PCA CASE NO. 2012-04

IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF CROATIA AND THE GOVERNMENT OF THE REPUBLIC OF SLOVENIA, SIGNED ON 4 NOVEMBER 2009

- between -

THE REPUBLIC OF CROATIA

- and -

THE REPUBLIC OF SLOVENIA

(together, the "Parties")

FINAL AWARD

29 June 2017

ARBITRAL TRIBUNAL:
Judge Gilbert Guillaume (President)
Ambassador Rolf Einar Fife
Professor Vaughan Lowe
Professor Nicolas Michel
Judge Bruno Simma

REGISTRAR:
Dr. Dirk Pulkowski
The Permanent Court of Arbitration

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I. INTRODUCTION

1. The present arbitration concerns a territorial and maritime dispute between the Republic of Croatia and the Republic of Slovenia. Both Croatia and Slovenia are successor States to the Socialist Federal Republic of Yugoslavia ("SFRY"). The dispute was submitted to arbitration in accordance with an arbitration agreement signed on 4 November 2009 in Stockholm ("Arbitration Agreement").[2] Pursuant to the Arbitration Agreement, the course of the maritime and land boundary between the two States, "Slovenia's junction to the High Sea", and the regime for the use of the relevant maritime areas are to be determined by the Tribunal.

A. GENERAL GEOGRAPHY

2. Croatia shares land borders with Slovenia to the north, Hungary to the north-east, Serbia to the east, Bosnia and Herzegovina to the south-east and Montenegro to the south. It shares maritime boundaries in the Adriatic Sea with Slovenia, Italy, Bosnia and Herzegovina, and Montenegro.

3. The largest part of Croatia's territory consists of lowlands, with hilly areas in central Croatia. Moreover, the Pannonian Basin, the Dinaric Alps, and the Adriatic Basin constitute major geomorphological features. The Danube, the Sava, the Drava, the Mura, and the Kupa (Kolpa) Rivers are amongst Croatia's main watercourses, forming in some cases part of the boundaries with neighbouring States. Furthermore, Croatia comprises over a thousand islands and islets.

4. Slovenia shares land borders with Italy to the west, Austria to the north, Hungary to the north-east, and Croatia to the south-east. It shares maritime boundaries in the Adriatic Sea with Croatia and Italy.

5. Most of Slovenia's territory is mountainous, two fifths of it being part of the Alps. In areas bordering Croatia and Hungary, Slovenia's territory also includes parts of the Pannonian plain. The Soča, the Sava, the Drava, the Mura, and the Kolpa (Kupa) Rivers are among Slovenia's main watercourses, forming in some cases part of the boundaries with neighbouring States.

6. The land border between Croatia and Slovenia starts east from the tripoint with Hungary ("Land Boundary Tripoint"), and reaches its terminal point on the coast of the Bay called by Slovenia the Bay of Piran and by Croatia the Bay of Savudrija/Piran ("the Bay").

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[2] Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, done in Stockholm on 4 November 2009, Annex HRLA-75 / Annex SI-395.

7. The disputed maritime area is located in the northernmost part of the Adriatic Sea, which includes the Gulf of Trieste. The Gulf of Trieste is enclosed by the coasts of Italy, Slovenia, and Croatia.

8. The Bay is an "indentation in the Gulf of Trieste," representing approximately 3.3 % of the total area of the Gulf of Trieste.[3] The mouth of the Bay is approximately 5 km wide and runs between Cape Savudrija in Croatia and Cape Madona in Slovenia. While the location of the land boundary endpoint (and thus the starting point of the maritime boundary) is in dispute between the Parties, they agree that it is located on the coast of the Bay.

9. Two treaties delimiting the northern part of the Adriatic Sea were concluded by the SFRY and Italy. The Treaty concluded on 10 November 1975 at Osimo ("Treaty of Osimo") delimited the territorial sea between the SFRY and Italy, by an equidistance line that extends for a distance of 25.7 nautical miles ("NM") and connects five points.[4] Furthermore, an agreement on the delimitation of the continental shelf between Italy and the SFRY was concluded on 8 January 1968 at Rome (the "1968 Treaty") defining a line of delimitation with 43 points connected by 40 straight segments and 2 curved segments.[5] In accordance with established principles of customary law reflected in Article 11 of the Vienna Convention on the Succession of States in respect of Treaties,[6] a succession of States does not as such affect a boundary established by treaty. Accordingly, and as the Parties have accepted,[7] the delimitation lines established pursuant to the 1968 Treaty and the Treaty of Osimo are applicable to Croatia and Slovenia as successor States to the SFRY. Points on these lines may therefore be utilized by the Tribunal to the extent necessary.

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3 Croatia's Memorial, para. 2.13.

4 Treaty on the Delimitation of the Frontier for the Part Not Indicated as Such in the Peace Treaty of 10 February 1947 (with annexes, exchanges of letter and final act), done in Osimo on 10 November 1975, 1466 U.N.T.S. 72, Annex HRLA-50.

5 Agreement between the Government of the Socialist Federative Republic of Yugoslavia and the Government of the Italian Republic on the Delimitation of the Continental Shelf between the Two Countries, done in Rome on 8 January 1968 *Official Gazette of the Socialist Federal Republic of Yugoslavia (Treaties)*, No. 28/1970, 7 ILM 547 (1968), Annex HRLA-43.

6 Vienna Convention on the Succession of States in respect of Treaties, done in Vienna on 23 August 1978, 1946 U.N.T.S. 3.

7 Croatia's Memorial, para. 2.17; Slovenia's Memorial, paras 9.52-53.

B. HISTORICAL BACKGROUND

1. Historical Developments up to the 18th Century

10. The Marches, or Margraviates, of Carniola ("March of Carniola") and Styria ("March of Styria") were established in the 10th and 12th centuries respectively. Their territories formed part of the eastern border region of the Holy Roman Empire of the German Nation. They are today part of Slovenia. The Principality of Croatia had been established in the early 9th century, beyond the the frontier of what was to become the Holy Roman Empire, south and east of the areas to be covered by the Marches of Carniola and Styria. The Principality became the Kingdom of Croatia in 925, which entered into a union with the Kingdom of Hungary in 1102. In 1526-1527, the Croatian and Hungarian Parliaments elected Ferdinand I of Austria to the throne, uniting both lands under the House of Habsburg.

11. From the second half of the 18th century, under Maria Theresa and Joseph II, Habsburg Austria undertook reforms to modernise and unify the State administration. This included the development of a centralised system of administrative boundaries between kingdoms, duchies, and provinces.

12. The first detailed land surveys were carried out in the second half of the 18th century. They resulted in the creation of the first cadastres. Such a comprehensive survey was carried out between 1763 and 1787 by Habsburg Austria, resulting in the so-called *Josephinische Landesaufnahme* ("Josephine Survey").

2. The Austrian Empire and the Austro-Hungarian Empire (1804-1918)

13. The Napoleonic Wars brought major changes in the region, including the dissolution of the Holy Roman Empire in 1806. In 1804, King Francis II of Austria had already established the Austrian Empire and declared himself Emperor of Austria under the name Francis I. The Austrian Empire lasted in that form up to 1866.

14. A further, detailed land survey was carried out under the Austrian Empire. Commenced under Francis I and conducted from 1817 to 1861, it resulted in the so-called *Franziszeische Kataster* ("Franciscan cadastre"). It served as a basis for taxation, as opposed to military mapping carried out in a separate *Franziszeische Landesaufnahme.* This Franciscan cadastre contains detailed cadastral maps prepared for each cadastral municipality.

15. In 1867, the Austro-Hungarian Compromise transformed the Austrian Empire into the Austro-Hungarian Empire, which lasted until 1918. Its eastern part, known as "the territories of the holy Hungarian Crown of Stephan," or Transleithania, was constituted by the Kingdom of Hungary and the Kingdom of Croatia-Slavonia. The remaining provinces were included in the western part of the Empire, officially named "the Kingdoms and Lands represented in the Imperial Council," also known as Cisleithania.

16. According to Croatia, the constitutional and political status of the Kingdom of Croatia within Austria-Hungary was governed by the Croatian-Hungarian Compromise of 1868, which created a union between the "Kingdom of Croatia, Slavonia and Dalmatia" and the Kingdom of Hungary.[8] The territories that now constitute Slovenia were then mainly part of the Austrian Crown Lands of Styria and Carniola, and of the Austrian Littoral.[9]

17. Within the Austro-Hungarian Empire, a large part of the territories which later became Slovenia and those which became part of Croatia were essentially divided by the boundary between Cisleithania and Transleithania.[10]

3. The Kingdom of Serbs, Croats and Slovenes (1918-1929)

18. Following the breakup of the Austro-Hungarian Empire in the aftermath of World War I, the Kingdom of Serbs, Croats and Slovenes was established on 1 December 1918. Its boundary with Austria was defined by the Treaty of Peace between the Allied and Associated Powers and Austria, done in Saint-Germain-en-Laye on 10 September 1919 ("Treaty of Saint-Germain").[11] Its boundary with Hungary was defined by the Treaty of Peace between the Allied and Associated Powers and Hungary, done in Trianon, on 4 June 1920 ("Treaty of Trianon").[12] The new kingdom relinquished its rights over the *Venezia Giulia* area ("Julian March") to Italy under the Treaty

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8 Croatia's Memorial, para. 6.9.

9 Croatia's Memorial, para. 6.10; Transcript, Day 3, p. 97:20-21.

10 Slovenia's Memorial, para. 2.46.

11 Treaty of Peace between the Allied and Associated Powers and Austria (Peace Treaty of Saint-Germain-en-Laye), done in Saint-Germain-en-Laye on 10 September 1919, British and Foreign State Papers, 1919, Vol. CXII (London, HM Stationery Office, 1922), p. 317.

12 Treaty of Peace between the Allied and Associated Powers and Hungary, done in Trianon on 4 June 1920, British and Foreign State Papers, 1919, Vol. CXII (London, HM Stationery Office, 1922), p. 317; 6 L.N.T.S. 187.

between the Kingdom of Italy and the Kingdom of Serbs, Croats and Slovenes, done in Rapallo, on 12 November 1920 ("Treaty of Rapallo").[13]

19. The Kingdom of Serbs, Croats and Slovenes was divided into provinces (*oblasti*).[14] In 1922, a Decree on the Division of the State into Provinces established 33 such *oblasti*.[15] The current territory of Slovenia includes areas that at the time were part of Ljubljana *oblast* and Maribor *oblast*, with the addition under the Treaty of Trianon of the areas of Prekmurje and Medmurje/Medjimurje, which became part of Maribor *oblast.*[16] According to Slovenia, the administrative division within the Kingdom of Serbs, Croats and Slovenes into *oblasti* largely corresponded to the division into districts used in the Austro-Hungarian Empire.[17]

4. The Kingdom of Yugoslavia (1929-1941)

20. King Alexander instituted the Kingdom of Yugoslavia in 1929, after a major political crisis. An Act of 1929 on the Name and Division of the Kingdom into Administrative Territories (the "1929 Act") replaced the 33 *oblasti* by nine new provinces called *banovine*. These were later described in the 1931 Constitution of the Kingdom of Yugoslavia ("1931 Constitution").[18] The *banovine* boundaries largely replicated the boundaries of the Kingdom of Serbs, Croats and Slovenes, and thus also those within the former Austro-Hungarian Empire.[19]

21. The Ljubljana and the Maribor *oblasti* were then merged into a single *Dravska banovina*, albeit with some exceptions, including Medmurje/Medjimurje. The relevant parts of the territory of Croatia were divided into the *Savska banovina* and the *Primorska banovina*. In 1939, these merged, with some other counties, to form the *Banovina Hrvatska*.[20]

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13 Treaty between the Kingdom of Italy and the Kingdom of the Serbs, Croats and Slovenes, done in Rapallo on 12 November 1920, 18 L.N.T.S. 387.

14 Constitution of the Kingdom of Serbs, Croats and Slovenes, *Official Gazette of the Kingdom of Serbs, Croats and Slovenes (Regional Government for Slovenia)*, No. 87/1921, Article 95, Annex SI-56.

15 Decree on the Division of the State into Provinces (*Oblasti*), *Official Gazette of the Kingdom of Serbs, Croats and Slovenes (Regional Administration for Slovenia)*, No. 49/1922, Annex SI-57.

16 Slovenia's Memorial, para. 2.51.

17 Transcript, Day 3, pp. 97:16-22, 125:21-24, 126:1.

18 Constitution of the Kingdom of Yugoslavia, *Official Gazette of the Kingdom of Yugoslavia (Dravska banovina)*, No. 53/1931, Annex SI-65.

19 Transcript, Day 1, p. 72:10-14; Transcript, Day 3, p. 97:13-22.

20 Decree on the Banovina Hrvatska, *Official Gazette of the Kingdom of Yugoslavia*, No. 194-A-LXVIII/1939, Annex SI-70.

5. The Yugoslav Territory During World War II

22. World War II spilled over to the territory of the Kingdom of Yugoslavia in April 1941, leading to occupation by the forces of the Axis and the creation of the "Independent State of Croatia." The latter had to yield a part of its territory along the coast to Italy, and the *Dravska banovina* was divided between the German Reich, Italy and Hungary.

23. Anti-fascist liberation and resistance movements emerged. On Croatia's account:

> 5.12 During World War II in Yugoslavia, partisan resistance to the German and Italian occupation forces, and to the governments that the occupying powers installed, was led by the Anti-fascist Council of People's Liberation of Yugoslavia (AVNOJ). AVNOJ was the supreme authority of the Yugoslav resistance movement and exercised legislative and executive functions in liberated areas falling under its control. Partisan organizations in the various regions of Yugoslavia operated under its general command.
>
> 5.13 In Croatia, the highest governing organ of the partisan resistance was the National Anti-fascist Council of the People's Liberation of Croatia (ZAVNOH), which served as the governing authority in liberated parts of Croatia. In Slovenia, the resistance was led by the Liberation Front of the Slovenian People, which functioned as the responsible governing authority in liberated Slovene areas.[21]

24. On Slovenia's account:

> In September 1941, the Slovenian People's Liberation Committee (*Slovenski narodnoosvobodilni odbor, SNOO*) – which later became the Slovenian People's Liberation Council (*Slovenski narodnoosvobodilni svet, SNOS*) – was created by the Executive Committee of the Liberation Front (*Izvršni odbor Osvobodilne fronte, IOOF*). In the occupied territory of the later Croatia, the National Anti-Fascist Council of the People's Liberation of Croatia (*Zemaljsko antifašističko vijeće narodnog oslobođenja Hrvatske, ZAVNOH*) was created in 1942; it was renamed in 1945 the People's Parliament of Croatia (*Hrvatski narodni sabor*). At the federal level, the Anti-Fascist Council of People's Liberation of Yugoslavia (*Antifašističko Vijeće Narodnog Oslobođenja Jugoslavije, AVNOJ*) established in 1942, assumed civil authority as the political umbrella organ of the liberation movements. It proclaimed, in November 1943, the Democratic Federation of Yugoslavia (DFY) and assumed itself the functions of the interim legislative body of the Federation. In addition, it appointed the National Committee for the Liberation of Yugoslavia (*Nacionalni komite osvoboditve Jugoslavije, NKOJ*) to act as the interim executive authority.[22]

6. The Yugoslav Federation (1945-1991)

25. Yugoslavia emerged from World War II as a member of the victorious coalition. Already during the War, in November 1943, the Anti-Fascist Council of People's Liberation of Yugoslavia ("AVNOJ") had decided that the future State would be a federal entity composed of six units, namely (in alphabetical order) Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia,

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21 Croatia's Memorial, paras 5.12-13.

22 Slovenia's Memorial, para. 2.58.

and Slovenia.[23] On 29 November 1945, the Constituent Assembly proclaimed the Federal People's Republic of Yugoslavia ("FPRY").[24] The FPRY and its constituent republics were formally established with the adoption of the Constitution of the Federal People's Republic of Yugoslavia on 31 January 1946.[25] Croatia and Slovenia were part of the FPRY as two out of six constituent republics.[26]

26. The Yugoslav armed forces under the command of Marshal Tito had occupied the Julian March and the city of Trieste in the last days of World War II.[27]

27. In the Belgrade Agreement of 9 June 1945 between Yugoslavia, the United Kingdom and the United States, the provisional partition and administration of the Julian March were agreed upon. The area west of the so-called Morgan Line, including the northwestern part of the Julian March, the city of Trieste as well as Pula and anchorages on the Western coast of Istria, became Zone A. The Yugoslav armed forces left this zone and handed it over to the command and control of the Supreme Allied Commander. The remaining part of the Julian March became Zone B and subject to military administration by Yugoslavia.

28. The 1947 Peace Treaty with Italy[28] substantially modified the division and administration of the former Julian March. Article 21 established the Free Territory of Trieste ("FTT"). The FTT was placed in part under Anglo-American administration and in part under Yugoslav military administration. The corresponding areas continued to be referred to as Zone A and Zone B and continued to be divided along the Morgan Line. Zone B of the FTT was composed of the districts of Koper and Buje.

29. Under Article 3 of the 1947 Peace Treaty, the remaining parts of former Zone A were transferred to Italian civil administration, and the remaining parts of former Zone B were placed under the

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23 Decision of the Second Session of the AVNOJ to Create Yugoslavia on Federal Principle, 29 November 1943, *Official Gazette of the DFY*, No. 1/1945, Annex SI-75.

24 Declaration Proclaiming the Federal People's Republic of Yugoslavia, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 93/1945, Annex SI-84.

25 Constitution of the Federal People's Republic of Yugoslavia, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 10/1946, Annex SI-85.

26 Constitutional Act on the Foundations of the Social and Political System of the Federal People's Republic of Yugoslavia and on Federal Authorities, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 3/1953, Article 2, Annex SI-126.

27 Slovenia's Memorial, para. 2.68; Croatia's Memorial, para. 5.25.

28 Treaty of Peace with Italy, done in Paris on 10 February 1947, 49 U.N.T.S. 3, Annex HRLA-18.

administration of the FPRY. The latter territory was formally integrated into the FPRY's territory by an order of the People's Assembly of the FPRY of 15 September 1947.[29]

30. In 1954, the FTT was dissolved, pursuant to a Memorandum of Understanding between the Governments of Italy, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Yugoslavia regarding the Free Territory of Trieste ("London Memorandum").[30] Most of Zone A of the FTT was thereby transferred to Italy, while the remainder of the FTT was integrated into the FPRY.[31] The district of Koper was attributed to Slovenia and the district of Buje to Croatia. This was done in conformity with the FPRY's "Act of 25 October 1954 on the Applicability of the Constitution, Laws and other Federal Legal Regulations on the Territory, onto which the Civil Administration of the FPRY was extended by Means of an International Agreement".[32] After these major modifications, the territories of Slovenia and Croatia essentially remained unchanged until independence.

31. The Federal People's Republic of Yugoslavia (FPRY) changed its name to the Socialist Federal Republic of Yugoslavia (SFRY) in 1963.

32. The three federal constitutions of 1946,[33] 1963[34] and 1974,[35] as well as Yugoslavia's Constitutional Law on the Social and Political Organization of the Federal People's Republic of

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29 Order to Extend the Applicability of the Constitution, Laws and Other Legal Regulations of the Federal People's Republic of Yugoslavia that was attached to the Federal People's Republic of Yugoslavia under the Peace Treaty with Italy, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 80/1947, Annex SI-108; Slovenia's Memorial, para. 2.73; Croatia's Memorial, paras 5.29-30.

30 Memorandum of Understanding between the Governments of Italy, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Yugoslavia regarding the Free Territory of Trieste, done in London on 5 October 1954, U.N.T.S., Vol. 235, No. 3297, p. 99, Annex SI-137; Slovenia's Memorial, para. 2.76; Croatia's Memorial, para. 5.37.

31 Transcript, Day 2, p. 47:14-16; Transcript, Day 3, p. 91:18-24.

32 Act on the Applicability of the Constitution, Laws, and Other Federal Legal Regulations on the Territory, onto which the Civil Administration of the Federal People's Republic of Yugoslavia was extended by means of an International Agreement, 1954, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 45/54, Annex SI-138.

33 Constitution of the Federal People's Republic of Yugoslavia, 1946, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 10/1946, Annex HRLA-12; Croatia's Memorial, para. 3.32; Slovenia's Memorial, para. 5.21.

34 Constitution of the Socialist Federal Republic of Yugoslavia, 1963, *Official Gazette of the Socialist Federal Republic of Yugoslavia*, No. 14/1963, Annex HRLA-40; Croatia's Memorial, para. 3.37; Slovenia's Memorial, para. 5.25.

35 Constitution of the Socialist Federal Republic of Yugoslavia, 1974, *Official Gazette of the Socialist Federal Republic of Yugoslavia*, No. 9/1974, Annex HRLA-46; Croatia's Memorial, para. 3.38; Slovenia's Memorial, para. 5.25.

Yugoslavia,[36] contained provisions as to the boundaries between the republics, but did not describe or delimit them.[37] As detailed further in Section IV below, the Parties disagree regarding the competence of the republics to determine their own boundaries under the various constitutional and legislative regimes. Moreover, they disagree as to how these boundaries were determined.[38]

33. A border commission was established in 1955 in respect of the parts of the FTT that were integrated into Slovenia and Croatia in 1954, *i.e.* the Koper and Buje Districts respectively ("1955 Border Commission"). The Parties disagree as to the legal effect of the 1955 Border Commission's proposals.[39]

7. Independence

34. Both Croatia and Slovenia declared independence on 25 June 1991. On that day, the Parliament of the Republic of Croatia, the *Sabor*, adopted the Constitutional Decision on the Sovereignty and Independence of the Republic of Croatia and the Declaration on the Establishment of the Sovereign and Independent Republic of Croatia.[40] On that same day, the Assembly of the Republic of Slovenia adopted the Declaration of Independence and the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia.[41]

35. On 27 August 1991, the Member States of the then European Community ("EC") assembled in Brussels in an extraordinary ministerial meeting to establish the Peace Conference on Yugoslavia and an arbitration commission. The Commission became known as the "Badinter Commission" after the name of its chair, the President of the French Constitutional Council, Robert Badinter.

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36 Constitutional Law on the Basis of Social and Political Organization of the Federal People's Republic of Yugoslavia and Federal Authorities, 1953, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 3/1953, Annex HRLA-25; Croatia's Memorial, para. 3.36; Slovenia's Memorial, para. 5.24.

