo na razgraničenja svih morskih prostora, nastalo u međunarodnoj arbitražnoj i sudskoj praksi. Temeljno je pravno pravilo u svim morskim razgraničenjima da kopno dominira morem, tj. da je kopno ono koje daje obalnoj državi pravo na vode koje oplakuje njegove obale.

Izlažu se najvažnije naznake načela uti possidetis iz novije međunarodne sudske i arbitražne prakse, kako u kopnenim tako i u morskim razgraničenjima. U pojedinostima je opisan režim historijskog zaljeva Fonseca na srednjeameričkoj prevlaci na kome obale imaju Nikaragva, Honduras i El Salvador. Režim kondominija svih triju obalnih država utvrđen je presudom Centralnoameričkog suda iz 1917, a potvrđen je i u presudi Vijeća Međunarodnog suda o Kopnenim, otočnim i morskim granicama iz 1992.

Na temelju toga prava razmatra se pravno neutemeljen zahtjev Slovenije prema Hrvatskoj za svim morskim prostorima u Piranskom zaljevu, te za njezin izlaz na otvoreno more kroz hrvatsko teritorijalno more.

Između Hrvatske i Italije svi su morski prostori razgraničeni temeljem ugovorâ koje je s tom državom sklopila bivša SFRJ. Pitanje razgraničenja pojavit će se nakon što obje države proglase svaka svoj gospodarski pojas.

Između Hrvatske i Bosne i Hercegovine glavna pitanja su riješena dvama sporazumima iz 1994. u okviru Washingtonskih sporazuma. Stranke su im Hrvatska i Federacija Bosne i Hercegovine. Prvim sporazumom Hrvatska se obvezala iznajmiti Federaciji komad kopna u luci Ploče koji će imati položaj slobodne zone. Drugim, kolateralnim sporazumom, Federacija će Hrvatskoj priznati neograničen tranzit cestom kroz Neum, između istočne i zapadne granice Neuma s Hrvatskom.

Napokon, SRJ ima pravno neutemeljen teritorijalni zahtjev prema Hrvatskoj nad rtom Oštro na krajnjem jugu hrvatske obale koga treba odbiti. Inače sporazum o morskim granicama treba postići od crte sredine na moru, na ulazu u Boku Kotorsku, između rta Oštro i otočića Mamula. Od te točke valja odrediti teritorijalno more uz hrvatsku obalu u Boki Kotorskoj, a u pravcu prema pučini treba odrediti crtu razgraničenja teritorijalnog mora Hrvatske i SRJ do udaljenosti od 12 morskih milja. Nakon te udaljenosti, sve do već utvrđene granice epikontinentnog pojasa s Italijom, treba odrediti granicu i toga pojasa između tih dviju država.

Pri razgraničenju epikontinentnog i gospodarskog pojasa trebat će kao "posebnu okolnost" uzeti u obzir konkavan oblik obale Albanije u blizini granice sa SRJ. Usljed toga niti će SRJ prema Albaniji, a niti Hrvatska prema SRJ, moći ishoditi crtu sredine.