37 Slovenia's Memorial, para. 5.20; Slovenia's Counter-Memorial, para. 3.66; Croatia's Memorial, paras 3.33-38; Croatia's Counter-Memorial, para. 313.

38 Slovenia's Memorial, para. 5.20; Slovenia's Counter-Memorial, para. 3.67; Croatia's Memorial, paras 3.2, 3.33-39; Transcript, Day 3, p. 109:3-9.

39 Slovenia's Memorial, para. 6.246; Croatia's Counter-Memorial 4.27-32; Transcript, Day 2, pp. 54:16-25, 57:9-59:12; Transcript, Day 3, pp. 186:1-189:12; Transcript, Day 5, pp. 169:2-176:7; Transcript, Day 8, pp. 139:9-151:17.

40 Constitutional Decision on the Sovereignty and Independence of the Republic of Croatia, *Official Gazette of the Republic of Croatia*, No. 31/1991, Annex SI-237; Declaration on the Establishment of the Sovereign and Independent Republic of Croatia, 1991, *Official Gazette of the Republic of Croatia*, No. 31/1991, Annex SI-236.

41 Declaration of Independence [of the Republic of Slovenia], *Official Gazette of the Republic of Slovenia*, No. 1/91-1, Annex SI-233; Constitutional Act on the Enforcement of the Basic Constitutional Charter of the Republic of Slovenia, *Official Gazette of the Republic of Slovenia*, Nos. 1-4/91-I and 19/91, Annex SI-235.

Between late 1991 and the middle of 1993, the Badinter Commission handed down fifteen opinions pertaining to legal issues arising from the fragmentation of Yugoslavia.[42]

36. By 15 January 1992, the EC and all EC Member States had recognized Slovenia and Croatia.[43] Croatia and Slovenia became Members of the United Nations ("UN") on 22 May 1992.[44]

C. EVENTS AFTER 1991

37. The Parties emphasise that at the time of independence they both accepted that the legal principle of *uti possidetis* applied to the determination of the border.[45] Thus they agree that "the border between them therefore remains the border that existed at the moment of independence between the two constituent republics of the SFRY."[46] However, they disagree as to the source of the title of the land boundary (*i.e.* how the border at that time was defined).

38. Croatia also emphasises that in connection with Slovenia's request for recognition, the Badinter Commission took note of the fact that "[t]he Republic of Slovenia also stresses that it has no territorial disputes with neighbouring States or the neighbouring Republic of Croatia."[47] Croatia therefore maintains that Slovenia's position has subsequently changed.[48]

39. With regard to the maritime boundary, Croatia asserts that "both States adopted the position that the maritime border between the former republics had not been formally determined."[49] However, according to Croatia, "there was an understanding . . . that the delimitation of the territorial seas of Croatia and Slovenia would follow the equidistance method set out in Article 15 of UNCLOS,"

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42 *See in particular*, Conference on Yugoslavia, Arbitration Commission, Opinion No. 5 on the Recognition of the Republic of Croatia by the European Community and its Member States, 11 January 1992, Annex SI-250; Conference on Yugoslavia, Arbitration Commission, Opinion No. 7 on International Recognition of the Republic of Slovenia by the European Community and its Member States, 11 January 1992, Annex SI-251.

43 European Community, Declaration on Yugoslavia, 16 December 1991, United Nations Documents, 16 December 1991, UN Doc. No. A/46/805, Annex SI-242.

44 United Nations, General Assembly, Resolution 46/236, Admission of the Republic of Slovenia to membership in the United Nations, 22 May 1992, UN Doc. No. A/RES/46/236; United Nations, General Assembly, Resolution 46/238, Admission of the Republic of Croatia to membership in the United Nations, 22 May 1992, UN Doc. No. A/RES/46/238.

45 Croatia's Memorial, para. 2.21; Slovenia's Memorial, paras 2.105 (iv), 3.05; Transcript, Day 1, p. 56:15-17; Transcript, Day 3, pp. 15:9-11, 68:22-69:4l; Transcript, Day 8, p. 162:22-24.

46 Slovenia's Memorial, paras 2.105 (iv); *see also* Transcript, Day 1, pp. 57:17-58:20; Transcript, Day 2, p. 195:17-21; Transcript, Day 4, pp. 182:24-183:7.

47 Croatia's Memorial, paras 2.22, 3.17-3.18, *citing* Badinter Commission, Opinion No. 7, pp. 1512, Annex HRLA-61; Transcript, Day 2, p. 96:9-13.

48 Transcript, Day 1, p. 52:7-16.

49 Croatia's Memorial, para. 2.22; *see also* Transcript, Day 2, p. 101:16-20.

which Croatia finds confirmed in a map published in Slovenia in 1991,[50] as well as in minutes of initial negotiations.[51]

40. Following Croatia's review of the legislation adopted by Slovenia since 2001 regarding maritime areas, Croatia concludes as follows:

> Slovenia's constant changes of position were accompanied by increasingly exorbitant claims. Its initial position reflected the Parties' common acceptance of equidistance. Slovenia then claimed that it was a "geographically disadvantaged state" that was not entitled to proclaim an EEZ, but nevertheless claimed the entire Bay of Savudrija/Piran and the right of a "territorial" exit to the high seas in the Adriatic (1993). Next it claimed to have a continental shelf and then purported to declare an ecological zone in front of the Croatian coast (in 2003 and 2005). These acts made a negotiated settlement impossible. Recognizing this, Croatia sought international judicial settlement in accordance with international law.[52]

41. Slovenia, for its part, draws the following conclusion from the overview of the negotiations between the Parties:[53]

- Regarding the land boundary, the initial proposals of Slovenia and Croatia from 1992 reflected the understanding of the boundary as of 25 June 1991. Because of disagreement, compromise proposals were put forward in different forums.
- During the negotiations, Slovenia made clear on several occasions (e.g., in the Memorandum on the Bay of Piran, during negotiations in the framework of the Mixed Diplomatic Commission, in documentation for the Perry mediation, and during the 2001 Drnovšek-Račan Treaty negotiations) that its vital interest is to maintain the territorial contact/access of Slovenia to the high seas[54]
- Although 2001 Drnovšek-Račan Treaty was not signed by Croatia it was a culmination of nine years of negotiations, aiming to reaching [sic] a fair and just result and to strengthening the good neighbourly relations between the two States.

42. Slovenia further emphasises that "Slovenia's position has never been that the median line principle [or equidistance method] would apply to the Bay [of Piran]" and points out that "Croatia itself notes [this] in the paragraph of its Memorial discussing the 1993 Memorandum on the Bay of Piran."[55]

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50 Croatia's Memorial, para. 2.22, Figure 9.3, Croatia's Memorial, Vol. III.

51 Croatia's Memorial, para. 2.22, *also referring to* a Slovenian document presented to the EU during Slovenia's accession negotiations; *see* Negotiating Position of the Republic of Slovenia, Intergovernmental Conference on the Accession of the Republic of Slovenia to the European Union, Ljubljana, 18 December 1998, Appendix, Annex HR-84; Transcript, Day 2, pp. 90:1-24, 94:21-95:3.

52 Croatia's Memorial, para. 2.58; *see also* Croatia's Memorial, para. 2.85 a.-d.

53 Slovenia's Memorial, para. 3.68; *see also* Slovenia's Memorial, paras 1.10-21.

54 *See also* Slovenia's Counter-Memorial, paras 2.41-42.

55 Slovenia's Counter-Memorial, para. 7.47, *citing* Croatia's Memorial para. 9.42; Slovenia's Reply, paras 1.02-07, 4.05, 4.57; Transcript, Day 3, pp. 25:5-26:15.

43. The negotiations between the Parties concerning the land and maritime boundary in the period between 1992 and 2001 proceeded in several stages, which will be summarized below.

1. The Draft Border Agreement Allegedly Proposed by Slovenia in 1991

44. According to Croatia, Slovenia presented Croatia with a draft border agreement during an initial meeting in Ljubljana after the Parties had gained independence. Croatia states that, in the proposed draft, the border was to be "determined by the present border between the municipalities," and lists respective Croatian and Slovenian municipalities in the border region.[56] Croatia refers to Article 1 of this draft agreement, which provides:

> Along the Dragonja River the border runs about 1 km westwards, where it turns southwestwards and 2 km north of the settlement of Momjan again reaches the Dragonja River. From there the border runs along the Dragonja River up to its mouth into the sea in the Bay of Piran.[57]

45. Croatia claims that the wording of this provision "is unambiguous" as regards both the land boundary and Slovenia's proposal that "the Bay of Savudrija/Piran was to be divided between Croatia and Slovenia at the 1975 Osimo Treaty line."[58] Croatia therefore concludes that "on the critical date, there was no material dispute over the boundary along the lower Dragonja River or on the sea," and that "Slovenia did not then consider the Bay as having the status of internal waters or the status of a historic bay."[59]

46. Slovenia maintains that it has "no record or recollection of any draft agreement being handed over at or in connection with the 29 October 1991 meeting" and submits that "[i]f a draft were passed by anyone to the Croatians, it could not have been any kind of official proposal."[60] In support of this statement, Slovenia notes that its own contemporaneous record of the meeting "makes no mention of any draft agreement" and stated instead, *inter alia*, that "Slovenia and Croatia will prepare a draft agreement."[61] Slovenia also points out that the text that Croatia contends Slovenia

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56 Croatia's Counter-Memorial, para. 2.12; Transcript, Day 2, p. 90:7-12.

57 Croatia's Counter-Memorial, para. 2.12, *citing* Republic of Slovenia, Draft Agreement between the Republic of Slovenia and the Republic of Croatia on the Common Border, 29 October 1991, along with the Report of the meeting, November 1991, Annex HR-285; Transcript, Day 1, p. 52:3-6.

58 Croatia's Counter-Memorial, para. 2.14; Transcript, Day 1, pp. 51:17-52:2; Transcript Day 2, pp. 90:15-91:3.

59 Croatia's Counter-Memorial, para. 2.14.

60 Slovenia's Reply, para. 1.04; Transcript, Day 3, p. 27:7-8; Transcript, Day 7, pp. 71:23; 72:19-73:4.

61 Slovenia's Reply, paras 1.04-05; Transcript, Day 3, p. 27:13-16.

presented in 1991 is in Croatian, rather than in Slovenian, and that no map indicating the maritime boundary is attached to it.[62]

47. Slovenia therefore disputes Croatia's conclusion that any draft agreement that was allegedly presented by Slovenia in 1991 could show that there "was no material dispute over the boundary along the lower Dragonja River or on the sea." Slovenia notes that it was only after the October 1991 meeting that Slovenia's preparations of a draft border agreement commenced.[63] Slovenia recalls that its first proposal for a border agreement was submitted to Croatia on 26 March 1992; that proposal "reflected the initial view of Slovenia on the land boundary and showed that the maritime boundary was still to be determined."[64] Furthermore, Slovenia emphasises that the alleged draft agreement of 1991 does not make any reference to "equidistance" in relation to the delimitation of the maritime boundary. Hence, the alleged proposal does "not provide evidence of a 'common understanding' between the Parties that their maritime boundary would be delimited by an equidistance line."[65]

2. Negotiations in 1992-1993

48. The Parties both acknowledge that bilateral negotiations in respect of the land and maritime border took place from 1992 onward.

49. On 26 March 1992, Slovenia had proposed to the Ministry of Foreign Affairs of Croatia a draft agreement (which Croatia refers to in the present dispute as a "somewhat revised" version of the draft agreement allegedly presented in October 1991).[66] This draft was, later the same year, referred to by Slovenia's Foreign Minister as "a distinct political document that does not prejudge concrete solutions regarding the demarcation" and that "will enable the beginning of expert work."[67] This draft agreement provided that the border follow the existing boundary, which ran

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62 Transcript, Day 3, p. 27:10-11; Transcript, Day 7, pp. 71:25-72:13.

63 Slovenia's Reply, para. 1.06.

64 Slovenia's Reply, paras 1.05-07, *citing* Croatia's Counter-Memorial, para. 2.14.

65 Slovenia's Reply, para. 4.05; Transcript, Day 3, p. 27:8-9; Transcript, Day 7, p. 72:14-18.

66 Draft Border Agreement between the Republic of Slovenia and the Republic of Croatia, 26 March 1992, Article 1, Annex SI-253; Transcript, Day 1, p. 65:26; Transcript, Day 3, pp. 21:10-17, 27:19; Transcript, Day 7, p. 73:4-5; *see also* Slovenia's Memorial, paras 3.13-14; Croatia's Counter-Memorial, para. 2.14; Transcript, Day 5, p. 14:14.

67 Letter of Slovenia's Foreign Minister, Dr. Dimitrij Rupel, to the Croatian Maritime Minister and President of the Croatian State Committee for Borders, Dr. Davorin Rudolf, 26 May 1992, Annex SI-256; *see also* Slovenia's Memorial, para. 3.15; Slovenia's Counter-Memorial, para. 2.10.

along the border Rivers Mura, Drava, Sotla, Sava, Bregana and Kolpa, the dry channel of the Dragonja River, and boundaries between the border municipalities.[68]

50. In Article 2 of the draft agreement, Slovenia proposed that "[t]he Parties . . . study the issue of lateral delimitation at sea in accordance with the principles and rules of international law."[69]

51. On 26 May 1992, at the first meeting of surveying and mapping experts, the attendees agreed that "the definition of cadastral boundaries" would be "the point of departure for the final decision" on the land boundary.[70]

52. On 9 August 1992, Croatia responded with a draft agreement proposing boundaries defined by the cadastral municipalities according to an initial land survey.[71] Croatia stated in its proposed Article 2 that "[t]he maritime boundary between the Republic of Croatia and the Republic of Slovenia [run] from the Dragonja's outfall to the tripoint with Italy in the Gulf of Trieste, which will be established according to international criteria."

53. On 30 September 1992, a new draft was submitted by Slovenia. It proposed following the border defined by the cadastral municipalities "according to original survey," thus including within Slovenia territories on the left bank of the Dragonja River.[72] Croatia responded with a new draft Convention, whereby the "[t]he boundary between the Republic of Croatia and the Republic of Slovenia shall be the boundary that was considered State boundary between the two republics of the former Socialist Federal Republic of Yugoslavia, notably the boundary between the municipalities."[73] On 10 November 1992, at a meeting of the two delegations, a provision in

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68 Draft Border Agreement between the Republic of Slovenia and the Republic of Croatia, 26 March 1992, Article 1, Annex SI-253; *see also* Slovenia's Memorial, para. 3.14; Slovenia's Counter-Memorial, para. 2.10; Transcript, Day 1, pp. 64:3-65:26.

69 Comparison of the first Slovenian (26 March 1992) and Croatian Proposals (9 August 1992) of the Land and Maritime Boundary, Annex SI-429; Croatia's Counter-Memorial, para. 2.14.

70 Aide-Mémoire of the Meeting of Surveying and Mapping Expert Delegations of the Republic of Slovenia and the Republic of Croatia for the Definition of the Border, 26 May 1992, Annex SI-257; Transcript, Day 1, pp. 66:1-67:6; *see also* Slovenia's Memorial, para. 3.16,

71 Croatia's Memorial, para. 3.17; Croatia's Counter-Memorial, para. 2.15; Slovenia's Counter-Memorial, para. 2.11; Transcript, Day 3, p. 21:12-13.

72 Draft Agreement between the Republic of Slovenia and the Republic of Croatia on the Common State Border adopted by the Government of the Republic of Slovenia, 24 September 1992, Annex SI-262; *see also* Slovenia's Memorial, para. 3.19; Croatia's Counter-Memorial, para. 2.17; Transcript, Day 3, p. 21:13.

73 Convention between the Republic of Croatia and the Republic of Slovenia on Common State Border, Draft, 4 November 1992, Annex SI-264; *see also* Slovenia's Memorial, para. 3.20; Croatia's Counter-Memorial, para. 2.18; Transcript, Day 3, p. 21:14.

Croatia's draft Convention to the effect that "the boundary of cadastral municipalities of the original survey is considered as the initial situation" was held by Slovenia to be unclear.[74]

54. At this second exchange of drafts, Slovenia's proposal did not contain a provision on the maritime boundary.[75] Croatia proposed for its part, in Article 1, that "the boundary on rivers and at sea . . . be delineated and demarcated on the basis of international rules and criteria."[76] At a meeting following this exchange, Slovenia proposed omitting such a provision.[77]

55. Contrary to Slovenia's position, Croatia asserts that "[u]ntil 1993 Slovenia expressed no disagreement with Croatia that the maritime delimitation should follow an equidistance line from the land boundary terminus through the Bay seawards to the maritime boundary with Italy," referring to the minutes of early negotiations between the Parties, which "contain no Slovene proposal which differed from this approach."[78]

3. The Parties' Expert Groups

56. Expert groups were established jointly by the Parties ("Parties' Expert Groups").[79] They held meetings between December 1992 and June 1993. A meeting of surveying and mapping experts took place on 15 March 1993 in order to "determine, in broad terms," discrepancies in the Parties' "interpretations of the course of the cadastral border" and "merely set up a basis for future work."[80] The surveying and mapping experts adopted a common report on 2 June 1994 ("1994 Report"[81]). When comparing the Parties' data, the experts noted the following:

> 2.1 Basic facts
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> - The comparison of the data on the course of the border was carried out on 244 sheets of topographic maps at a scale of 1:5000 containing each side's interpretation of the course of the border as depicted by their respective surveying and mapping expert groups;

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74 Slovenia's Memorial, para. 3.21.

75 Draft Agreement between the Republic of Slovenia and the Republic of Croatia on the Common State Border adopted by the Government of the Republic of Slovenia, 24 September 1992, Annex SI-262.

76 Convention between the Republic of Croatia and the Republic of Slovenia on Common State Border, Draft, 4 November 1992, Annex SI-264; Slovenia's Memorial, para. 3.20.

77 Slovenia's Memorial, para. 3.21.

78 Croatia's Memorial, paras 2.22, 2.35, *also referring to* a Slovenian document presented to the EU during Slovenia's accession negotiations; *see* Negotiating Position of the Republic of Slovenia, Intergovernmental Conference on the Accession of the Republic of Slovenia to the European Union, Ljubljana, 18 December 1998, Appendix, Annex HR-84; Croatia's Counter-Memorial, para. 2.19.

79 Slovenia's Memorial, para. 3.22.

80 Slovenia's Memorial, para. 3.24; *see also* Croatia's Counter-Memorial, para. 2.20.

81 Joint Report of the Surveying and Mapping Experts of the Republic of Slovenia and the Republic of Croatia on the basis of past meetings, 2 June 1994, Annex SI-282.

- There are 166 cadastral communities on the Slovenian side of the border and 161 on the Croatian side;
- The length of the land border between the Republic of Slovenia and the Republic of Croatia, calculated on the basis of digital data, is 670 km.

2.2 The following was established on the basis of the adopted criteria (Item 1.2 of this Joint Report):

- 77%, i.e. approximately 510 km, of the joint border is "in line with the set criteria";
- 10%, i.e. approximately 70 km, of the joint border has not yet been agreed upon (a discrepancy of up to 2 cm on maps);
- With regard to 13%, i.e. approximately 80 km, of the joint border, significant discrepancies (discrepancies exceeding 2 cm on maps) have been established, namely in the areas along the rivers Mura and Drava, and at the confluence of the rivers Sotla, Sava and Bregana, in the Sekuliči cadastral municipality, along the Čabranka, at Snežnik, in the Topolovec cadastral municipality and along the Dragonja river (between the cadastral municipalities of Raven and Sečovlje on the Slovenian side and the Kaštel cadastral municipality on the Croatian side). The surveying and mapping experts were not able to compare the data regarding the border from Čabar to the sea. Detailed information is contained in the minutes of the meetings of surveying and mapping experts.[82]

4. Slovenia's 1993 Memorandum on the Bay of Piran and Croatia's Reaction

57. In April 1993, Slovenia issued a Memorandum on the Bay of Piran,[83] which stated:

> The Republic of Slovenia advocated the maintenance of the integrity of the Bay of Piran under its sovereignty and jurisdiction and the exit to the high seas on the basis of admissible criteria of international law and taking into consideration the specific situation of the Republic of Slovenia.
>
> The Republic of Slovenia holds a view that the Bay of Piran is a case *sui generis* which dictates exclusive regard of the historic title and other special circumstances. Slovenia, therefore, resolutely rejects the application of the criterion of the median line, which would – in the case of the Bay of Piran – represent an unjust and impractical solution for the Republic of Slovenia, entirely contrary to the historical and actual state in the Bay of Piran.[84]

58. As regards "the maritime boundary with the Republic of Croatia outside [the Bay]," the Slovenian Memorandum took the following position:

> [C]onsidering the specific situation, the principle of equity – implying also the so-called special circumstances deriving from Article 12 of the 1958 Convention on Territorial Waters and Contiguous Zone – also has to be taken into consideration. The Republic of Slovenia undoubtedly meets the requirements for the application of this institute, since it belongs to the group of the so-called geographically disadvantaged States which, due to their geographic position, cannot declare their exclusive economic zone. The vital question of acquisition of sufficient quantities of national resources for the survival of the Slovene nation is also raised

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82 *Ibid*.

83 Memorandum on the Bay of Piran, Ljubljana, 7 April 1993, Annex SI-272; Slovenia's Memorial, para. 3.06; Letter of Prime Minister of the Republic of Slovenia, Dr. Janez Drnovšek to the Prime Minister of the Republic of Croatia, Nikica Valentić, 5 May 1993, Annex SI-273; *see also* Slovenia's Memorial, para. 3.06; Croatia's Counter-Memorial, para. 2.21.

84 Memorandum on the Bay of Piran, Ljubljana, 7 April 1993, p. 3, Annex SI-272.

> here. Therefore, the Republic of Slovenia is of the opinion that it is necessary, in accordance with the principle of equity and considering the institute of special circumstances, to draw the maritime boundary with the Republic of Croatia in such a way as to ensure that the territorial waters of the Republic of Slovenia would, at least at a narrow section, join the high seas of the Adriatic. [85]

59. Slovenia argues that in this Memorandum it had made its position clear to Croatia in May 1993, as regards the Bay of Piran being integrally under Slovenia's sovereignty and jurisdiction, and concerning Slovenia's vital interest in a territorial junction to the high seas of the Adriatic. Slovenia maintains that its position was made clear on many occasions thereafter.[86]

60. Croatia alleges that the 1993 Memorandum marks "the first time Slovenia claimed sovereignty over the entire Bay" and the first time Slovenia "rejected the use of the equidistance method."[87] It notes that this change in Slovenia's position came "a full two years after independence."[88] Slovenia answers that it "seems rather natural" for it to have "formulated its claim when it realised that it was challenged by its new neighbour" (Croatia). It notes that a passage of time of two years from independence until the 1993 Memorandum "is not that long a lapse of time."[89] Slovenia notes that this also explains why the Slovenian Government had initially indicated to the Badinter Commission that it had no territorial disputes with its neighbours.[90]

61. On 26 May 1993, the Committee on International Relations of the National Assembly of the Republic of Slovenia adopted certain "Standpoints and Conclusions." As highlighted by Slovenia, its points VI and VII read as follows:

> VI.
>
> The most important criterion for the determination of the land frontier is municipality boundaries and/or boundaries of cadastral municipalities . . .
>
> Should the Republic of Croatia insist on the current territorial claims both at land and at sea, the National Assembly hereby instructs the Government of the Republic of Slovenia to raise claims – based on historic facts – which would ensure respect for the inviolability of our territory and the realisation of Slovenia's interests.
>
> VII.
>
> As regards the Bay of Piran, the National Assembly of the Republic of Slovenia reiterates the fact that in recent history, the Republic of Slovenia has had indisputable jurisdiction over the Bay of Piran. It has managed it accordingly and provided for its protection and preservation. The Bay of Piran belongs to the Republic of Slovenia also in accordance with the principle of international law of uti possidetis.

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85 Memorandum on the Bay of Piran, Ljubljana, 7 April 1993, p. 5, Annex SI-272.

86 Transcript, Day 3, pp. 28:2-29:20.

87 Croatia's Counter-Memorial, para. 2.22; Transcript, Day 1, p. 50:11-22; Transcript, Day 2, p. 91:6-17.

88 Transcript, Day 5, pp. 14:23-15:3.

89 Transcript, Day 4, pp. 20:16-21:5.

90 Transcript, Day 4, p. 21:6-15.

> As regards exit to the high seas, the National Assembly underlines that the Republic of Slovenia, throughout recent history, has indisputably had unhindered exit to the high seas. This is the reason why the National Assembly points out that exit to international waters is an inherent right of the Republic of Slovenia.[91]

62. On 18 November 1993, the Assembly of Croatia adopted "Standpoints" concerning the frontier in the Bay and the area of the Dragonja River, which provided, *inter alia*:

> 1.
> Equidistance method to be applied in the Piran Bay, i.e., each point of the borderline should be equally distant from Croatian and Slovenian coasts (centre-line);
>
> 2.
> in the Dragonja river area the borderline runs along the St. Odorik channel by which Dragonja flows into the sea as of 25 June 1991 . . . .[92]

5. Joint/Mixed Diplomatic Commission and Expert Group

63. On 30 July 1993, the Parties signed an Agreement on the Establishment and the Mandate of Joint Bodies for the Identification and Demarcation of the State Border.[93] A Diplomatic Commission for the Identification and Demarcation of the State Border between the Republic of Croatia and the Republic of Slovenia ("Joint/Mixed Diplomatic Commission")[94] was established pursuant to this Agreement in order to conduct the negotiations on the boundaries.

64. The Joint/Mixed[95] Diplomatic Commission established a subsidiary Joint/Mixed Croatian-Slovenian Commission for Border Demarcation, Maintenance and Renewal of the State Border

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91 Standpoints and Conclusions of the National Assembly of the Republic of Slovenia on the Frontier between the Republic of Slovenia and the Republic of Croatia, 26 May 1993, Annex SI-275; Slovenia's Memorial, para. 3.09; Croatia's Counter-Memorial, para. 2.24; Transcript, Day 3, p. 29:8-11.

92 Standpoints of the Republic of Croatia Regarding the Determination of the State Border in the Piran Bay and the Dragonja River Area, Zagreb, 18 November 1993, Annex HR-70; Croatia's Memorial, para. 2.39; Standpoints of the Republic of Croatia concerning the State Frontier in the Bay of Piran and in the Area of the Dragonja River, 18 November 1993, Annex SI-278; *see also* Slovenia's Memorial, para. 3.10; Croatia's Counter-Memorial, para. 2.26.

93 Agreement between the Governments of the Republic of Croatia and the Republic of Slovenia on the Establishment and the Mandate of Joint Bodies for the Identification and Demarcation of the State Border, 30 July 1993, *Official Gazette of the Republic of Croatia (Treaties)*, No. 1/1997, Annex HRLA-63; Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia on the Establishment and Composition of Joint Bodies for the Establishment and Demarcation of the State Border, Čateške Toplice, 30 July 1993, *Official Gazette of the Republic of Slovenia, (International Treaties)*, No. 16/1993, Annex SI-277; Croatia's Counter-Memorial, para. 2.27; Transcript, Day 3, p. 22:4-7.

94 Minutes of the 1st Regular Session of the Joint Croatian-Slovenian Commission for Border Demarcation, Maintenance and Renewal of the State Border (Sremič) [Krško], 14 September 1995, Annex II: Rules of Procedure, Annex HR-75, Annex III: Instructions for the Work of the Joint Expert Group for Collating Non-aligned Cadastral District Borders, Sec. 2.1, Annex HR-75; Transcript, Day 3, p. 23:8-24; *see also* Croatia's Memorial, paras 1.13, 4.18-26,

95 It is noted that, in relation to the Joint/Mixed Diplomatic Commission and its related Expert Group and Border Demarcation Commission, the Parties have proposed slightly different translations of their names, with Croatia proposing to translate the Croatian term "mješovitu" as "Joint"; and Slovenia proposing to

("Joint/Mixed Border Demarcation Commission"). At its meeting on 13-14 September 1995, this subsidiary commission set up an expert group (the "Joint/Mixed Expert Group" or "Expert Group") made up of geodetic and technical experts with the task to identify the contested parts of the land boundary.

65. Within the Joint/Mixed Diplomatic Commission, Slovenia claims that it took the following initial positions:

- balanced alignment of the land boundary
- the integrity of the Bay of Piran, and
- territorial access to the high seas . . . .[96]

66. Slovenia claims that Croatia took the following initial positions:

- to keep all parts it possesses at the land part,
- the strict equidistance line in the Bay of Piran and its continuation until the Osimo boundary in the direction to Gradež,
- a territorial contact with Italy that is as long as possible, and,
- enabling innocent passage for Slovenia through Croatia's territorial sea.[97]

67. Croatia disputes this view of its initial position. While Croatia acknowledges that it sought "to keep all parts it possess[ed] at the land part," there was "no particular need for Croatia to insist on territorial contact with Italy."[98] Croatia believes Slovenia has introduced this position in order to equate it with Slovenia's desire for "territorial access to the high seas."[99] Croatia also disputes Slovenia's characterization that Croatia was "willing to make big concessions on the Bay during the negotiations."[100]

68. On 15 February 1994, at the first meeting of the Joint/Mixed Diplomatic Commission, Slovenia proposed the following with respect to the border in the Dragonja River area and the maritime areas, which was not accepted by Croatia:

> Considering the proposal of the Republic of Croatia that after the delimitation a part of the territory and rights of the Republic of Slovenia as at 25 June 1991 (the territory south of the Dragonja River, a half of the Bay of Piran and control over the access to the high seas) belongs to Croatia and considering that the dissolution of the former SFRY has brought about, in certain aspects, a special delimitation case, the Republic of Slovenia suggests that the two states peacefully define in a treaty that the state border runs in Istria from the Sečovlje

translate the Slovenian "mešano" term as "Mixed". Without prejudice to either Party's position, the translation "Joint/Mixed" is used in the following sections, except when describing either Party's position or documents adduced by a Party, in which case each Party's favoured translation is used.

96 Slovenia's Memorial, para. 3.31.

97 Slovenia's Memorial, para. 3.32.

98 Croatia's Counter-Memorial, paras 2.28-30.

99 Croatia's Counter-Memorial, para. 2.30.

100 Croatia's Counter-Memorial, para. 2.31.

> III cadastral municipality and along the northern coastal part of the Savudrija Promontory; from there on the maritime boundary will be defined in such a way as to enable the Republic of Slovenia to have free exit to the high seas.[101]

69. In 1994, Slovenia adopted a law which declared the settlements Škudelin, Bužin and Škrile on the south bank of the Dragonja River to be part of the Slovenian Municipality of Piran.[102] According to Croatia, this was intended to establish a more favourable position for Slovenia in relation to a future maritime delimitation.[103] In response, the Croatian Parliament adopted a special Declaration condemning the Slovenian law.[104] Slovenia subsequently amended the legislation, suspending its application to the above settlements pending the definition of the border between the Republic of Slovenia and the Republic of Croatia.[105]

70. On 23 February 1995, at the third meeting of the Joint/Mixed Diplomatic Commission, the Joint Minutes adopted the following conclusions emphasised by Slovenia:

> a) The Mixed Diplomatic Commission expressed optimism regarding further definition of the border line on land. The Slovenian side is of the opinion that the boundaries of cadastral municipalities on the day of the declaration of independence of both countries, 25 June 1991, constitute the basic criterion for the definition of the state border along the entire border between the two countries. By contrast, Croatia is of the opinion that boundaries of cadastral municipalities are only one among the essential criteria in the definition of the border line; however, the factual situation as at 25 June 1991, i.e. on the day of the declaration of independence of both countries, is the prevailing factor in defining the state border. The Croatian side again pointed to the issue of the Trdinov vrh or Sveta Gera.
>
> b) As regards the maritime boundary, both delegations agreed that none of the sides may withdraw from the official positions of the Republic of Slovenia and the Republic of Croatia represented so far and contained in the Memorandum on the Bay of Piran of 7 April 1993 and the positions of the Republic of Croatia on the definition of the state border in the Bay of Piran and in this regard in the basin of the Dragonja River of 18 November 1993. The Diplomatic Commission decided that negotiations on the future course of the border need to be continued.[106]

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101 Draft Conclusions of the Slovenian Delegation of the Mixed Diplomatic Commission for the Border between the Republic of Slovenia and the Republic of Croatia, 4 February 1994, Annex SI-279; *see also* Slovenia's Memorial, para. 3.34.

102 Law on the Establishment of Municipalities and the Determination of Their Territories, *Official Gazette of the Republic of Slovenia*, No. 60/1994, Annex SI-750; *see also* Croatia's Memorial, para. 2.30.

103 Croatia maintains these settlements are in Croatia; Croatia's Memorial, para. 2.30 and Chapter 5.

104 Declaration on the Condemnation of the Unilateral Act of the Parliament of the Republic of Slovenia, Parliament of the Republic of Croatia, *Official Gazette of the Republic of Croatia*, No. 71/1994, Annex HR-71.

105 Croatia's Memorial, para. 2.31, *referring to* Law on Changes and Amendments to the Law on the Establishment of Municipalities and the Determination of Their Territories, *Official Gazette of the Republic of Slovenia*, No. 69/1994, Article 2 and Article 6(a).

106 Joint Minutes of the third meeting of the Mixed Diplomatic Commission for the Establishment and Demarcation of the State Border between the Republic of Slovenia and the Republic of Croatia Otočec (Slovenia), 23 February 1995, Annex SI-285; Slovenia's Memorial, para. 3.36.

71. Both Parties note that on 20 September 1995, at a meeting of the two Prime Ministers, Slovenia proposed that "a small part of the Bay of Piran" be allotted to Croatia, a proposal which in Croatia's view required that "nearly the entire Bay of Piran be accorded to Slovenia, as well as a territorial corridor through the territorial sea of Croatia, thus providing Slovenia with territorial contact with the high seas."[107] The Slovenian proposal was rejected by Croatia.[108] According to Slovenia, Croatia proposed that Slovenia have two-thirds of the Bay.[109]

72. In the course of bilateral negotiations between 1993 and 1995, including at Prime Minister level, the Parties concluded two treaties on Marine Fisheries, in 1994 and 1995, allowing Slovenian fishermen to fish in Croatian territorial waters under certain conditions.[110]

73. On 20 December 1996, the Expert Group issued an official report signed by both Parties ("1996 Report")[111] and approved by the Joint/Mixed Border Demarcation Commission.[112] This report concluded that 9% (or 60 km) of the Parties' common land boundary was "unaligned", meaning that "cadastral district boundaries were separated by more than 50 m."[113] The Border Demarcation Commission also prepared cartographic material which in its view was "sufficient for the preparation of the agreement on common State boundary."[114]

74. In respect of the 1996 Report, Croatia submits that only "[a]long the approximately 60 km where the Parties' cadastral district boundaries were found not to be aligned, the international boundary

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107 Croatia's Memorial, para. 2.41.

108 Croatia's Memorial, para. 2.41, *referring to* Letter of the Chairman of the State Border Commission of the Republic of Croatia, Dr. Hrvoje Kačič, to Dr. Iztok Simoniti, No. 50408-95-1, Zagreb, 21 September 1995, Annex HR-76.

109 Slovenia's Memorial, para. 3.37; Transcript, Day 3, p. 30:9-18.

110 Slovenia's Memorial, paras 9.127-32.

111 Joint Croatian-Slovenian Expert Group for Collating Unaligned Borders of Cadastral Districts, *State Border, Republic of Croatia – Republic of Slovenia: Joint Report on the Results of the Collation of the Records of Cadastral District Borders in Areas of Greater Discrepancies*, 20 December 1996, Annex HR-80; Joint Report of the Mixed Slovene-Croatian Expert Group for the Comparison of Cadastral Boundaries Displaying Discrepancies, Zagreb, 20 December 1996, Annex SI-293; *see also* Croatia's Memorial, para. 1.13; Slovenia's Memorial, para. 3.38.

112 Minutes of the 3rd Regular Session of the Joint Croatian-Slovenian Commission for Demarcation, Maintenance and Renewal of the State Border, Čatež ob Savi, 7 March 1997, Annex HR-81; *see also* Croatia's Memorial, paras 2.32, 4.25; Slovenia's Memorial, para. 3.38; Transcript, Day 1, p. 68:19-23.

113 Mixed Slovenian-Croatian Expert Group for the comparison of cadastral boundaries displaying discrepancies, State Border Republic of Slovenia—Republic of Croatia, Joint Report on the results of the comparison of cadastral boundaries in the areas displaying significant discrepancies, Zagreb, 20 December 1996, point 2, Annex SI-293; Joint Minutes of the third meeting of the Mixed Diplomatic Commission for the Establishment and Demarcation of the State Border between the Republic of Slovenia and the Republic of Croatia (hereinafter referred to as the Diplomatic Commission), Otočec (Slovenia), 23 February 1995, Annex SI-285; Transcript, Day 1, pp. 68:24-69:7; *see also* Croatia's Memorial, para. 2.31; Slovenia's Memorial, paras 3.38, 5.74.

114 Slovenia's Memorial, para. 3.38.

was disputed."[115] Slovenia objects to Croatia's reliance upon the 1996 Report. In its view, "this report, of a technical nature, was merely one step in the efforts to reach political agreement on the course of the land boundary."[116] According to Slovenia, the Expert Group did not compare the cadastral records of the entire land boundary.[117] Slovenia asserts that the Expert Group's task was instead "to identify (only) the cadastral boundary discrepancies," as the body "had no mandate or power to identify 'those parts of the border that, on the date of independence, were agreed, and those parts that were in dispute', as Croatia states."[118] Slovenia argues in this regard that "under the 1993 Agreement the power to determine the boundary remained with the two governments."[119] Croatia, however, maintains that the 1996 Report resulted from a process in which "the Parties themselves, following independence, jointly compared their cadastral boundaries precisely in order to determine the disputed and agreed parts of the boundary."[120]

75. At a meeting in March 1997, the Joint/Mixed Diplomatic Commission noted that the remaining discrepancies "could not be settled solely by the principles of geodetic alignment."[121] Following an unsuccessful attempt to reach agreement at the Foreign Ministers' level in October 1997, the Joint/Mixed Diplomatic Commission met one last time in July 1998.[122]

76. During this final meeting, the Joint/Mixed Diplomatic Commission adopted minutes with "Agreed Conclusions". Slovenia cites those Conclusions as evidence that no agreement on the boundary resulted from the process.[123] According to Slovenia, "[i]t was envisaged that the following meeting of the Mixed Diplomatic Commission would be devoted to the maritime issues," but "it was not possible even to agree on the agenda of the next meeting of the Mixed

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115 Croatia's Memorial, para. 4.3; Croatia's Reply, para. 2.18.

116 Slovenia's Counter-Memorial, paras 2.12, 2.20; Transcript, Day 3, pp. 22:20-23:3, 32:1-23.

117 Transcript, Day 3, p. 89:6-9; Transcript, Day 8, pp. 88:18-91:17.

118 Slovenia's Counter-Memorial, para. 2.20; Transcript, Day 8, p. 91:14-17.

119 Transcript, Day 3, pp. 31:22-26, 33:5-6.

120 Croatia's Reply, para. 2.5; Transcript, Day 5, p. 150:5-17.

121 Croatia's Memorial, para. 2.32; Slovenia's Counter-Memorial, paras 2.21-23; Transcript, Day 1, pp. 88:26-89:21.

122 Joint Minutes and Joint Statement of the 4th Meeting of the Mixed Diplomatic Commission for the Definition and Demarcation of the State Border between the Republic of Croatia and the Republic of Slovenia, 21 July 1998, Zagreb, Annex SI-298; *see also* Croatia's Memorial, para. 2.32; Slovenia's Memorial, para. 3.41.

123 Transcript, Day 2, p. 24:1-5, *referring to* Joint Minutes and Joint Statement of the 4th meeting of the Mixed Diplomatic Commission for the definition and demarcation of the state border between the Republic of Croatia and the Republic of Slovenia, 21 July 1998, Annex SI-298.

Diplomatic Commission – Croatia cancelled the meeting called by Slovenia just a few hours before the meeting was due to take place."[124]

6. The 1997 Agreement on Local Border Traffic and Cooperation

77. On 28 April 1997, the Parties concluded an Agreement on Local Border Traffic and Cooperation ("SOPS/LBTA"),[125] for a period of three years, to be extended tacitly for each subsequent year.[126] The Agreement concerned both the land border and the maritime areas.

78. With respect to those areas, Article 47(1) of the SOPS/LBTA provides as follows:

> Each Contracting Party shall, with a view to ensuring unhindered continued cooperation and development in border sea fishing, reciprocally facilitate fishing in its border area in the sea, as provided for in Article 1, Paragraph 4, for fishers having permanent residence or the seat of a company in the border area of the other Contracting Party.[127]

79. Pursuant to Articles 1(3) and 1(4) of SOPS/LBTA, the SOPS/LBTA applies to the following area:

> 3. The border area at sea under this Agreement shall be the sea area under sovereignty of each of the Contracting Parties, situated to the north of the 45 degrees and 10 minutes parallel north latitude along the west Istrian coast, from the outer limit of the territorial sea of the Republic of Croatia, where this parallel touches the land of the west Istrian coast (the cape Grgatov rt Funtana).
>
> 4. The border area at sea for sea fishing in the border area shall be limited to the respective territorial seas of the Contracting Parties within the border area at sea under Paragraph 3 hereof. The sea fishing area provided for under the SOPS, of approximately 1,200 sq km.[128]

80. Article 59 of the SOPS/LBTA provides:

> The provisions of this Agreement do not in any way prejudice the determination and demarcation of the state border between the Contracting Parties.[129]

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124 Slovenia's Counter-Memorial, para. 2.32.

125 Agreement between the Republic of Croatia and the Republic of Slovenia on Local Border Traffic and Cooperation (LBTA), done in Ljubljana on 28 April 1997, *Official Gazette of the Republic of Croatia (Treaties)*, No. 15/1997, Annex HRLA-64; Agreement between the Republic of Slovenia and the Republic of Croatia on Border Traffic and Cooperation (SOPS), Annex SI-295; Croatia's Counter-Memorial, para. 2.36; Transcript, Day 4, p. 33:1-3.

126 Slovenia's Memorial, para. 9.135, *referring to* SOPS, Article 60.

127 Transcript, Day 4, p. 33:6-9.

128 Croatia's Memorial, para. 2.42; Slovenia's Memorial, para. 9.137 (Slovenia's translation quoted); Transcript, Day 4, p. 33:9-15.

129 Agreement between the Republic of Slovenia and the Republic of Croatia on Border Traffic and Cooperation, 28 April 1997, Article 59, Annex SI-259.

81. Slovenia argues that the SOPS/LBTA nevertheless remains relevant in the present dispute on the basis of its recognition of a Croatian-Slovenian "border area at sea."[130] Slovenia asserts that it "sheds light on what the parties considered to be the relevant coasts for their maritime activities."[131] Croatia objects to Slovenia's reliance on the SOPS/LBTA to establish the area relevant to delimitation. This objection is based on the fact that Article 59 of the SOPS/LBTA provides that the agreement "is expressly without prejudice to delimitation."[132]

82. The SOPS/LBTA provisions on land were swiftly implemented.[133] However, the Parties faced difficulties in implementing the fisheries provisions.[134] As a result of those difficulties, incidents occurred in July, August and September 2002.[135] In an effort to remedy the situation, the Parties managed to agree on a provisional implementation of the SOPS/LBTA (Arrangement on the Temporary Implementation of Articles 47 and 52 of SOPS/LBTA).[136] This arrangement applied until 30 April 2004.[137]

83. In 2004, following Slovenia's accession to the European Union ("EU"), the EU informed Slovenia that the EU had competence over the fishing provisions of SOPS/LBTA.[138] The Parties' discussions over implementation of the SOPS/LBTA thereafter continued with the European Commission. In 2005-2006, the European Commission proposed draft implementing rules.[139] In 2007, it appointed two fisheries experts to present recommendations on the implementation.[140]

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130 Slovenia's Counter-Memorial, para. 2.59.

131 Transcript, Day 4, p. 33.

132 Transcript, Day 5, p. 110:1-8.

133 Slovenia's Memorial, para. 9.140.

134 Croatia's Memorial, para. 2.44; Slovenia's Memorial, paras 9.140 *et seq*.

135 Slovenia's Memorial, para. 9.141.

136 Arrangement on the temporary regime for the implementation of provisions under Articles 47 to 52 of the Agreement on Border Traffic and Cooperation, 10 September 2002, Annex SI-328; Background Paper on the Fisheries Aspects of the Agreement between the Republic of Croatia and the Republic of Slovenia on Local Border Traffic and Co-operation (LBTA), Croatian Paper (September 2007), Annex HR-113; *see also* Croatia's Memorial, para. 2.44; Slovenia's Memorial, para. 9.142.

137 Croatia's Memorial, para. 2.44 (stating May 2004 as the relevant date); Slovenia's Memorial, para. 9.145; Transcript, Day 8, p. 53:6-11.

138 Letter from the Directorate-General for Fisheries of the European Commission to the Ministry of Agriculture, Forestry and Food of Slovenia, No. FISH.B.3/MC/geD(2004)13677, 26 August 2004, Annex SI-348.

139 Slovenia's Memorial, para. 9.150.

140 Recommendation on Implementation of the Fisheries Provisions of the Agreement between the Republic of Slovenia and the Republic of Croatia on Border Traffic and Cooperation (LBTA) by Mr. Stefan de Maré and Mr. Olu Poulsen, Brussels, 14 March 2008, Annex HR-114.

84. Finally, according to Croatia, it was agreed during its EU accession negotiations that the fishing rights of the Parties under the SOPS/LBTA, would be included in the relevant EU fisheries regulations and that they would be implemented as of the date the Award delivered by this Tribunal enters into force.[141] Slovenia, however, "does not agree that the SOPS fisheries provisions have been subsumed in Croatia's EU Accession Treaty," and asserts that "they are separate legal instruments which provide separate legal bases for the protection of the parties' mutual fishing rights."[142]

85. As to the further relevance of the SOPS/LBTA to the present dispute, Slovenia disputes Croatia's characterization of the SOPS/LBTA as an agreement dividing fishing areas using a median line.[143] Slovenia instead argues that it "never agreed to the application of equidistance, whether in the context of the SOPS Agreement or otherwise."[144]

7. Negotiations in 1998-1999

86. Between 1998 and 1999, the Parties resumed bilateral negotiations at the Foreign Ministers' level. According to Slovenia, the Ministers had by November 1998 "agreed that 91.1% of the land boundary was coordinated."[145] At the meetings, the Parties maintained their diverging views as regards the Dragonja River area and the maritime issues.[146] Moreover, Slovenia asserts that it "clearly expressed" that its territorial access to the high seas was "of utmost importance to Slovenia."[147] According to Slovenia, the outcome of these negotiations was "inconclusive."[148]

87. Croatia asserts that during the 1998-1999 negotiation period, "Slovenia staged various political events in the vicinity of the common border with Croatia along the Dragonja River."[149] Croatia

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141 Transcript, Day 5, p. 111:5-8; Croatia's Memorial, para. 2.46, *referring to* Treaty between the Member States of the European Union and the Republic of Croatia Concerning the Accession of the Republic of Croatia to the European Union, *Official Gazette of the Republic of Croatia (Treaties)*, No. 2/2012, Annex III, 5. Fisheries, Annex HRLA-78.

142 Transcript, Day 8, pp. 52:3-53:5; Slovenia's Memorial, para. 9.153, *referring to* Common Position, CONF/HR-10/11, 6 June 2011, Chapter 13 – Fisheries, pp. 3, 14, Annex SI-424; Annex III, Point 5 to the Accession Treaty concerning the accession of the Republic of Croatia to the European Union, Annex SI-428.

143 Slovenia's Counter-Memorial, para. 2.57, *citing* Croatia's Memorial, para. 2.44.

144 Slovenia's Counter-Memorial, para. 2.57.

145 Slovenia's Memorial, para. 3.42; Transcript, Day 1, p. 69:8-12.

146 Slovenia's Memorial, paras 3.42-44.

147 Slovenia's Memorial, para. 3.45.

148 Transcript, Day 3, p. 24:9-13.

149 Croatia's Counter-Memorial, para. 2.33.

characterizes this as an attempt to "promote a 'historical' justification for the novel expansion of its territorial claims."[150]

88. On 26 March 1999, the Croatian Parliament adopted a Declaration on the Inter-State Relations between Croatia and Slovenia.[151] This set out possible solutions for the Dragonja River area and the delimitation of the Bay and required the Croatian Government to submit to parliamentary approval, prior to signature, any final draft border agreement with Slovenia.[152]

89. These negotiations produced no agreement on the land boundary. According to Croatia, "the territorial disputes identified by the Joint Expert Report remain unsettled."[153]

90. Nor was agreement achieved on the maritime issues. The Croatian side successively proposed to divide the Bay in a ratio 1/3:2/3, and then 1/4:3/4, in favour of Slovenia. Both proposals were rejected by the Slovenian side.[154] Similarly, no agreement was reached on Slovenia's territorial access to high seas. In the course of these meetings, the Croatian Foreign Minister took the view that the dispute should be submitted to third-party dispute settlement.

91. In 1999, the Parties agreed to mediation of the disagreement over the delimitation of the territorial sea by Dr. William Perry, former U.S. Secretary of Defence.[155] The Parties did not reach agreement and no further meetings were held in this format after exchanges in July and November 1999.[156] Slovenia notes that on 7 June 1999, in the context of the mediation, Croatia had submitted a document pursuant to which it was prepared to adjust its claim as regards an equidistance line in the Bay. According to Slovenia, Croatia had recognized special circumstances within the

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150 *Ibid*.

151 Declaration on the Inter-State Relations between the Republic of Croatia and the Republic of Slovenia, Croatian State Parliament, *Official Gazette of the Republic of Croatia*, No. 32/1999, Article 11, Annex HR-85; Croatia's Counter-Memorial, para. 2.33.

152 Croatia's Memorial, para. 2.33; Para. 11 of the Declaration reads: "11. Before signing a maritime and land border agreement the Croatian Government shall submit to the House of Representatives of the Croatian Parliament the final draft of the agreement for approval"; Transcript, Day 5, p. 16:8-18.

153 Croatia's Memorial, para. 4.26.

154 Slovenia's Memorial, paras 3.42-45; Transcript, Day 3, pp. 30:9-31:7; Transcript, Day 5, pp. 14:23-15:21.

155 Croatia's Memorial, para. 2.47; Slovenia's Memorial, paras 3.46-54; Croatia's Counter-Memorial, para. 2.35; Transcript, Day 3, p. 24:14-18.

156 Croatia's Memorial, para. 2.47; Slovenia's Memorial, para. 3.53; *see also* Reply of the Republic of Croatia to the "Positions of the Republic of Slovenia on the Delimitation of the Maritime Boundary between the Republic of Slovenia and the Republic of Croatia", 27 July 1999, Annex SI-308; Reply of the Republic of Slovenia to the "Reply of the Republic of Croatia to the 'Positions of the Republic of Slovenia on the Delimitation of the Maritime Boundary between the Republic of Slovenia and the Republic of Croatia'", 8 November 1999, Annex SI-309.

meaning of Article 15 of the UN Convention on the Law of the Sea ("UNCLOS"[157]),[158] and proposed as an alternative to delimitation the joint use and management of the Bay. In this document, according to Slovenia, Croatia also argued that a corridor to the high seas was not founded in international law.[159] Slovenia further notes that Croatia had offered a regime substantially closer to that of the high seas.[160] Slovenia considered that the Bay retained the status of internal waters and, because the previously federal territorial sea had not been divided between the republics, remained a maritime area held in common by the two newly independent States until they agreed on its division.[161]

8. The 2001 Drnovšek-Račan Agreement

92. Negotiations at Prime Ministers' level intensified in 2001. On 20 July 2001, the Parties initialled the Draft Drnovšek-Račan Agreement on the Common State Border (2001) ("Drnovšek-Račan Agreement").[162] The Committee on International Relations of the National Assembly of the Slovenia approved the Drnovšek-Račan Agreement on 19 July 2001.[163] However, Croatia emphasises that the draft text was rejected by the Foreign Affairs Committee of the Parliament of Croatia[164] even before it had been submitted to the Croatian Parliament for approval.[165]

93. According to Slovenia, the Drnovšek-Račan Agreement "has considerable importance" as "the most highly developed effort of the Parties to achieve a 'comprehensive' solution."[166] Slovenia emphasises that the Drnovšek-Račan Agreement "did not reflect the *status quo* (*uti possidetis*) as of 25 June 1991; instead, it represented a negotiated compromise, which took into account and

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157 United Nations Convention on the Law of the Sea, done in Montego Bay on 10 December 1982, 1833 U.N.T.S. 3.

158 Positions of the Republic of Croatia on the Delimitation at Sea with the Republic of Slovenia, 7 June 1999, Annex SI-306; Slovenia's Memorial, para. 3.50.

159 *Ibid*.

160 *Ibid*.

161 Positions of the Republic of Slovenia on the Delimitation of the Maritime Boundary between the Republic of Slovenia and Republic of Croatia, 11 June 1999, Annex SI-307; Slovenia's Memorial, para. 3.51.

162 Draft Agreement between the Republic of Croatia and the Republic of Slovenia on the Common State Border, 2001, Annex HR-86; Croatia's Memorial, para. 2.48; Treaty between the Republic of Slovenia and the Republic of Croatia on the Common State Border, Annex SI-316; Slovenia's Memorial, para. 3.57; *see also* Croatia's Counter-Memorial, para. 2.37; Slovenia's Counter-Memorial, paras 2.33-35.

163 Decision by the Committee on International Relations of the National Assembly, No. 212-08/92-5/59, 25 July 2001, Annex SI-317; Slovenia's Memorial, para. 3.58.

164 Croatia's Memorial, para. 2.49.

165 Declaration on Inter-State Relations between the Republic of Croatia and the Republic of Slovenia, Croatian State Parliament, *Official Gazette of the Republic of Croatia*, No. 32/1999, Annex HR-85.

166 Slovenia's Memorial, para. 3.60; Transcript, Day 3, pp. 4:12-15, 34:1-12.

balanced the interests of both States on land as well as at sea."[167] According to Slovenia, the Drnovšek-Račan Agreement "reflected a global negotiated compromise on land and on sea and was the definitive treaty text that resulted from nine years of intensive negotiations and that both States considered as equitable at the time."[168] Slovenia argues that "[w]ith the initialling of the 2001 Treaty, the negotiations were regarded as concluded."[169]

94. The Slovenian version of the text of the Drnovšek-Račan Agreement provided, *inter alia*:

> Article 4
>
> Junction of the Territorial Sea of the Republic of Slovenia with the High Seas
>
> [. . .]
>
> (2) The width of the junction of the territorial sea of the Republic of Slovenia with the high seas shall equal the distance from point B referred to in Article 3, paragraph 1, of this Treaty,[170] to the Madona promontory.[171]

95. The Croatian version of the text of the Drnovšek-Račan Agreement provided, *inter alia*:

> Article 4
>
> Link of the Republic of Slovenia's Territorial Sea with the High Seas
>
> [. . .]
>
> (2) The link of the Republic of Slovenia's territorial sea with the high seas has a width which equals the distance between point B, as defined in Article 3, paragraph 1 of the present Treaty, and Cape Madona.[172]

96. Croatia disputes several characterizations made by Slovenia of the Drnovšek-Račan Agreement. It notes that the Ministerial discussion's goal was to reach a "package" solution on "bilateral issues that went beyond just the issue of maritime and land delimitation."[173] It also notes that the ratification of the SOPS/LBTA was not part of the deal, but rather "a unilateral act of Slovenia whereby it simply confirmed its readiness to be bound by a treaty from which it benefited."[174] Furthermore, Croatia maintains that the Agreement itself, in addition to not having been approved

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167 Slovenia's Counter-Memorial, para. 2.34; Transcript, Day 3, p. 4:15-21.

168 Slovenia's Counter-Memorial, para. 2.47.

169 Transcript, Day 3, pp. 33:24-34:3.

170 The Tribunal understands that this is a point one-fourth of the distance between the northernmost points of the Savudrija and Madona promontories.

171 Treaty between the Republic of Slovenia and the Republic of Croatia on the Common State Border, Article 4 (2), Annex SI-316; Transcript, Day 3, pp. 37:20-38:6.

172 Draft Agreement between the Republic of Slovenia and the Republic of Croatia on the Common State Border, Article 3(1), Annex HR-86; Transcript, Day 3, pp. 37:20-38:6. The Slovenian term "Stik" in the authentic version was translated into English as "Junction" in the Slovenian version, while the Croatian term "Dodir" was translated into English as "Link" in the Croatian version.

173 Croatia's Counter-Memorial, para. 2.38; Transcript, Day 5, pp. 18:6-19:7, 21:9-22:8.

174 Croatia's Counter-Memorial, para. 2.39.

by the Croatian Parliament, was merely a draft text that had not been signed by Croatia, and had merely been initialled by the head of the Slovenian delegation as a "final working adjustment" ("končna delovna uskladitev" in Slovenian).[175]

97. Croatia asserts that "in face of Slovenia's increasingly extreme positions with regard to the land and maritime boundary . . . it was not possible to reach agreement,"[176] while Slovenia contends that several incidents took place at sea as a result of Croatia's efforts "to enforce its own view of the maritime boundary (an equidistance line)."[177] Slovenia asserts that "after 2001, Croatia's position was that the dispute should be referred to international adjudication."[178] Croatia asserts that "for several years [after 1999], bilateral efforts to resolve the dispute over the boundary continued," ultimately failing because of the irreconcilable negotiating positions of the Parties.[179] According to Slovenia, bilateral discussions after 2001 were devoted to "the possible submission of the dispute to third party settlement," and did not constitute substantive negotiations.[180] On this basis, Slovenia asserts that the legislation adopted by the respective Parties after 2001 was irrelevant to the boundary negotiating process.[181]

9. Negotiation of the Arbitration Agreement

98. Following negotiations facilitated by the European Commission, Croatia and Slovenia reached a compromise to submit the dispute to arbitration by concluding the Arbitration Agreement on 4 November 2009.

99. The Parties hold different views on the circumstances of the negotiation of the Arbitration Agreement. Thus, Croatia takes the following position in its conclusions:

> e. Croatia has consistently called for the dispute to be settled by an international judicial body applying international law. Slovenia was reluctant to follow this course, and in 2008 initiated an open blockade of Croatia's EU accession negotiations, notwithstanding the fact that the bilateral boundary issue had no place in the accession process.
>
> f. The EU supported initiatives to end the Slovenian blockade, to enable the continuation of the Croatian accession process in early 2009.
>
> g. In September 2009 Slovenia agreed to lift its objection to the accession process and negotiations on the settlement of the border dispute by arbitration continued. The Parties

175 Croatia's Counter-Memorial, paras 2.40-44; Transcript, Day 5, pp. 17:3-7, 20:16-21:8.

176 Croatia's Memorial, para. 2.34.

177 Slovenia's Counter-Memorial, para. 2.49; Transcript, Day 3, p. 3:6-12.

178 Slovenia's Counter-Memorial, para. 2.48, *citing* Croatia's Memorial, paras 2.59-60.

179 Croatia's Memorial, para. 2.34.

180 Slovenia's Counter-Memorial, para. 2.48.

181 Slovenia's Counter-Memorial, para. 2.53.

> agreed that Croatia would be allowed to make an interpretative declaration to the effect that nothing in the Agreement should be understood by the Tribunal as expressing or implying any consent to Slovenia's claim to "territorial contact" with the high seas.[182]

100. Further, in Croatia's view, the Arbitration Agreement "provides for the removal of Slovenia's blockade of Croatia's EU accession negotiations."[183] It considered that "it has been important for Croatia to ensure that the conduct of these proceedings, as well as the outcome, should be delinked from the accession process."[184]

101. For its part, Slovenia describes the negotiations of the Arbitration Agreement as follows:

> - Both States showed a certain flexibility regarding the form of third party settlement: while Slovenia preferred mediation or conciliation, Croatia preferred to settle the dispute before the International Court of Justice in accordance with Article 38(1) of the ICJ Statute. The compromise was to agree on arbitration but taking into consideration also equity and other grounds, not only international law, to achieve a fair and just result.
> - The conclusion of the Arbitration Agreement was the result of a strong commitment of the Slovenian and Croatian Prime Ministers to securing their countries' vital interests. For Slovenia the vital interest is reflected in Articles 3 and 4 of the Arbitration Agreement as they were proposed by Rehn in June, including Slovenia's junction to the High Sea. For Croatia the vital interest was that Slovenia consents to the continuation of Croatian EU accession negotiations and that the arbitral award not be delivered before Croatia became a Member of the European Union.[185]

102. In 2002, Croatian Prime Minister Ivica Račan proposed to Slovenian Prime Minister Janez Drnovšek binding arbitration as a solution to the border dispute.[186] Between 2003 and 2005, Croatia proposed several times that the dispute be resolved by international adjudication at the International Court of Justice ("ICJ"),[187] whereas Slovenia "referred to Article 33 of the Charter of the United Nations, and its preference to settle the dispute through diplomatic means, as the

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182 Croatia's Memorial, para. 2.85.

183 Croatia's Memorial, para. 1.10.

184 *Ibid*.

185 Slovenia's Memorial, para. 3.105.

186 Letter from Prime Minister of the Republic of Croatia, Mr. Ivica Račan, to Prime Minister of the Republic of Slovenia, Dr. Janez Drnovšek, Zagreb, 3 September 2002, Annex HR-88; Croatia's Memorial, para. 2.59.

187 Letter from the Prime Minister of the Republic of Croatia, Mr. Ivica Račan, to Prime Minister of the Republic of Slovenia, Dr. Janez Drnovšek, Zagreb, 3 September 2002, Annex HR-88; *Note verbale* No. 5893/03 from the Ministry of Foreign Affairs of the Republic of Croatia to the Embassy of the Republic of Slovenia, Zagreb, 18 November 2003, Annex HR-91; *Note verbale* from the Ministry of Foreign Affairs and European Integration of the Republic of Croatia to the Embassy of the Republic of Slovenia, No. 170/06, Zagreb, 12 January 2006, Annex HR-104; *Note verbale* from the Ministry of Foreign Affairs and European Integration of the Republic of Croatia to the Embassy of the Republic of Slovenia, No. 171/06, Zagreb, 12 January 2006, Annex HR-103; *see also* Croatia's Memorial, para. 2.60; Slovenia's Memorial, para. 3.73.

dispute involved Slovenia's vital interests."[188] In 2006, Croatia repeated its invitation to refer "the dispute over the state border delimitation at sea to an international judicial body."[189]

103. In 2007, the Parties reached agreement in principle that the territorial and maritime disputes should be referred to the ICJ.[190] According to Slovenia, a Mixed Group of Legal Experts was established in order to conclude a special agreement to that effect, but the three ensuing meetings between 2008 and 2009 did not result in such an agreement.[191] At the first meeting in June 2008, the Parties exchanged separate drafts of a Special Agreement on the submission of the border dispute to the ICJ.[192] At the two last meetings, Slovenia proposed that because the "applicable principles [are] broader than the pure application of international law" (invoking Article 38(2) of the Statute of the International Court of Justice), the dispute should be referred to *ad hoc* arbitration; this proposal was rejected by Croatia.[193] In March 2009, Slovenia's new Prime Minister, Borut Pahor, "terminated the functions" of the Slovenian members of the Mixed Group of Legal Experts, because, Slovenia explains, "the report [of the latter group] assessed that under the given mandate no progress could be achieved."[194]

104. In December 2008, Slovenia (a member of the EU since May 2004)[195] raised reservations to seven of the negotiating chapters at the Intergovernmental Accession Conference of the EU with

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188 Slovenia's Memorial, para. 3.73.

189 *Note verbale* from the Ministry of Foreign Affairs and European Integration of the Republic of Croatia to the Embassy of the Republic of Slovenia, No. 170/06, Zagreb, 12 January 2006, Annex HR-104; *Note verbale* from the Ministry of Foreign Affairs and European Integration of the Republic of Croatia to the Embassy of the Republic of Slovenia, No. 171/06, Zagreb, 12 January 2006, Annex HR-103; Croatia's Memorial, para. 2.60.

190 Croatia's Memorial, para. 2.62; Slovenia's Memorial, para. 3.76, Statements by Prime Ministers of the Republic of Croatia, Dr. Ivo Sanader, and the Republic of Slovenia, Mr. Janez Janša, Bled, 26 August 2007, Annex HR-112; Statement of the Prime Minister of the Republic of Slovenia, Janez Janša, after the meeting with the Prime Minister of the Republic of Croatia, Ivo Sanader, Bled, 26 August 2007 (Transcription), Annex SI-366; Croatia's Counter-Memorial, paras 2.51-52.

191 Slovenia's Memorial, paras 3.77-79.

192 Slovenia's Memorial, para. 3.78, *referring to* Special Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia on the Submission of the Boundary Dispute between the two States to the International Court of Justice, Draft Slovenian text, Annex SI-371 and Special Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia on the Submission of the Boundary Dispute between the two States to the International Court of Justice, Draft Croatian text, Annex SI-372.

193 Slovenia's Memorial, para. 3.79.

194 Slovenia's Memorial, para. 3.79; Croatia's Memorial, para. 2.62; Croatia's Counter-Memorial, paras 2.51-52.

195 Croatia's Memorial, para. 2.63 n.69: "Croatia supported the Slovene accession process and did not seek a final delimitation of its borders before Slovenia's accession. Slovenia thus became a Member State of the EU before any boundary agreement was signed with Croatia and while continuing to reject Croatian proposals to submit the dispute for international adjudication." *See also* Slovenia's Memorial, para. 9.147.

Croatia, on the basis that "in its negotiating positions the Croatian government has been referring to legal acts which – directly or through implementing regulations – prejudice the definition of the border between Slovenia and Croatia."[196]

105. Croatia expressed readiness to provide "a guarantee that nothing submitted by Croatia to the EU during the accession process would be used to prejudice the final delimitation between the two States,"[197] and in November-December 2008 responded to the proposal of the French Presidency of the EU Council that the Parties exchange letters to a similar effect.[198] The proposed assurances were rejected by Slovenia, which considers that the "proposed texts did not meet Slovenian concerns."[199]

106. In January 2009, the European Commissioner for Enlargement, Mr. Olli Rehn ("Commissioner Rehn"), launched an initiative to facilitate the resolution of the border dispute,[200] proposing that a Senior Experts Group ("SEG") set up by the Parties resolve the border dispute and make recommendations that the Parties would be "committed to respect."[201] The proposal was rejected by Croatia which maintained its position that the dispute be resolved at the ICJ in accordance with international law and considered that "the task of the SEG should be limited to mediating the negotiations on a Special Agreement to submit the dispute to the [ICJ]."[202]

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196 Information on Prejudices in Certain Negotiating Chapters of Accession Negotiations for Croatia's Membership of the EU, Ministry of Foreign Affairs of the Republic of Slovenia, Ljubljana, 18 December 2008, p. 5, Annex HR-119; Croatia's Memorial, para. 2.63; Slovenia's Memorial, para. 3.81; Press Release of Slovenian Ministry of Foreign Affairs, *available at* <www.mzz.gov.si/nc/en/newsroom/news/article/141/25059/>, Annex SI-374; Information on prejudices in certain negotiating chapters of accession negotiations for Croatia's membership of the EU (18 December 2008), Annex SI-375.

197 Croatia's Memorial, para. 2.64.

198 Croatia's Memorial, para. 2.64; Slovenia's Memorial, para. 3.81; Draft Letter from the Presidency of the EU Council to Croatia, and Draft Reply from Croatia to the Presidency of the EU Council, 15 December 2008, Annex HR-118, which read, *inter alia*: "These Croatian and EU documents and positions produced and submitted in the accession negotiations cannot in any way prejudice the final resolution of the border issue between Slovenia and Croatia."

199 Slovenia's Memorial, para. 3.81.

200 Croatia's Memorial, para. 2.65; Slovenia's Memorial, para. 3.82; Basic Elements for a Joint Statement on European Facilitation on the Border Issue between Slovenia and Croatia, 26 January 2009, Annex HR-120; Basic Elements for a Joint Declaration on European Facilitation on the Border Issue between Slovenia and Croatia, 26 January 2009, Annex SI-378.

201 Basic Elements for a Joint Statement on European Facilitation on the Border Issue between Slovenia and Croatia, 26 January 2009, Annex HR-120; Basic Elements for a Joint Declaration on European Facilitation on the Border Issue between Slovenia and Croatia, 26 January 2009, Annex SI-378. *See also* Slovenia's Memorial, para. 3.82: "Thus, from the outset of the Rehn process the agreement for arbitration was linked to the lifting of Slovenia's reservations as regards Croatia's accession negotiations."

202 Slovenia's Memorial, para. 3.83.

107. In February 2009, Commissioner Rehn proposed that the SEG resolve the border issue "based upon principles of international law."[203] At the second trilateral meeting on 10 March 2009, Croatia insisted that the SEG have only a procedural role in assisting the Parties to conclude an agreement to submit the dispute to the ICJ, while Slovenia maintained its view that the role of the SEG should be to resolve the dispute. [204] According to Slovenia, as the dispute had become "highly politicized," the SEG's final solution must be fair and should take into account "(1) the territorial status quo as of 25 June 1991; (2) special – including historic – circumstances; (3) vital interests of the countries concerned; and (4) any significant substantial common achievements made so far."[205]

108. At the third trilateral meeting on 17 March 2009, the Parties agreed in principle to European facilitation, to be provided by a senior experts' group, in order to solve the border issue.[206] According to Slovenia, the Parties also agreed at the meeting that Article 33 of the Charter of the United Nations was the basis of the further trilateral discussions, that "unblocking" of Croatia's accession negotiations would be a key element in the final agreement, and that the Parties would sign a joint declaration to the effect that the situation on 25 June 1991 would not be prejudiced.[207] In the resulting Draft Agreement on Arbitration ("Third Proposal of Commissioner Rehn"), the SEG was to arbitrate the dispute.[208] At the fourth trilateral meeting, Slovenia stated that it was open to considering a resolution of the dispute through legal rather than diplomatic means. However, its main reservation concerned the provision on Applicable Law, taking the position that the dispute should take into account the Parties' "vital interests" and "all relevant circumstances" and that the SEG should decide *ex aequo et bono*.[209] Croatia maintained its position that the dispute should be submitted to the ICJ.[210]

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203 Slovenia's Memorial, para. 3.84; Letter from Commissioner Rehn to the Ministry of Foreign Affairs of the Republic of Slovenia, 20 February 2009, Annex SI-380; Draft Joint Declaration on Mediation on the Border Issue between the Republic of Slovenia and the Republic of Croatia, 20 February 2009, Annex SI-381.

204 Slovenia's Memorial, para. 3.86.

205 Slovenia's Memorial, para. 3.86; Slovenia's Counter-Memorial, para. 2.62.

206 Slovenia's Memorial, para. 3.87; Commissioner Rehn Press Conference, 17 March 2009, Annex SI-383.

207 Slovenia's Memorial, para. 3.87.

208 Annex Draft Agreement on Arbitration, 24 March 2009, Annex SI-384.

209 Slovenia's Memorial, para. 3.89.

210 *Ibid*.

109. On 22 April 2009, Commissioner Rehn provided the Parties with a Draft Agreement on Dispute Settlement, whose final draft ("Rehn Draft I") was submitted to them on 23 April 2009.[211] Its Articles 3 and 4 read:

> **Article 3: Task of the Arbitral Tribunal**
>
> (1) The Arbitral Tribunal shall determine
> (a) the course of the maritime and land boundary between the Republic of Croatia and the Republic of Slovenia; and
> (b) the regime for the use of the relevant maritime areas and Slovenia's contact to the High Sea.
> (2) The Parties shall specify the details of the subject-matter of the dispute within one month after entry into force of this Agreement. If they fail to do so, the Arbitral Tribunal shall use the submissions of the parties for the determination of the exact scope of the maritime and territorial disputes and claims between the Parties.
> (3) The Arbitral Tribunal shall render an award on the dispute.
> (4) The Arbitral Tribunal has the power to interpret the present Agreement.
>
> **Article 4: Applicable Law**
>
> The Arbitral Tribunal shall apply
> (a) the rules and principles of international law for the determinations referred to in Article 3(1)(a);
> (b) international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result for the determination referred to in Article 3(1)(b).[212]

110. Rehn Draft I proposed a Joint Declaration to replace Article 11(4) of the initial version made on 22 April 2009:

> Today, we, the Prime Ministers of Slovenia and Croatia, have signed a bilateral agreement on arbitration, witnessed by the European Commission, France, the Czech Republic and Sweden.
> According to Article 11 (1) of the Agreement on Dispute Settlement, it shall be ratified expeditiously by both sides in accordance with their respective constitutional requirements. We will therefore submit the signed agreement to our respective Parliaments within one week. We are confident that each parliament will, according to its own constitutional rules, give its consent for ratification by the end of June 2009.
> In view of this way ahead, reservations as regards opening and closing of negotiation chapters where the obstacle is related to the dispute are lifted so as to resume immediately the accession negotiations within the Intergovernmental Conference.[213]

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211 Croatia's Memorial, para. 2.66, Draft Agreement on Dispute Settlement, 23 April 2009, Annex HR-122; Slovenia's Memorial, paras 3.90-91; Fourth proposal of Commissioner Rehn, entitled "Draft Agreement on Dispute Settlement", 22 April 2009, Annex SI-385; Final version of Commissioner Rehn's fourth proposal, the "Draft Agreement on Dispute Settlement", 23 April 2009, Annex SI-386.

212 Draft Agreement on Dispute Settlement, 23 April 2009, Annex HR-122; Final version of Commissioner Rehn's fourth proposal, the "Draft Agreement on Dispute Settlement", 23 April 2009, Annex SI-386.

213 *See* Final version of Commissioner Rehn's fourth proposal, the "Draft Agreement on Dispute Settlement," 23 April 2009, Annex SI-386; Fourth proposal of Commissioner Rehn, entitled "Draft Agreement on Dispute Settlement", 22 April 2009, Annex SI-385, Article 11(4) of which read: "Articles 1, 2, 9, and 10 shall be provisionally applied as of signature."

111. Croatia accepted Rehn Draft I[214] as "it separated the issue of delimitation of the territorial sea, which would be determined in accordance with international law, from aspects of its use, which would be determined based on international law, . . . equity and the principle of good neighbourly relations."[215] Slovenia proposed amendments, notably that the determination in Article 3(1)(a) include the words "including territorial contact with the High Seas" after the words "the course of the maritime and land boundary between the Republic of Croatia and the Republic of Slovenia,"[216] and that Article 4 read:

> **Article 4: Applicable Law**
>
> The Arbitral Tribunal shall apply
>
> (a) the rules and principles of international law;
>
> (b) Equity and the principle of good neighbourly relations, taking into account also vital interests of both Parties and all relevant circumstances, in order to achieve a fair and just result;
>
> And should therefore decide ex aequo et bono.[217]

112. Croatia highlights that Slovenia also "proposed that the blockade on Croatia's EU accession only be lifted after the Arbitration Agreement was ratified by both Parliaments, instead of an immediate lifting of the blockade, as had been proposed by Commissioner Rehn."[218]

113. In June 2009, Commissioner Rehn presented a revised Draft Agreement on Dispute Settlement ("Rehn Draft II"), Articles 3 and 4 of which read:

> **Article 3: Task of the Arbitral Tribunal**
>
> (1) The Arbitral Tribunal shall determine
>
> (a) the course of the maritime and land boundary between the Republic of Croatia and the Republic of Slovenia;
>
> (b) Slovenia's junction to the High Sea;
>
> (c) the regime for the use of the relevant maritime areas.
>
> (2) The Parties shall specify the details of the subject-matter of the dispute within one month after entry into force of this Agreement. If they fail to do so, the Arbitral Tribunal shall use the submissions of the parties for the determination of the exact scope of the maritime and territorial disputes and claims between the Parties.
>
> (3) The Arbitral Tribunal shall render an award on the dispute.

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214 Letter from the Minister of Foreign Affairs and European Integration of the Republic of Croatia, Mr. Gordan Jandrokovič, to the Commissioner for Enlargement and European Neighbourhood Policy, Mr. Olli Rehn, Zagreb, 8 May 2009, Annex HR-124; Decision on Acceptance of the Draft Agreement on Dispute Settlement and the Draft Joint Declaration between Croatia and Slovenia, Croatian Parliament, Zagreb, 8 May 2009, Annex HR-123.

215 Croatia's Memorial, para. 2.67; Transcript, Day 5, p. 26:6-13.

216 Slovenia's Memorial, para. 3.93; Transcript, Day 3, pp. 58:13-59:4; Transcript, Day 5, p. 26:14-10.

217 Slovenia's Memorial, para. 3.93; *see also* Croatia's Memorial, para. 2.68.

218 Croatia's Memorial, para. 2.68; Croatia's Counter-Memorial, para. 2.56.

(4) The Arbitral Tribunal has the power to interpret the present Agreement.

Article 4: Applicable Law

The Arbitral Tribunal shall apply

(a) the rules and principles of international law for the determinations referred to in Article 3(1)(a);

(b) international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result by taking into account all relevant circumstances for the determinations referred to in Article 3(1)(b) and (c).[219]

114. With respect to the language of Article 3(1)(b), Croatia submits that it "was not in line with Slovenia's proposal, and apparently was added by the European Commission." Moreover, it holds that the "exclusion of the notion of 'territorial contact' and the separation of the notion of 'junction' from the determination of the territorial (land and maritime boundary) issues . . . clarified that there was no presumption that Slovenia should be granted any such contact."[220] Croatia notes as well that the term "junction" in Rehn Draft II was new, as Rehn Draft I had instead used the term "contact",[221] and Slovenia's proposal on 15 May 2009 used the words "territorial contact".[222]

115. Slovenia disputes Croatia's assertion that its proposed amendments were not accepted and that Slovenia "did not obtain its red line."[223] Slovenia highlights that a reference to the "vital interests" of the Parties was added in the Preamble of Rehn Draft II. It adds that "[d]uring the negotiations, Croatia was fully aware that Slovenia considered its territorial contact with the high seas as its vital interest,"[224] whereas "Croatia's vital interest was the continuation of the [EU] accession process with the aim of concluding the accession negotiations as soon as possible."[225] Slovenia also notes that "the determination of Slovenia's junction to the high sea was separated into a

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219 Draft Agreement on Dispute Settlement, 12 June 2009, Annex HR-125; Draft Agreement on Dispute Settlement, 15 June 2009, Annex SI-389; Transcript, Day 3, p. 59:9-10; Transcript, Day 5, p. 26:19-20. The Tribunal notes that the Parties appear to have submitted different versions of the Draft Agreement, dated 12 June 2009 and 15 June 2009, respectively. However, these versions do not differ in contents. Importantly, the provisions discussed above in both versions are identical.

220 Croatia's Memorial, para. 2.69; Croatia's Counter-Memorial, paras 2.64, 2.68. Croatia observes that "[a]lthough Slovenia has described aspects of its proposed amendments, it has chosen not to annex the integral text of that proposal" (footnote omitted), and goes on to state that it therefore "annexes that document with this *Reply* to allow the Tribunal to form its own view on the basis of the document itself", Croatia's Reply, para. 1.12, *referring to* Amendments proposed by Slovenia on the Draft Agreement on Dispute Settlement of 23 April 2009 (Rehn Draft I) as sent to the EU Commissioner Rehn on 15 May 2009, Annex HR-377; *see also* Transcript, Day 1, pp. 40:10-19, 45:4-11.

221 Croatia's Counter-Memorial, para. 2.64.

222 Transcript, Day 5, p. 24:18-27.

223 Transcript, Day 3, p. 59:5-10; Transcript, Day 7, p. 76:17-25.

224 Slovenia's Memorial, para. 3.94 and paras 1.10-20; Transcript, Day 3, pp. 59:17-60:3.

225 Slovenia's Memorial, paras 1.10, 1.12, stating that Article 9 of the Arbitration Agreement reflects this.

distinct element of the tribunal's task under Article 3(1)(b), and was thus differentiated from the question of the regime for use of the relevant maritime areas," noting that "[i]n Rehn I they had been together."[226] Slovenia notes further that the phrase "Slovenia's contact to the High Sea" that had been used in Rehn Draft I was changed to "Slovenia's junction to the High Sea" in Rehn Draft II," and that the "applicable law provision was further expanded with respect to the determination of . . . Slovenia's junction to the high sea and the regime for use."[227] As such, Slovenia argues, "Croatia's understanding of 'junction' was clear" and "the 'vital interests' *quid pro quo* was well understood."[228]

116. In particular, Slovenia asserts that its vital interest was "clearly stated several times,"[229] including during the negotiations between 1992 and 2001, during the 2001 Draft Agreement negotiations, and during the 2009 negotiations of the Arbitration Agreement. It considers that accommodation of its vital interests was the "the *sine qua non* condition for any settlement of the maritime boundary dispute throughout the negotiations, including for the conclusion of the Arbitration Agreement."[230] Slovenia also highlights that its vital interest is referred to in documents adopted by its Government and Parliament, such as the Memorandum on the Bay of Piran,[231] the Standpoints and Conclusions of the National Assembly,[232] positions submitted in the context of the mediation with Dr. William Perry in 1999,[233] the Decision on the Protection of the Interest of the Republic of Slovenia in the Process of Accession of the Republic of Croatia to the North

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226 Transcript, Day 3, p. 60:4-12.

227 Transcript, Day 3, p. 60:13-19; Transcript, Day 7, p. 17:12-13.

228 Slovenia's Reply, paras 1.15-16, *referring to* Diplomatic Cable from the U.S. Embassy in Zagreb to the U.S. Department of State, 11 September 2009, para. 7, Annex SI-988, and Diplomatic Cable from the U.S. Embassy in Zagreb to the U.S. Department of State, 28 July 2009, paras 4, 7, Annex SI-987.

229 Slovenia's Memorial, para. 1.13.

230 *Ibid*.

231 Slovenia's Memorial, para. 1.14, *citing* Memorandum on the Bay of Piran, 7 April 1993, Annex SI-272: "The vital question of acquisition of sufficient quantities of national resources for the survival of the Slovene nation is also raised here. Therefore, the Republic of Slovenia is of the opinion that it is necessary, in accordance with the principle of equity and considering the institute of special circumstances, to draw the maritime boundary with the Republic of Croatia in such a way as to ensure that the territorial waters of the Republic of Slovenia would, at least at a narrow section, join the high seas of the Adriatic."

232 Slovenia's Memorial, para. 1.15, Standpoints and Conclusions of the National Assembly of the Republic of Slovenia on the Frontier between the Republic of Slovenia and the Republic of Croatia, 26 May 1993, Chapt. VII, para. 2, Annex SI-275: "As regards exit to the high seas, the National Assembly underlines that the Republic of Slovenia, throughout recent history, has indisputably had unhindered exit to the high seas. This is the reason why the National Assembly points out that the exit to international waters is an inherent right of the Republic of Slovenia."

233 Slovenia's Memorial, para. 1.16, Positions of the Republic of Slovenia on the Delimitation of the Maritime Boundary between the Republic of Slovenia and Republic of Croatia, 11 June 1999, last paragraph, Annex SI-307.

Atlantic Treaty of 18 February 2009,[234] and the Resolution on National Strategy adopted on 26 March 2010.[235] Slovenia alleges that "Croatia never protested or objected to such an understanding of Slovenia's vital strategic interest."[236]

117. For its part, Croatia notes that Slovenia's proposals that the "vital interests of the parties" be introduced "as a criterion for the Tribunal's determinations and to permit the Tribunal to decide the matter "*ex aequo et bono*" had been rejected.[237]

118. Rehn Draft II was rejected by Croatia "a few hours before the meeting"[238] for its finalization. Croatia explains that "as a matter of principle it was unacceptable for Croatia to consider any further amendments or modifications," given that it had accepted Rehn Draft I without making any comments or amendments on the understanding that it had been presented to the Parties on a "take-it-or-leave-it" basis.[239] The trilateral negotiations with the European Commission were thereafter suspended.[240]

119. Croatia characterizes the respective stances of the Parties as equally "unhappy with the Rehn II proposal": Slovenia "because none of its substantial amendments were incorporated into it," and Croatia "because it had accepted the Rehn I text on a 'take it or leave it basis' without proposing

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234 Slovenia's Memorial, para. 1.17, National Assembly of Republic of Slovenia, Decision on the Protection of the Interests of the Republic of Slovenia in the Process of Accession of the Republic of Croatia to the North Atlantic Treaty, 19 February 2009, Annex SI-379.

235 Slovenia's Memorial, para. 1.19, Resolution on the National Security Strategy of the Republic of Slovenia, *Official Gazette of the Republic of Slovenia*, No. 27/2010, para. 2.1, Annex SI-403.

236 Slovenia's Memorial, para. 1.19.

237 Croatia's Memorial, para. 2.70.

238 Slovenia's Memorial, para. 3.95.

239 Croatia's Memorial, para. 2.71, *referring to* Letter from the Minister of Foreign Affairs of the Republic of Slovenia, Mr. Dimitrij Rupel, to the Commissioner for Enlargement and European Neighbourhood Policy, Mr. Olli Rehn, Ljubljana, 29 June 2006, Annex HR-105. The letter accepting Rehn Draft I, Annex HR-124 stated: "In regard of the fact that the said Draft Agreement and Joint Declaration have been presented by you and by the Trio to both sides for response on the basis of the 'take it or leave it principle', I have the honour to inform you that Croatian side, having fully examined the texts of both documents, has decided to accept them as they are." *See also* Preamble to the Decision of Croatian Parliament, Annex HR-123, stating: "Taking into account that the proposed texts of the Agreement . . . were offered to the Republic of Croatia and the Republic of Slovenia on a take-it-or-leave-it basis"; Transcript, Day 5, p. 25:4-6.

240 Slovenia states that "[j]ust before meeting, the Croatian Foreign Minister informed Commissioner Rehn and the Slovenian Foreign Minister that Croatia was not willing to continue negotiations under the auspices of the European Commission", Slovenia's Memorial, para. 3.95; Croatia states that "[h]aving received negative responses from both Parties, by the end of June 2009 Commissioner Rehn observed that after several months of negotiations no agreement could be reached between the Parties and further efforts in this respect were suspended", Croatia's Memorial, para. 2.72.

any amendments to that Draft."[241] As such, Croatia argues that "Slovenia declined to accept the Rehn II proposal."[242]

120. Slovenia denies that Croatia's evidence supports the inference that Slovenia was dissatisfied with Rehn Draft II, submitting that Slovenia's own evidence "shows that Slovenia was willing to accept Rehn's June 2009 proposal [Rehn Draft II] as it was, and that it was Croatia that had difficulties to accept it."[243] Slovenia further disputes Croatia's suggestion that Slovenia's proposals were not incorporated into Rehn Draft II, highlighting Rehn Draft II's reference to "vital interests" in its Preamble and changes to Articles 3 and 4 of the draft which reflected Slovenia's amendments.[244]

121. On 31 July 2009, the new Croatian Prime Minister, Jadranka Kosor, and her Slovenian counterpart, Borut Pahor, resumed bilateral negotiations. An "oral arrangement"[245] was reached on the continuation of Croatia's accession negotiations and the resolution of the border dispute, relating, according to Slovenia, to the following three points:

- appropriate elimination of Croatian prejudicial references in the EU accession process,
- Slovenian consent to the continuation of Croatian EU accession process, and
- Agreement on the resolution of border dispute based on [Rehn Draft II][246]

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241 Croatia's Counter-Memorial, para. 2.73; Transcript, Day 5, pp. 26:19-27:10.

242 Croatia's Counter-Memorial, para. 2.72, *referring to* Letter from the Minister of Foreign Affairs of the Republic of Slovenia, Mr. Dimitrij Rupel, to the Commissioner for Enlargement and European Neighbourhood Policy, Mr. Olli Rehn, Ljubljana, 29 June 2006, Annex HR-105; Transcript, Day 5, p. 27: 15-16.

243 Slovenia's Reply, para. 1.12, *referring to* Diplomatic Cable from the U.S. Embassy in Zagreb to the U.S. Department of State, 11 September 2009, Annex SI-988. The cable stated: "But he [Davorin Stier, Croatian Prime Minister's Foreign Relations Advisor] was *concerned that the Slovene side would push hard to force the Croatians to accept the June 15 document without changes*, or at least without any changes to Article 3 describing the tasks of the Tribunal. That would be impossible for Croatia. One necessary change, which Stier claimed Slovenia favored as well, was to amend the language on when the Tribunal should conclude its work, to state that the Tribunal's award would only be issued after Croatia's EU Accession Treaty was fully ratified. More controversial, Stier said, was that *Article 3 would have to be modified in some way to clarify that the Tribunal did not start its work with a presumption whether or not there should be a 'chimney' or other form of direct contact between Slovenia and international waters*" (emphasis added by Slovenia); Transcript, Day 3, pp. 60:20-61:7.

244 Slovenia's Counter-Memorial, paras 2.67, 2.71; Slovenia's Reply, paras 1.09-16, *referring to* Diplomatic Cable from the U.S. Embassy in Zagreb to the U.S. Department of State, 16 June 2009, para. 2, Annex SI-986; Diplomatic Cable from the U.S. Embassy in Zagreb to the U.S. Department of State, 11 September 2009, para. 7, Annex SI-988, and Diplomatic Cable from the U.S. Embassy in Zagreb to the U.S. Department of State, 28 July 2009, paras 4 and 7, Annex SI-987; *referring also to* a Statement of Croatian President, Dr. Ivo Josipović, of February 2010: D. Butković: An Interview with the Third Croatian President, Jutarnji list, 20 February 2010, Annex SI-991; Transcript, Day 3, pp. 60:20-61:7.

245 Slovenia's Memorial, para. 3.96, *also referring to* "Kosor and Pahor say solution could be found this year", Press Release of Croatia's Ministry of Foreign Affairs and European Integration, 31 July 2009, Annex SI-391; Croatia's Memorial, para. 2.73; Croatia's Counter-Memorial, para. 2.74.

246 Slovenia's Memorial, para. 3.96.

122. With respect to the third aspect, Croatia asserts that the Parties agreed "that nothing in the Arbitration Agreement would prejudge any specific outcome of the arbitration, but would simply direct the Tribunal to apply the applicable law to the tasks assigned to it."[247]

123. On 11 September 2009, the Croatian Prime Minister informed the Swedish Presidency of the Council of the European Union of the agreement reached between the Parties, stating, *inter alia*, that:

> In this context, with the aim of addressing Slovenia's reservations on several negotiations chapters, on behalf of the Croatian Government, I would like to declare that no document in our accession negotiations with the European Union can prejudge the final resolution of the border dispute between Croatia and Slovenia.
>
> The resolution or the way of resolution of the border dispute will be pursued through the continuation of the talks between Croatia and Slovenia facilitated by the European Union. It was also agreed that both sides will continue negotiations on border dispute settlement with the understanding either to submit the border dispute to the Arbitral Tribunal or to conclude the bilateral agreement on common state border in accordance with the key priorities expressed in the Accession Partnership with Croatia (Council Decision 2008/119/EC) and with the aim to fulfill them. Both sides also agreed that the 25 June 1991 *[sic]* presents the basis for the resolution of the border dispute and that no document or action undertaken unilaterally by either side after that date shall be accorded legal significance for the task of any arbitral tribunal, or any other procedure relating to the settlement of the border dispute between Croatia and Slovenia and cannot in any way prejudge the outcome of the process.[248]

124. At a trilateral meeting on 2 October 2009, the Parties discussed the procedural aspects of the Arbitration Agreement. In particular, it was agreed that Article 7(1) of Rehn Draft II (which read "[t]he Arbitral Tribunal shall strive to issue its award within one year after its establishment") would be eliminated and that a new text was to be negotiated.[249]

125. On the other hand, Slovenia and Commissioner Rehn opposed the renegotiation of the provisions in Article 3(1)(b) and Article 4(b), which had been challenged by Croatia on the basis that they "prejudiced the final resolution of the dispute and were very close to Slovenian positions."[250]

126. At meetings between 20 and 26 October 2009, the Parties agreed to the new language of Article 7(1): "the Arbitral Tribunal shall issue its award expeditiously"[251] and of Article 11(3): "All procedural timelines expressed in this Agreement shall start to apply from the date of the signature

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247 Croatia's Memorial, para. 2.75; Croatia's Counter-Memorial, paras 2.75-77; Transcript, Day 5, p. 28:15-19.

248 Letter from the Prime Minister of the Republic of Croatia, Ms. Jadranka Kosor, to the Prime Minister of the Kingdom of Sweden, Mr. Fredrik Reinfeldt, Zagreb, 11 September 2009, Annex HR-126; Exchange of letters between the Prime Ministers of Croatia and of Sweden regarding the agreement of Croatia and Slovenia of 11 September 2009, EU Accession Document, 25 September 2009, Annex SI-392.

249 Slovenia's Memorial, para. 3.98.

250 Slovenia's Memorial, para. 3.99; Slovenia's Counter-Memorial, para. 2.69.

251 Slovenia's Memorial, para. 3.102.

of Croatia's EU Accession Treaty." Slovenia summarizes this negotiation as follows: "For Croatia, it was extremely important that the award of the Tribunal would not be delivered before Croatian accession to the European Union, while for Slovenia it was of utmost importance that the language of the two substantive articles (*i.e.*, Articles 3 and 4) would not be changed."[252]

127. At a meeting of the two Prime Ministers' foreign relations advisers on 26 October 2009, the Parties agreed on the final text of the Arbitration Agreement, which was subsequently communicated by telefax to the EU Presidency.[253]

128. According to Croatia, at a meeting in Zagreb on 26 October 2009, Slovenia's Prime Minister agreed that "Croatia could issue a statement to the effect that nothing in the Arbitration Agreement should be understood by the Tribunal as manifesting Croatia's agreement that Slovenia possesses (or should be granted) territorial contact with the high seas" and that Croatia "would issue the Statement after the signature of the Arbitration Agreement, but before ratification by the Croatian Parliament."[254]

129. With respect to such a statement, Slovenia states that it "did not agree to the issue of such unilateral statement, either at the time of the signature of the Agreement or at any later time."[255] Moreover, it disputes Croatia's assertion that the Parties "jointly informed the Presidency" that they had agreed that Croatia could issue a declarative statement.[256] Slovenia specifically denies that the evidence put forth by Croatia "show[s] that Slovenia agreed to the withdrawal of the clarification of the word 'junction' from the text of the Arbitration Agreement in exchange for a unilateral 'clarification' by Croatia."[257] Slovenia asserts that Croatia "reopened the issue of the

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252 *Ibid*.

253 *Ibid*.

254 Croatia's Memorial, para. 2.76 and n.81: "Before seeking the approval of the Croatian Parliament to sign the Arbitration Agreement and the accompanying Statement, Croatia invited both the United States and Sweden to witness the issuance of the Croatian Statement after the signature of the Arbitration Agreement." *Referring to note verbale* from the Ministry of Foreign Affairs and European Integration of the Republic of Croatia to the Embassies of the Kingdomof Sweden and of the United States of America, No. 6048/09, Zagreb, 29 October 2009, Annex HR-128. Croatia explains that "[b]oth countries were already aware of the content of the Statement. Croatia received an affirmative response from the United States", *referring to note verbale* from the Embassy of the United States of America to the Ministry of Foreign Affairs and European Integration of the Republic of Croatia, No. 047, Zagreb, 30 October 2009, Annex HR-129. In its Counter-Memorial, paras 2.77-79, Croatia reiterates that the Croatian Statement "was adopted as a result of Slovenia's initiative, as an acceptable alternative to a joint statement," *citing* Diplomatic Cable from the U.S. Embassy in Ljubljana to the U.S. Department of State, 3 September 2009, Annex HR-313; and Diplomatic Cable from the U.S. Embassy in Zagreb to the U.S. Department of State, 3 November 2009, Annex HR-314.

255 Slovenia's Reply, paras 1.18-21.

256 Slovenia's Memorial, para. 3.103; Slovenia's Counter-Memorial, paras 2.74-75.

257 Slovenia's Reply, para. 5.06.

joint statement" after agreement on the final text of the Arbitration Agreement. Slovenia disagreed with the substance of the proposed statement, which, in its view "was in contradiction of all the drafting history of the Agreement."[258] According to Slovenia, on the day of the signing ceremony "it was still uncertain what Croatia's intentions were and whether Croatia would make a unilateral declaration at the signing ceremony."[259]

130. On 2 November 2009, the Croatian Parliament adopted a "Decision on Giving Consent to the Government of the Republic of Croatia to sign the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia and on giving consent to issuing the Statement on non-prejudice."[260] In its Article 2 it authorized the Croatian Government to sign "a Statement of non-prejudice . . . as formulated in the text presented by document of the Government of the Republic of Croatia from 30 October 2009."

10. Conclusion and Ratification of the Arbitration Agreement

131. On 4 November 2009, the Prime Ministers of the Parties signed the Arbitration Agreement as well as a Joint Declaration.[261] The signature took place at Prime Ministers' level and in the presence of the EU presidency, which at the time was held by the Prime Minister of Sweden, Mr. Fredrik Reinfeldt.[262]

132. On 9 November 2009, Croatia made the following statement ("Croatia's Declaration"):

> With regard to the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed in Stockholm on 4 November 2009,
> The Republic of Croatia is issuing the following statement, on the content of which the Croatian and Slovenian side jointly informed the Presidency of the Council of the European Union and the United States of America on 27 October 2009:
> Nothing in the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia shall be understood as Croatia's consent to Slovenia's claim to its territorial contact with the high seas.[263]

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258 Slovenia's Memorial, para. 3.103.

259 Croatia's Counter-Memorial, para. 2.82; Slovenia's Counter-Memorial, para. 2.76; Slovenia's Reply, para. 1.21.

260 Decision on Giving Consent to the Government of the Republic of Croatia to sign the Arbitration Agreement between Croatia and Slovenia and on Giving Consent to Issuing the Statement on Non-Prejudice, Croatian Parliament, Zagreb, 2 November 2009, Annex HR-130.

261 Joint Declaration done in Stockholm on 4 November 2009, Annex SI-398.

262 Croatia's Memorial, para. 2.78.

263 Statement of the Republic of Croatia to the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, 9 November 2009, Annex HRLA-76 (transmitted to Slovenia by diplomatic note on 9 November 2009); *Note verbale* from the Ministry of

133. Croatia reiterates that the issuance of its Declaration had been "previously agreed" and that its content had been previously shared with Slovenia, the Presidency of the Council of the EU (Sweden) and the United States of America.[264] Slovenia, on the other hand, repeats that it "did not agree" to the issuance of the Declaration "either at the time of signature of the [Arbitration] Agreement or at any later time."[265] Slovenia emphasises that in interviews during the referendum campaign, representatives in Ljubljana of the Presidency of the Council of the EU and of the United States denied that Croatia and Slovenia had jointly informed them of the Croatian statement and the Croatian statement was therefore unilateral.[266] According to Croatia, both Sweden and the United States had been made aware of the content of its Statement before the signing of the Arbitration Agreement.[267]

134. Slovenia asserts that it was informed of Croatia's Declaration on 9 November 2009 through diplomatic channels.[268] Croatia's diplomatic note in this regard reads as follows:

> The Republic of Croatia is issuing the following statement, on the content of which the Croatian and Slovenian sides jointly informed the Presidency of the Council of the European Union and the United States of America on 27 October 2009;
>
> *Nothing in the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia shall be understood as Croatia's consent to Slovenia's claim to its territorial contact with the high seas.*
>
> As agreed with the Slovenian side, the Republic of Croatia is issuing this Statement after the signature of the Arbitration Agreement and before the ratification of the Arbitration Agreement in the Republic of Croatia and the Republic of Slovenia, in accordance with Article 11, paragraph 1 of the Arbitration Agreement. [269]

Foreign Affairs and European Integration of the Republic of Croatia to the Embassy of the Republic of Slovenia, No. 6257/09, 9 November 2009, Annex HR-131; Croatia's Counter-Memorial, para. 2.84.

264 Croatia's Memorial, para. 2.81; Croatia's Counter-Memorial, para. 2.86; Transcript, Day 5, pp. 28:10-29:14.

265 Slovenia's Reply, paras 1.17-21.

266 Slovenia's Memorial, para. 4.53, "Sweden Confirms Croatia's Unilateral Statement", Slovenian Press Agency, 26 May 2010, Annex SI-406; "US Says Croatia's Statement Unilateral in Every Sense", Slovenian Press Agency, 26 May 2010, Annex SI-407; Croatia's Counter-Memorial, para. 2.88.

267 Croatia's Counter-Memorial, para. 2.88, *citing note verbale* from the Embassy of the United States to the Ministry of Foreign Affairs of the Republic of Croatia, No. 047, Zagreb, 30 October 2009, Annex HR-129.

268 Slovenia's Memorial, para. 4.44, *referring to note verbale* from the Ministry of Foreign Affairs and European Integration of the Republic of Croatia to the Embassy of the Republic of Slovenia in Zagreb, and Statement of the Republic of Croatia to the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, No. 6257, 9 November 2009, Annex SI-399.

269 *Note verbale* from the Ministry of Foreign Affairs and European Integration of the Republic of Croatia to the Embassy of the Republic of Slovenia, No. 6257/09, Zagreb, 9 November 2009, Annex HR-131; *Note verbale* from the Ministry of Foreign Affairs and European Integration of the Republic of Croatia to the Embassy of the Republic of Slovenia in Zagreb, No. 6257, and Statement of the Republic of Croatia to the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, 9 November 2009, Annex SI-399.

135. On 19 November 2009, Slovenia responded to Croatia through diplomatic channels. Its note enclosed a Declaration issued in response to Croatia's Declaration, which reads, in part:

> With regard to the sovereign right of any State to issue unilateral declarations and while the Republic of Slovenia took note of the intent of the Republic of Croatia to issue a unilateral declaration to the said Arbitration Agreement, the Republic of Slovenia declares that it has not agreed with the Statement of the Republic of Croatia from 9 November 2009 nor with its content;
>
> the Republic of Slovenia declares that in accordance with international law the unilateral statement given with respect to the said Arbitration Agreement cannot affect its substance and considers the Statement of the Republic of Croatia from 9 November 2009 as unacceptable and without any effect for the arbitral proceedings;
>
> the Republic of Slovenia declares that the task of the Arbitral Tribunal shall be to determine the territorial contact of the Republic of Slovenia's territorial sea with the High Seas (Slovenia's junction to the High Sea), thus the preservation of the right of Slovenia to the junction to the High Sea as of the day of its independence, 25 June 1991;
>
> the Republic of Slovenia also states that the said Arbitration Agreement shall be interpreted by the Arbitral Tribunal in accordance with the ordinary meaning to be given to the terms of the provisions of the Arbitration Agreement alone.[270]

136. On 20 November 2009, the Croatian Parliament adopted the Law on the Ratification of the Arbitration Agreement together with Croatia's Declaration.[271]

137. In a diplomatic note of 6 December 2010, Slovenia recalled that "the content of the Croatian Statement of 9 November 2009 was also rejected by the representatives of the United States of America and of the Kingdom of Sweden in their public statement in May 2010."[272]

138. According to Slovenia, the Arbitration Agreement provoked considerable political interest in its public opinion, "not least because of the confusion caused by Croatia's unilateral statement."[273] This made the Slovenian Government request a review by the Constitutional Court of the constitutionality of the Arbitration Agreement. In an Opinion of 18 March 2010, the

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270 Ministry of Foreign Affairs of the Republic of Slovenia, Note No. ZMP 170/09 and Declaration by the Republic of Slovenia with respect to the Arbitration Agreement, 19 November 2009, Annex SI-400; *Note verbale* of the Ministry of Foreign Affairs of the Republic of Slovenia to the Embassy of the Republic of Croatia in Ljubljana, No. ZMP 170/09, 19 November 2009, Annex HR-132. Croatia observes that the "text of Slovenia's Statement in its Diplomatic Note differs from the text that was published in Slovenia's Official Gazette," Croatia's Memorial, para. 2.81 n.85. *See also* Slovenia's Counter-Memorial, para. 2.79.

271 Law on the Ratification of the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, *Official Gazette of the Republic of Croatia (Treaties)*, No. 12/2009, Annex HRLA-74; Slovenia's Memorial, para. 4.50; Act ratifying the Arbitration Agreement, *Official Gazette of the Republic of Croatia (Treaties)*, No. 12/2009, Annex SI-401; Croatia's Counter-Memorial, para. 2.90.

272 Slovenia's Memorial, para. 4.58; *Note verbale* of the Embassy of the Republic of Slovenia in Zagreb to the Ministry of Foreign Affairs and European Integration of the Republic of Croatia, No. 255/10, 6 December 2010, Annex SI-413.

273 Slovenia's Memorial, para. 4.51.

Constitutional Court ruled that the Arbitration Agreement "was not inconsistent with Slovenian constitutional order."[274]

139. On 19 April 2010, the Slovenian Parliament adopted the Act Ratifying the Arbitration Agreement together with its Declaration disagreeing with Croatia's Declaration.[275] The Arbitration Agreement was narrowly approved in a subsequent "legislative referendum."[276]

140. In addition, on 7 October 2010, following a further request for constitutional review, this time in respect of the Act Ratifying the Arbitration Agreement, the Constitutional Court of Slovenia ruled that the latter was not inconsistent with the Constitution of Slovenia.[277]

141. On 25 November 2010, the Parties exchanged diplomatic notes by which they expressed consent to be bound by the Arbitration Agreement.[278] According to Slovenia, this "exchange of instruments of ratification . . . did not include any statement, nor was any statement attached to the Arbitration Agreement upon its joint registration with the United Nations."[279]

142. On 29 November 2010, the Arbitration Agreement entered into force.[280]

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274 Slovenia's Memorial, para. 4.52, *referring to* Constitutional Court of Slovenia, Opinion Rm 1-09, Arbitration Agreement, 18 March 2010, Operative Part, *Official Gazette of the Republic of Slovenia*, No. 25/2010, Annex SI-402. Point VI of the Opinion of the Court reads:

> VI. Article 3 (1)(a), Article 4(a), and Article 7 (2) and (3) of the Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia, which must be interpreted and reviewed as a whole in terms of content, are not inconsistent with Article 4 of the Constitution in conjunction with Section II of the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia.

275 Act Ratifying the Arbitration Agreement, *Official Gazette of the Republic of Slovenia*, (*International Treaties*), No. 11/2010, Annex SI-404; Croatia's Counter-Memorial, para. 2.90.

276 Slovenia's Memorial, para. 4.53 and n.20: "51.54% of those voting voted in favour, with a turnout of 42.66%;" Report regarding the Referendum on the Arbitration Agreement, *Official Gazette of the Republic of Slovenia*, No. 53/2010, Annex SI-408.

277 Slovenia's Memorial, para. 4.54; Constitutional Court of the Republic of Slovenia, Decision No. U-I-180/10-13, 7 October 2010, *Official Gazette of the Republic of Slovenia*, No. 73/2010, Annex SI-409.

278 Slovenia's Memorial, para. 4.55; *Note verbale* from the Ministry of Foreign Affairs of the Republic of Slovenia to the Embassy of the Republic of Croatia in Ljubljana, No. ZMP 170/09, 25 November 2010, Annex SI-410; *Note verbale* from the Ministry of Foreign Affairs and European Integration of the Republic of Croatia to the Embassy of the Republic of Slovenia in Zagreb, No. 6126/10, 25 November 2010, Annex SI-411; *Note verbale* from the Ministry of Foreign Affairs of the Republic of Slovenia to the Embassy of the Republic of Croatia in Ljubljana, No. ZMP 170/09-1, 25 November 2010, Annex SI-412; Slovenia's Counter-Memorial, para. 2.80; Slovenia's Reply, paras 1.22-25; *Note verbale* from the Ministry of Foreign Affairs and European integration of the Republic of Croatia to the Embassy of the Republic of Slovenia in Zagreb, 6126/10, 25 November 2010, Annex SI-992.

279 Slovenia's Counter-Memorial, para. 2.80.

280 Croatia's Counter-Memorial, para. 2.92.

143. On 25 May 2011, the Arbitration Agreement was jointly submitted by the Parties for registration in accordance with Article 102 of the Charter of the United Nations.[281] The Joint Submission of the Parties to the Secretary-General of the United Nations read in part as follows:

> We would like to inform that the joint submission for registration of the Arbitration Agreement, without submission of the respective unilateral interpretative statements done by Croatia and Slovenia, which form an integral part of the acts of ratification approved by the Parliaments in each state and are without attempt to amend the Arbitration Agreement, does not in any way affect their legal status with regard to the Arbitration Agreement.
>
> In addition, we would further like to inform that the Arbitration Agreement is not accompanied by any jointly agreed statement.[282]

144. A copy of the Arbitration Agreement is **annexed** to the present Award.

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281 Joint Submission of the Republic of Croatia and the Republic of Slovenia to the Secretary-General of the United Nations for the Registration of the Arbitration Agreement, New York, 25 May 2011, Annex HR-134; Registration of the Arbitration Agreement, Letter to United Nations Secretary General, 25 May 2011, Annex SI-421.

282 *Ibid.*

II. HISTORY OF THE PROCEEDINGS

145. Article 2 of the Arbitration Agreement provides:

> Article 2. Composition of the Arbitral Tribunal
>
> (1) Both Parties shall appoint by common agreement the President of the Arbitral Tribunal and two members recognized for their competence in international law within fifteen days drawn from a list of candidates established by the President of the European Commission and the Member responsible for the enlargement of the European Commission. In case that they cannot agree within this delay, the President and the two members of the Arbitral Tribunal shall be appointed by the President of the International Court of Justice from the list.
>
> (2) Each Party shall appoint a further member of the Arbitral Tribunal within fifteen days after the appointments referred to in paragraph 1 have been finalised. In case that no appointment has been made within this delay, the respective member shall be appointed by the President of the Arbitral Tribunal.
>
> (3) If, whether before or after the proceedings have begun, a vacancy should occur on account of death, incapacity or resignation of a member, it shall be filled in accordance with the procedure prescribed for the original appointment.

146. Pursuant to Article 2(1) of the Arbitration Agreement, on 17 January 2012, the Parties agreed to appoint Judge Gilbert Guillaume as the presiding arbitrator and to appoint Professor Vaughan Lowe and Judge Bruno Simma as arbitrators. As provided for in the Arbitration Agreement, the European Commission assisted the Parties in the appointment process.

147. Pursuant to Article 2(2) of the Arbitration Agreement, on 26 January 2012, Slovenia appointed Dr. Jernej Sekolec as arbitrator, and, on 31 January 2012, Croatia appointed Professor Budislav Vukas as arbitrator.

148. Following consultation with the Parties, Terms of Appointment were signed on 4 April 2012 by Croatia and on 12 April 2012 by Slovenia and the President of the Tribunal. By agreement of the Parties, the Permanent Court of Arbitration ("PCA") acts as Registry in this arbitration pursuant to Section 7 of the Terms of Appointment.

149. Pursuant to Section 8 of the Terms of Appointment, a contact point was established with the European Commission for any matter that the Tribunal would like to bring to the Commission's attention. Mr. Joost Korte, Deputy Director-General for Enlargement was appointed for this purpose by the European Commission on 7 February 2012. On 30 October 2013, the European Commission notified the Registry that the role of the contact point was taken over by Mr. Lucio Gussetti, Principal Adviser at the Legal Service of the European Commission.

150. On 13 April 2012, the Tribunal held a First Procedural Meeting with the Parties at the Peace Palace, in The Hague.

151. On 1 May 2012, the Tribunal, having considered the discussion at the First Procedural Meeting, issued Procedural Order No. 1, which addressed, among other items, the timetable for the Parties' written pleadings, the form of written submissions and communications, and the submission of documentary, witness and expert evidence. The Order also recorded the Parties' agreement that the Award of the Tribunal be made public.

152. Pursuant to paragraph 2.1.3 of Procedural Order No. 1, in the event that a Party wished to submit a Reply in response to the Counter-Memorial of the other Party, it should file a request to that effect by 30 November 2013. In the event that the Tribunal, having heard the views of the other Party, granted a further round of written submissions, each Party should have the opportunity to submit a Reply by 26 March 2014.

153. Under paragraph 2.2 of Procedural Order No. 1, the Tribunal reserved the period from 26 May 2014 to 13 June 2014 for a hearing not exceeding two weeks.

154. In paragraph 8 of Procedural Order No. 1, the Tribunal also reserved any decision on the desirability of a site visit until after receipt of the Parties' Memorials and requested the Parties to reserve the period from 6 May to 12 May 2013.

155. On 7 February 2013, following the Parties' joint proposal for amendment to Procedural Order No. 1, the Tribunal issued Procedural Order No. 2, amending certain provisions concerning the modalities of filing of the Parties' written submissions.

156. On 11 February 2013, the Parties submitted their Memorials and accompanying documents, in both electronic and hard copy format ("Croatia's Memorial" and "Slovenia's Memorial").

157. By letter dated 15 April 2013, the Tribunal notified the Parties of its decision not to conduct a site visit in May 2013. In the same letter, the Tribunal informed the Parties that, given that consultations of the Registry with the Parties did not result in identifying convenient dates for a site visit in 2014, the Tribunal had decided to defer any decision on the desirability of a site visit until its review of the Parties' Counter-Memorials.

158. On 11 November 2013, the Parties filed their Counter-Memorials and accompanying documents, in both electronic and hard copy format ("Croatia's Counter-Memorial" and "Slovenia's Counter-Memorial").

159. On 26 November 2013, Croatia submitted a list correcting certain *errata* in its Counter-Memorial, and offered to provide a corrected version of its Counter-Memorial.

160. By letter dated 29 November 2013, Slovenia requested that the Parties be allowed to submit a Reply to the Counter-Memorials. By letter dated 3 December 2013, Croatia opposed this request.

161. On 2 December 2013, the President of the Tribunal held a telephone conference with the Parties regarding the organization of the hearing. Among other agenda items, each Party introduced its proposed schedule of the hearing and presented its view on the desirability of a Reply round of written submissions.

162. On 23 December 2013, the Tribunal, having considered the Parties' views expressed during the 2 December 2013 telephone conference, issued Procedural Order No. 3. Paragraph 1 of Procedural Order No. 3 granted Slovenia's request of 29 November 2013 that the Parties be allowed to submit a Reply to the Counter-Memorials.

163. In paragraph 2 of Procedural Order No. 3, the Tribunal set out the hearing schedule for the hearing to be conducted from Monday, 2 June 2014 to Friday, 13 June 2014. Pursuant to paragraph 3 of Procedural Order No. 3, no submission of witness evidence or expert opinions would be allowed on the occasion of the Reply or the hearing. Paragraph 4 of Procedural Order No. 3 related to the admissibility of new documents after the closure of the written proceedings.

164. On 21 January 2014, following a request from Slovenia, the Tribunal issued Procedural Order No. 4, which modified the hearing schedule that had been set out in Procedural Order No. 3.

165. On 26 March 2014, the Parties submitted their Replies and accompanying documents in hard copy ("Croatia's Reply" and "Slovenia's Reply"). The Parties also submitted copies in electronic format on 26 March 2014 (Slovenia) and 27 March 2014 (Croatia) respectively.

166. On 24 April 2014, the Republic of Croatia submitted corrected transparency sheets pertaining to the maps contained in Volumes III/4 and III/5 of its Reply.

167. On 28 April 2014, the PCA informed the Parties that the Tribunal was considering the appointment of Mr. Gérard Cosquer as its cartographic expert and Mr. David H. Gray as its hydrographic expert pursuant to paragraph 7.1 of Procedural Order No. 1, and communicated their respective *curricula vitae* and Draft Terms of Reference to the Parties.

168. By letter dated 1 May 2014, the PCA informed the Parties of Mr. Cosquer's and Mr. Gray's responses to the PCA's request to "disclose any circumstances that the Parties or the Tribunal should be aware of, although they may not rise to the level of conflict of interest." Following indications from the Agents of both Parties to the Registrar that neither Party had any objection

to the appointment of the proposed experts, on 15 May 2014, the Tribunal appointed Mr. Gérard Cosquer as an independent cartographic expert, and Mr. David Gray as an independent hydrographic expert.

169. On 26 May 2014, Croatia submitted corrected transparency sheets pertaining to the maps contained in Volumes III/1 and III/6 of its Reply.

170. On 29 May 2014, the PCA issued a Press Release communicating the hearing schedule to the public.

171. The hearing took place from 2 to 13 June 2014 in the Peace Palace, The Hague, the Netherlands. The following individuals participated on behalf of the Parties:

Republic of Croatia

Professor Maja Seršić
Head of the Chair of International Law, Faculty of Law, University of Zagreb

as Agent;

H.E. Ms. Andreja Metelko-Zgombić
Ambassador, Director General for EU Law, International Law and Consular Affairs, Ministry of Foreign and European Affairs of the Republic of Croatia

as Co-Agent;

H.E. Ms. Vesna Pusić
First Deputy Prime Minister and Minister of Foreign and European Affairs of the Republic of Croatia

H.E. Ms. Vesela Mrđen Korać
Ambassador of the Republic of Croatia to the Kingdom of the Netherlands, The Hague

Professor Vladimir Ibler
Professor, Fellow of the Croatian Academy of Sciences and Arts

Mr. Krešo Glavač
Chief of Cabinet, Ministry of Foreign and European Affairs of the Republic of Croatia

Ms. Danijela Barišić
Spokesperson, Ministry of Foreign and European Affairs of the Republic of Croatia

Mr. Davor Ljubanović
Counsellor, Embassy of the Republic of Croatia to the Kingdom of the Netherlands

Republic of Slovenia

Professor Mirjam Škrk
Head of the Chair of International Law, Faculty of Law, University of Ljubljana, former Judge and Vice-President of the Constitutional Court of the Republic of Slovenia

H.E. Ms. Simona Drenik, LL.M.
Minister Plenipotentiary, Legal Advisor, Cabinet of the Minister, Ministry of Foreign Affairs of the Republic of Slovenia

as Agents;

H.E. Mr. Karl Erjavec
Deputy Prime Minister and Minister of Foreign Affairs of the Republic of Slovenia

H.E. Mr. Roman Kirn
Ambassador of the Republic of Slovenia to the Kingdom of the Netherlands and Permanent Representative to the OPCW

H.E. Ms. Vlasta Vivod
Head of Minister's Office, Ministry of Foreign Affairs of the Republic of Slovenia

as Special Advisors;

Mr. Rodman R. Bundy
Member of the New York Bar, Eversheds LLP, Singapore

Ms. Alina Miron
Researcher, Centre de droit international de Nanterre (CEDIN), Université de Paris Ouest, Nanterre-La Défense

Dr. Daniel Müller

Ms. Nelija Vržina,
Third Secretary, Embassy of the Republic of Croatia to the Kingdom of the Netherlands

as Members of the Delegation;

Professor James Crawford, A.C., S.C., F.B.A.
Whewell Professor of International Law, University of Cambridge,
Member of the Institut de Droit international,
Barrister, Matrix Chambers, London

Professor Philippe Sands, Q.C.
Professor of International Law, University College London,
Barrister, Matrix Chambers, London

Mr. Paul S. Reichler
Partner, Foley Hoag,
Co-Chair of the International Litigation and Arbitration Department, Washington, D.C.

Mr. Andrew B. Loewenstein
Partner, Foley Hoag, Boston

Professor Zachary Douglas
Professor of International Law, Graduate Institute of International and Development Studies, Geneva,
Matrix Chambers, London

Professor Davor Vidas
Research Professor, Director of the Law of the Sea and Marine Affairs Programme, FNI, Oslo

as Counsel and Advocates;

Ms. Anjolie Singh
Member of the Indian Bar, Delhi

Mr. Trpimir Mihael Šošić
Senior Assistant Lecturer, Faculty of Law, University of Zagreb

Mr. Yuri Parkhomenko
Foley Hoag, Washington, D.C.

Mr. Zoran Bradić
Head of the Department for Borders, Ministry of Foreign and European Affairs of the Republic of Croatia

Mr. Sebastian Rogač
Ministry of Foreign and European Affairs of the Republic of Croatia

Mr. Goran Jutriša
Legal Expert
Consultant in International Law,
Researcher, Centre de droit international de Nanterre (CEDIN), Université de Paris Ouest, Nanterre-La Défense

Professor Alain Pellet
Université de Paris Ouest, Nanterre-La Défense,
Former Chairman of the United Nations International Law Commission,
Member of the Institut de Droit International

Mr. Eran Sthoeger, LL.M.
New York University School of Law

Sir Michael Wood, K.C.M.G.
Member of the International Law Commission,
Member of the English Bar

as Counsel and Advocates;

Ms. Natasha Harrington
Member of the English Bar,
Eversheds LLP, Paris

as Assistant to Counsel;

Ms. Héloïse Bajer-Pellet
Avocat, Member of the Paris Bar

Ms. Tessa Barsac, LL.M.
Consultant in International Law

Dr. Robin Cleverly, C.Geol, F.G.S.
Head, Law of the Sea Group, UK Hydrographic Office

Mr. Branko Dekleva, M.A.
First Secretary, Ministry of Foreign Affairs of the Republic of Slovenia

Mr. Vlado Ekmečič
First Secretary, Ministry of Foreign Affairs of the Republic of Slovenia

Ms. Barbara Granda, LL.M.
First Secretary, Ministry of Foreign Affairs of the Republic of Slovenia

Mr. Igor Karničnik, M.Sc.
Head of Hydrography Department, Geodetic Institute of Slovenia

Mr. Primož Kete
Head of Field for Cartography and Topography, Geodetic Institute of Slovenia

as Counsel;

Mr. Ilija Grgić
Head of the Department for State Border, State Geodetic Administration of the Republic of Croatia

Mr. Davor Kršulović
State Geodetic Administration of the Republic of Croatia

Ms. Davorka Sarić
Ministry of Foreign and European Affairs of the Republic of Croatia

Mr. Marjan Čuljak
Ministry of Foreign and European Affairs of the Republic of Croatia

Ms. Nancy Lopez
Foley Hoag, Washington, D.C.

Ms. Tracy Roosevelt
Foley Hoag, Boston

Mr. Pedro Ramirez
Foley Hoag, Washington, D.C.

as Assistants;

Ms. Victoria Taylor
International Mapping, Maryland

Mr. Alex Tait
International Mapping, Maryland

as Technical Assistants.

Ms. Špela Košir
First Secretary, Ministry of Foreign Affairs of the Republic of Slovenia

Mr. Primož Koštrica
Minister Counsellor, Ministry of Foreign Affairs of the Republic of Slovenia

Professor Martin Pratt
International Boundaries Research Unit, Department of Geography, Durham University

Mr. Samo Rus
Adviser, Ministry of Foreign Affairs of the Republic of Slovenia

Ms. Sonja Slovša Končan
Minister Counsellor, Ministry of Foreign Affairs of the Republic of Slovenia

Ms. Mateja Štrumelj Piškur, LL.M.
Minister Counsellor, Ministry of Foreign Affairs of the Republic of Slovenia

Ms. Vesna Žveglič
Senior Adviser, Ministry of Foreign Affairs of the Republic of Slovenia

as Experts and Advisors;

Ms. Diana Podgornik
Administrative Assistant, Ministry of Foreign Affairs of the Republic of Slovenia

as Support Staff.

172. At the hearing, Members of the Tribunal put questions to the Parties, to which replies were given orally in the second round of pleadings and, in respect of certain technical questions, in writing.

173. On 17 June 2014, the PCA issued a press release on conclusion of the hearing, including a summary of both Parties' positions, the content of which was agreed between the Parties.

174. On 30 April 2015, Croatia forwarded to the Tribunal a letter addressed to Slovenia, in which Croatia asked Slovenia to explain two statements made by the Slovenian Minister of Foreign Affairs on Slovenian television on 7 January 2015 and 22 April 2015 concerning the possible outcome of the arbitration.

175. Slovenia answered on 1 May 2015, submitting "that Slovenia has no information whatsoever concerning the outcome of the arbitration, nor any 'informal channel of communication with the Tribunal'." It added that Slovenia had not in any way sought to "bring pressure on the Tribunal."

176. In response to the letters dated 30 April 2015 and 1 May 2015, the Tribunal expressed concerns over the suggestion that one party might have access to confidential information related to the Tribunal's deliberations. It took note of both Parties' acknowledgement of their obligations under Article 10(1) of the Arbitration Agreement and affirmed that the arbitrators and the Parties' representatives were to refrain from *ex parte* communications.

177. By letter dated 9 July 2015, the Tribunal informed the Parties that the Award would be rendered on 17 December 2015.

178. On 22 July 2015, Serbian and Croatian newspapers published transcripts and audio files of two telephone conversations reportedly involving the arbitrator appointed by Slovenia, Dr. Jernej Sekolec, and Ms. Simona Drenik, then one of two Agents designated by Slovenia. The conversations were reported to have taken place on 15 November 2014 and 11 July 2015.

179. On 23 July 2015, the Tribunal notified the Parties that Dr. Sekolec had resigned from the Tribunal, and invited Slovenia to appoint an arbitrator to replace him.

180. Croatia transmitted translated extracts of the reported telephone conversations to the Tribunal on 24 July 2015, and asked that the Tribunal suspend the proceedings. Croatia also invited "the remaining members of the Tribunal to review the totality of the materials presented, and reflect on the grave damage that ha[d] been done to the integrity of the entire proceedings, as well as to the public perceptions of the legitimacy of the process."

181. On 26 July 2015, Slovenia expressed its "deep regret" about the facts reported in the Croatian press and informed the Tribunal of Ms. Drenik's resignation from her position as Agent of Slovenia. Slovenia however opposed Croatia's request to suspend the arbitral proceedings, and communicated this to the Tribunal by letter dated 27 July 2015. The following day, 28 July 2015, Slovenia appointed Mr. Ronny Abraham, President of the ICJ, to the Tribunal.

182. On 30 July 2015, the Tribunal notified the Parties that Professor Budislav Vukas had resigned from the Tribunal and, accordingly, invited Croatia to appoint an arbitrator to replace him as member of the Tribunal.

183. By *note verbale* of 30 July 2015, Croatia notified Slovenia that it considered Slovenia to have "engaged in one or more material breaches of the Arbitration Agreement," entitling Croatia to terminate the Arbitration Agreement "in accordance with Article 60, paragraph 1 of the Vienna Convention on the Law of Treaties." Croatia thus provided Slovenia with "the notification pursuant to Article 65, paragraph 1 of the Vienna Convention that it proposes to terminate

forthwith the Arbitration Agreement" and added that "from the date of this note the Republic of Croatia ceases to apply the Arbitration Agreement."

184. The following day, 31 July 2015, Croatia informed the Tribunal of the content of the *note verbale*, and that it could not "further continue the process [of the present arbitration] in good faith."

185. Slovenia informed Croatia by letter of 31 July 2015 that the action thus taken had, in its opinion, "no basis in international law" and that the Arbitration Agreement "is and remains the only valid legal basis for settling the border issue between the two countries." Slovenia informed the Tribunal on 13 August 2015 that it objected to Croatia's notification of the termination of the Arbitration Agreement, and stated that the Tribunal had the power and the duty to continue the proceedings.

186. On 3 August 2015, Judge Abraham notified the Tribunal of his resignation. Judge Abraham's resignation was communicated to the Parties shortly thereafter. The Tribunal accordingly invited Slovenia to appoint an arbitrator to replace Judge Abraham as member of the Tribunal.

187. Slovenia informed the Tribunal on 13 August 2015 that "in order to preserve the integrity, independence and impartiality of the Arbitral Tribunal and the ongoing proceedings, it [would] refrain from appointing a member of the Tribunal to replace Judge Abraham." Instead, Slovenia requested "the President of the Arbitration Tribunal, Judge Gilbert Guillaume, in exercise of his powers under Article 2, paragraph 2, of the Arbitration Agreement," to appoint a member of the Tribunal.

188. On 25 September 2015, the Tribunal informed the Parties that the President, in accordance with the procedure for the replacement of party-appointed arbitrators in Article 2, paragraphs 2 and 3 of the Arbitration Agreement, had appointed H.E. Ambassador Rolf Einar Fife, a national of Norway, to succeed Judge Abraham, and Professor Nicolas Michel, a national of Switzerland, to succeed Professor Vukas. The Parties were provided with a signed Declaration of Acceptance and Statement of Impartiality and Independence from each of Ambassador Fife and Professor Michel.

189. By letter dated 1 December 2015, the Tribunal fixed a procedural calendar for further written and oral submissions "concerning the legal implications of the matters set out in Croatia's letters of 24 July 2015 and 31 July 2015." The Tribunal directed the Parties to file their written submissions by 15 January 2016 (Croatia) and 26 February 2016 (Slovenia). In addition, the Tribunal informed the Parties that it intended to hold a hearing on these matters on 17 March 2016, requesting the Parties to confirm by 9 December 2015 their availability on that date.

190. By the same letter, the Tribunal released to the Parties two internal documents that Dr. Sekolec had submitted in the course of the proceedings: a note entitled "personal and confidential notes regarding the border on or around Dragonja" provided to the Tribunal in January 2015, and a document entitled "Mura River Sector: Various effectivités by Slovenia" provided to the Registry in November 2014. The Tribunal also informed the Parties that these were the only documents provided by Dr. Sekolec to the Tribunal or the Registry.

191. On 7 December 2015, in response to the Tribunal's letter dated 1 December, Slovenia confirmed its availability for the hearing on 17 March 2016. Croatia did not respond to the Tribunal's letter.

192. On 26 December 2015, the Tribunal confirmed to the Parties that the hearing would be held on 17 March 2016.

193. Croatia did not make any submission by the 15 January 2016 deadline stipulated in the Tribunal's letter to the Parties dated 1 December 2015.

194. The Written Submission of Slovenia ("Written Submission"), with accompanying documents, was filed on 26 February 2016. In its Written Submission, Slovenia requested the Tribunal to adjudge and declare that the "Arbitration Agreement of 4 November 2009 remains in force between the Parties," and that the "proceedings pursuant to the Arbitration Agreement shall continue until the Tribunal issues a final award." The request was reiterated by Slovenia at the hearing on 17 March 2016.

195. A hearing concerning the legal implications of the matters set out in Croatia's letters of 24 July 2015 and 31 July 2015 was held on 17 March 2016 at the Peace Palace, The Hague, the Netherlands.

196. Croatia did not appear at the hearing. The Tribunal was apprised of a press release of the Croatian Ministry of Foreign and European Affairs dated 14 March 2016 and of a *note verbale* from the Permanent Mission of the Republic of Croatia to the United Nations dated 16 March 2016, in which Croatia confirmed that it did not intend to participate in the hearing.

197. On 30 June 2016, the Tribunal issued a Partial Award addressing the legal consequences for the present arbitral proceedings of the contacts between Dr. Sekolec and Ms. Drenik. In its Partial Award, the Tribunal expressed its regret that Croatia had not availed itself of the opportunity to present formal pleadings and respond to questions from the Tribunal. The Tribunal noted, however, that it was a well-established principle of international procedural law that a unilateral decision to withdraw from dispute settlement proceedings cannot of itself bring such proceedings

to a halt. In the context of the arbitration before it, the Tribunal observed that this principle is set out in Article 28 of the PCA's Optional Rules for Arbitrating Disputes between Two States ("PCA Optional Rules"), which apply in the present proceedings pursuant to Article 6(2) of the Arbitration Agreement.

198. With respect to the question of jurisdiction, the Tribunal concluded that it "has jurisdiction under the provisions of the Arbitration Agreement and Article 21, paragraph 1 of the PCA Optional Rules, and in conformity with Article 65 of the Vienna Convention, to decide whether Croatia, acting under Article 60 of the Convention ha[d] validly proposed to Slovenia to terminate the Arbitration Agreement and ha[d] validly ceased to apply it."

199. With respect to the question of the continuation of the proceedings, the Tribunal affirmed that it had not only the authority but also the duty to settle the land and maritime dispute which was submitted to it. The Tribunal emphasised in this regard that it was incumbent on it to safeguard the integrity of the arbitral process. The Tribunal thus recalled the resignations of Dr. Sekolec as arbitrator, of Ms. Drenik as Agent for Slovenia, and of Professor Vukas as arbitrator. The Tribunal also recalled that, pursuant to the relevant provisions of the Arbitration Agreement, the President of the Tribunal had appointed as new members of the Tribunal H.E. Ambassador Rolf Einar Fife and Professor Nicolas Michel. The Tribunal stated that no doubt had been expressed on the impartiality or on the independence of the three remaining arbitrators or of the two new arbitrators. It was therefore concluded that the Tribunal was properly recomposed.

200. The Tribunal noted, for the avoidance of doubt, that since Dr. Sekolec and Professor Vukas had resigned as arbitrators, their views expressed in prior deliberation meetings were of no relevance for the work of the Tribunal in its present composition. Accordingly, no account would be had of their various deliberation notes, which they had circulated at earlier stages of these proceedings in their capacity as arbitrators. Further, in the interests of transparency, the two documents submitted by Dr. Sekolec to the Tribunal had been released to the Parties. The Tribunal observed in this regard that Dr. Sekolec, through his notes, did not communicate to the Tribunal any new arguments or facts not already contained in the official record of the Tribunal.

201. The Tribunal decided that Dr. Sekolec and Ms. Drenik acted in violation of provisions of the Arbitration Agreement and the Terms of Appointment adopted by the Parties and the Tribunal for the proceedings. The Tribunal then turned to the question as to whether there was a "material breach" of the Arbitration Agreement by Slovenia entitling Croatia to terminate the Agreement under Article 60, paragraph 1 of the Vienna Convention on the Law of Treaties. On the basis of the case law of international courts and tribunals, the Tribunal observed that termination of a

treaty under Article 60, paragraph 1 due to a breach is warranted only if the breach defeats the object and purpose of the treaty. In this regard, the Tribunal stated:

> 219. The treaty in question is of a specific kind. It is an arbitration agreement. As stated by the ICJ, "when States sign an arbitration agreement, they are concluding an agreement with a very specific object and purpose: to entrust an arbitration tribunal with the task of settling a dispute in accordance with the terms agreed by the parties, who define in the agreement the jurisdiction of the tribunal and determine its limits". In the present case, the Arbitration Agreement notes in its preamble that, "through numerous attempts, the Parties have not resolved their territorial and maritime dispute in the course of the past years". It contemplates the constitution of an arbitral tribunal, fixes its composition and task and determines the applicable law and procedure to be followed. It finally states that "[t]he award shall be binding on the Parties and shall constitute a definitive settlement of the dispute". The Arbitration Agreement, accordingly, is premised on a desire for the peaceful and definitive settlement of a dispute that had theretofore been incapable of amicable resolution.

202. The Tribunal therefore considered whether the breaches of the Arbitration Agreement by Slovenia were such as to defeat the object and purpose of the Arbitration Agreement:

> 223. [. . .]
>
> In its first letter to the Tribunal of 24 July 2015, Croatia took note of the resignation of Ms. Drenik and Dr. Sekolec and, appropriately, invited "the remaining members of the Tribunal to review the totality of the materials presented, and reflect on the grave damage that has been done to the integrity of the entire proceedings, as well as to public perceptions of the legitimacy of the process".
>
> 224. The Tribunal has so proceeded. It has been recomposed, and no doubt has been expressed on the independence and impartiality of the Tribunal in its new composition. The records of the arbitration have been carefully reviewed, and the two documents submitted by Dr. Sekolec to the Tribunal in collaboration with Ms. Drenik have been communicated to the Parties. These documents contained no facts or arguments not already present in the written or oral pleadings. The Parties were provided an opportunity to identify any other breaches of confidentiality in the proceedings of which they were aware, and neither Party raised any further issues. The Tribunal is satisfied that the procedural balance between the Parties is secured.
>
> 225. Accordingly, and in view of the remedial action taken, the Tribunal determines that the breaches of the Arbitration Agreement by Slovenia do not render the continuation of the proceedings impossible and, therefore, do not defeat the object and purpose of the Agreement. Accordingly, Croatia was not entitled to terminate the Agreement under Article 60, paragraph 1 of the Vienna Convention. The Arbitration Agreement remains in force.

203. Accordingly, the Tribunal affirmed its jurisdiction and unanimously decided:

> (a) Slovenia has violated provisions of the Arbitration Agreement of 4 November 2009;
>
> (b) The Arbitration Agreement remains in force;
>
> (c) The arbitral proceedings pursuant to the Arbitration Agreement shall continue;
>
> (d) After consultation with the Parties, the Tribunal shall determine the further procedural steps in this arbitration; and
>
> (e) The Tribunal reserves any decision in respect of the ultimate allocation of costs until its final award; however, for the time being, Slovenia shall advance the sums

> necessary to cover costs that arise as a result of the prolongation of the proceedings beyond the originally envisaged timetable.

204. On 4 November 2016, the Tribunal invited the Parties to indicate, by 18 November 2016, whether they wished to have an opportunity to make further submissions to the Tribunal in a short oral hearing. Pursuant to paragraph 231(d) of the Partial Award, the Tribunal would then determine the further procedure in this arbitration.

205. On 18 November 2016, Slovenia responded to the effect that it did "not itself see the need for a further hearing." However, "if the Tribunal or Croatia consider that a further hearing would be useful, Slovenia would of course assist the Tribunal in any way it deems helpful." No response to the Tribunal's letter of 4 November 2016 was received from Croatia.

206. On 29 March 2017, the Tribunal informed the Parties that it was satisfied that it was not necessary to request further submissions from the Parties or to put additional questions to the Parties. In accordance with Article 29 of the PCA Optional Rules, the Tribunal therefore declared the hearing in the present arbitration closed.

III. THE PARTIES' FORMAL REQUESTS

A. CROATIA'S REQUESTS

1. The Land Boundary

207. In respect of the land boundary, in its Memorial, Croatia requested that the Tribunal adjudge and declare that:

> (1) Under Article 3(1)(a) of the Arbitration Agreement, the land boundary between the Republic of Croatia and the Republic of Slovenia follows the line as depicted in the map found at Annex HR-A;[283]
>
> (2) In accordance with that land boundary,
>
> (a) no Slovenian personnel, whether military, civilian, police or security, shall be entitled to remain at the facility located at Sveta Gera in the Croatian Municipality of Ozalj;
>
> (b) Slovenia shall not hinder communication within the Croatian Municipality of Sveti Martin na Muri, including the area of Murišće.[284]

208. In its Counter-Memorial, Croatia requested that the Tribunal adjudge and declare that:

> (1) Under Article 3(1)(a) of the Arbitration Agreement, the land boundary between the Republic of Croatia and the Republic of Slovenia follows the line depicted in the series of maps comprising Volume III of this Reply;[285]
>
> (2) In accordance with that land boundary,
>
> (i) no Slovenian personnel, whether military, civilian, police or security, shall be entitled to remain at the facility located at Sveta Gera in the Croatian Municipality of Ozalj;
>
> (ii) Slovenia shall not hinder communication within the Croatian Municipality of Sveti Martin na Muri, including the area of Murišće.[286]

209. In its oral submissions at the hearing, Croatia requested that the Tribunal adjudge and declare that:

> (1) Under Article 3(1)(a) of the Arbitration Agreement, the land boundary between the Republic of Croatia and the Republic of Slovenia follows the line depicted in the series of maps comprising Volume III of the Counter-Memorial of the Republic of Croatia, subject to the technical corrections described in the Republic of Croatia's letters on 24th April 2014 and 26th May 2014. In addition to that, the areas not recorded in

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283 An electronic copy of the map exhibited in Annex HR-A, which Croatia has made part of its formal request in the present arbitration, may be consulted on the website of the PCA, acting as Registry in the proceedings.

284 Croatia's Memorial, p. 237.

285 An electronic copy of the maps comprising Volume III of Croatia's Counter-Memorial, which Croatia has made part of its formal request in the present arbitration, may be consulted on the website of the PCA, acting as Registry in the proceedings.

286 Croatia's Counter-Memorial, p. 373.

either Parties' [sic] cadastral records ("gaps") should also be delimited between the Parties as part of the Tribunal's award.

(2) In accordance with that land boundary, (i) no Slovenian personnel, whether military, civilian, police or security, shall be entitled to remain at the facility located at Sveta Gera in the Croatian Municipality of Ozalj; (ii) Slovenia shall not hinder communication within the Croatian Municipality of Sveti Martin na Muri, including the area of Murišće.

2. The Maritime Issues

210. In respect of the maritime issues, in its Memorial and Counter-Memorial, Croatia requested that the Tribunal adjudge and declare that:

(3) Under Article 3(1)(a) of the Arbitration Agreement, the maritime boundary between the Republic of Croatia and the Republic of Slovenia commences at the land boundary terminus, located at 45°28′42.3″N - 13°35′08.5″E, and then follows a simplified equidistance line as depicted in Figure 9.7, until it reaches the point located at 45º35′15.48″ N - 13º28′18.08″E;

(4) Under Article 3(1)(b) of the Arbitration Agreement, Slovenia's "Junction to the High Sea" does not imply or allow any territorial contact between Slovenia and the High Seas;

and

(5) Under Article 3(1)(b) and (c) of the Arbitration Agreement, Slovenia's "junction to the High Sea" and the "regime for the use of the relevant maritime areas" shall be, *mutatis mutandis*, that provided for by the regime of innocent passage through international straits, as set out in Article 45 of the 1982 Convention on the Law of the Sea, and subject to the existing IMO traffic separation scheme as may be modified from time to time. [287]

211. In its oral submissions at the hearing, Croatia requested that the Tribunal adjudge and declare that:

(3) Under Article 3(1)(a) of the Arbitration Agreement, the maritime boundary between the Republic of Croatia and the Republic of Slovenia commences at the land boundary terminus, located at 45°28′42.3″N - 13°35′08.5″E (ETRS89, GRS80), and then follows a simplified equidistance line as depicted in Figure 9.7 of Croatia's *Memorial*, until it reaches the point located at 45°35′15.48″N - 13°28′18.08″E;

(4) Under Article 3(1)(b) of the Arbitration Agreement, "Slovenia's junction to the High Sea" does not imply or allow any territorial contact between Slovenia and the High Seas;

and

(5) Under Article 3(1)(b) and (c) of the Arbitration Agreement, no "Slovenian junction to the High Sea" is required and the issue of the "regime for the use of the relevant maritime areas" does not arise. If, however, the Tribunal were to hold that such a "junction" is required, then it should be by reference to the regime of passage under Part III of the 1982 Convention on the Law of the Sea, as further particularized in Croatia's written answers to the Tribunal's questions.

[287] Croatia's Memorial, p. 237; Croatia's Counter-Memorial, Submissions.

3. Reservation of Rights

212. Croatia further noted in its Counter-Memorial that "[h]aving regard to the reservation of rights made in paragraph 5.60 of its Memorial, and the position adopted by the Slovenian Memorial in respect of the land boundary, Croatia reiterates its reservation of the right to amend its claims, as described in paragraphs 4.72 to 4.85 of this Counter Memorial, and as depicted in Figures CM 4.15 and CM 8.03, at a later stage of these proceedings."[288]

213. As presented in the second round of oral submissions on this part of the boundary, Croatia ceased to maintain such a reservation.[289]

B. SLOVENIA'S REQUESTS

1. The Land Boundary

214. In respect of the land boundary, in its Memorial and Counter-Memorial, Slovenia requested that the Tribunal adjudge and declare that:

> 1. The course of the land boundary between the Republic of Slovenia and the Republic of Croatia is as follows:
>
> **Mura River Sector**
>
> (*a*) From the confluence of the Rivers Krka and Mura (point B1), the land boundary runs westwards in the middle of the Mura River to a point north-east of Gibina.
>
> (Maps 1, 2 and 3 in Volume 2 [of Slovenia's Memorial])[290]
>
> **Central Sector**
>
> *Slovenske gorice*
>
> (*b*) From Gibina to the Presika Stream, the land boundary follows the eastern and southern boundaries of Slovenia's municipalities reflected in the records of the cadastral municipalities of Gibina, Šafarsko, Razkrižje, Veščica and Globoka, and encompassing 10 houses south of Razkrižje. It then follows the former State boundary between Austria and Hungary, reflected in the boundaries of Slovenia's municipalities, up to the point where it meets the Drava River to the south-east of Središče ob Dravi. (Maps 4, 5 and 6 in Volume 2 [of Slovenia's Memorial])

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288 Croatia's Counter-Memorial, p. 373.

289 Transcript, Day 5, p. 180:8-13.

290 An electronic copy of the maps comprising Volume 2 of Slovenia's Memorial, which Slovenia has made part of its formal request in the present arbitration, may be consulted on the website of the PCA, acting as Registry in the proceedings.

Drava River

(*c*) The land boundary then follows the middle of the Drava River from the point south-east of Središče ob Dravi, through the Ormož Lake (*Ormoško jezero*) to the point north-east of Zavrč where it reaches the municipality of Zavrč. (Maps 6, 7 and 8 in Volume 2 [of Slovenia's Memorial])

Haloze-Macelj

(*d*) From the Drava River to the Sotla River, the boundary follows the former State boundary between Austria and Hungary, reflected in the boundaries of Slovenian municipalities and Slovenia's cadastral records. (Maps 8, 9, 10 and 11 in Volume 2 [of Slovenia's Memorial])

Sotla River

(*e*) From the Haloze-Macelj area, the land boundary follows the middle of the Sotla River, passing through Lake Vonarsko (*Vonarsko jezero*), until it reaches outfall of the Sotla River into the Sava River. (Maps 11, 12, 13, 14, 15, 16, 17 and 18 in Volume 2 [of Slovenia's Memorial])

Sava and Bregana Rivers

(*f*) From the mouth of the Sotla River, the land boundary follows the middle of the Sava River up to the mouth of the Bregana River. It then continues in the middle of the Bregana River up to the foot of Gorjanci - Žumberačka gora in the vicinity of the settlement of Gabrovica. (Maps 18 and 19 in Volume 2 [of Slovenia's Memorial])

Gorjanci/Žumberak

(*g*) The land boundary then follows the southern and western boundaries of Slovenia's municipalities, including the military facility and the trigonometric point on Trdinov vrh, the settlement of Drage and the entire settlement of Brezovica pri Metliki, until it reaches the Kamenica River, to the east of the settlement with the same name. (Maps 19, 20, 21, 22 and 23 in Volume 2 [of Slovenia's Memorial])

Kamenica, Kolpa and Čabranka Rivers

(*h*) The land boundary continues to run in the middle of the Kamenica River to its outfall into the Kolpa River. From there, it follows the middle of the Kolpa River to the confluence of the Rivers Kolpa and Čabranka, continuing upstream on the latter and on its tributary until the river leaves the land boundary south of Novi Kot. (Maps 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35 in Volume 2 [of Slovenia's Memorial])

Kras

(*i*) From the Čabranka River to mount Škodovnik, the land boundary follows the former State boundary between Austria and Hungary, reflected in the boundaries of Slovenian municipalities, the protocol of the 1909 Joint Commission, and boundary markers on the ground. (Maps 35 and 36 in Volume 2 [of Slovenia's Memorial])

Istria Sector

(*j*) The land boundary then continues to follow the boundaries of Slovenia's municipalities as reflected in Slovenia's cadastral records until it reaches the Bay of Piran. (Maps 35, 36, 37, 38, 39, 40, 41, 42, 43, 44 and 45 in Volume 2 [of Slovenia's Memorial])

Bay of Piran

(*k*) Along the Bay of Piran, the boundary follows the coast of the Savudrija peninsula to the most prominent point of the Savudrija promontory. (Map 46 in Volume 2 [of Slovenia's Memorial])

The course of the land boundary is more precisely depicted on Maps 1 to 46, in a scale 1 : 25,000, contained in Volume 2 of the Memorial.[291]

215. In its oral submissions at the hearing, Slovenia requested that the Tribunal adjudge and declare that:

1. The course of the land boundary between the Republic of Slovenia and the Republic of Croatia is as follows:

Mura River Sector

(*a*) From the confluence of the Rivers Krka and Mura (point B1), the land boundary runs westwards in the middle of the Mura River to a point north-east of Gibina. (Maps 1 (as corrected in Slovenia's Counter-Memorial), 2 and 3 in Volume 2 of Slovenia's Memorial)

Central Sector

Slovenske gorice

(*b*) From Gibina to the Presika Stream, the land boundary follows the eastern and southern boundaries of Slovenia's municipalities reflected in the records of the cadastral municipalities of Gibina, Šafarsko, Razkrižje, Veščica and Globoka, and encompassing 10 houses south of Razkrižje. It then follows the former State boundary between Austria and Hungary, reflected in the boundaries of Slovenia's municipalities, up to the point where it meets the Drava River to the south-east of Središče ob Dravi. (Maps 4, 5 and 6 in Volume 2 of Slovenia's Memorial)

Drava River

(*c*) The land boundary then follows the middle of the Drava River from the point south-east of Središče ob Dravi, through the Ormož Lake (Ormoško jezero) to the point north-east of Zavrč where it reaches the municipality of Zavrč. (Maps 6, 7 and 8 in Volume 2 of Slovenia's Memorial)

Haloze-Macelj

[291] Slovenia's Memorial, pp. 617-19; Slovenia's Counter-Memorial, pp. 529-31.

(*d*) From the Drava River to the Sotla River, the boundary follows the former State boundary between Austria and Hungary, reflected in the boundaries of Slovenian municipalities and Slovenia's cadastral records. (Maps 8, 9, 10 (as corrected in Slovenia's Reply) and 11 in Volume 2 of Slovenia's Memorial)

Sotla River

(*e*) From the Haloze-Macelj area, the land boundary follows the middle of the Sotla River, passing through Lake Vonarsko (Vonarsko jezero), until it reaches the outfall of the Sotla River into the Sava River. (Maps 11, 12, 13, 14, 15, 16, 17 and 18 in Volume 2 of Slovenia's Memorial)

Sava and Bregana Rivers

(*f*) From the mouth of the Sotla River, the land boundary follows the middle of the Sava River up to the mouth of the Bregana River. It then continues in the middle of the Bregana River up to the foot of Gorjanci - Žumberačka gora in the vicinity of the settlement of Gabrovica. (Maps 18 and 19 in Volume 2 of Slovenia's Memorial)

Gorjanci / Žumberak

(*g*) The land boundary then follows the southern and eastern boundaries of Slovenia's municipalities, including the military facility and the trigonometric point on Trdinov vrh, the settlement of Drage and the entire settlement of Brezovica pri Metliki, until it reaches the Kamenica River, to the east of the settlement with the same name. (Maps 19, 20, 21, 22 and 23 in Volume 2 of Slovenia's Memorial)

Kamenica, Kolpa and Čabranka Rivers

(*h*) The land boundary continues to run in the middle of the Kamenica River to its outfall into the Kolpa River. From there, it follows the middle of the Kolpa River to the confluence of the Rivers Kolpa and Čabranka, continuing upstream on the latter and on its tributary until the river leaves the land boundary south of Novi Kot. (Maps 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 in Volume 2 of Slovenia's Memorial and map 35 as corrected in Slovenia's Reply)

Kras

(i) The land boundary then continues to follow the boundaries of Slovenia's municipalities as reflected in Slovenia's cadastral records until it reaches the Bay of Piran. (Maps 35, 36, 37, 38, 39, 40, 41, 42, 43 (as corrected in Slovenia's Reply), 44 and 45 in Volume 2 of Slovenia's Memorial)

Istria Sector

(*j*) The land boundary then continues to follow the boundaries of Slovenia's municipalities as reflected in Slovenia's cadastral records until it reaches the Bay of Piran. (Maps 35, 36, 37, 38, 39, 40, 41, 42, 43 (as corrected in Slovenia's Reply), 44 and 45 in Volume 2 of Slovenia's Memorial)

Bay of Piran

(*k*) Along the Bay of Piran, the boundary follows the coast of the Savudrija peninsula to the most prominent point of the Savudrija promontory. (Map 46 in Volume 2 of Slovenia's Memorial)

The course of the land boundary is more precisely depicted on Maps 1 to 46, in a scale 1 : 25,000, contained in Volume 2 of Slovenia's Memorial of 11 February 2013 as corrected in Counter-Memorial and Reply.

2. The Maritime Issues

216. In respect of the maritime delimitation, Slovenia requested in its Memorial and Counter-Memorial that the Tribunal adjudge and declare that:

> 2. The Bay of Piran has the status of Slovenian internal waters and is closed by a straight baseline connecting the most prominent points on the coasts of the Madona and Savudrija promontories.
>
> 3. The course of the maritime boundary between the Republic of Slovenia and the Republic of Croatia is constituted by a series of geodetic lines connecting the following points, as illustrated on Figure 11.1 [of Slovenia's Memorial]:
>
> (a) Starting at Point P1, which is situated on the low-water line at the point where the closing line across the Bay of Piran meets the coast at the Savudrija Promontory, the maritime boundary proceeds to Point P2, which is the easternmost point of Slovenia's junction to the High Sea;
>
> (b) From Point P2, the maritime boundary proceeds in a south-westerly direction, at a distance of three nautical miles from the Treaty of Osimo line, until it reaches Point P3, which is located 12 nautical miles from Croatia's coast;
>
> (c) From Point P3, the maritime boundary follows a line running parallel to, and at a constant distance of three nautical miles from, the 1968 continental shelf boundary between the former Yugoslavia and Italy, until it intersects the 45°10′N parallel of latitude at Point P4.
>
> 4. Slovenia's junction to the High Sea is a geodetic line connecting Point P2, which lies along the southern limits of Slovenia's territorial sea, with Point T4 bis, which is the point where the southern limits of Slovenia's territorial sea intersects the 1975 Treaty of Osimo boundary line agreed between the former Yugoslavia and Italy.
>
> 5. The regime for the use of the relevant maritime areas comprises the following:
>
> (a) With the exception of the area described in paragraph (b) below, the areas lying within 12 nautical miles of the Parties' respective baselines and delimited in accordance with paragraph 3 above constitute the territorial seas of Slovenia and Croatia, respectively. Slovenian fishermen will continue to enjoy their historical fishing rights in Croatia's territorial waters, which are also guaranteed by the Accession Treaty between Croatia and the European Union and by the 1997 Agreement on Border Traffic and Cooperation between the Parties;

(b) The maritime area lying within the corridor circumscribed by the lines connecting Points P2 and T4 bis in the north, the Treaty of Osimo line in the west, and the line connecting Points P2 and P3 in the east constitutes high seas within which Slovenia possesses sovereign rights over the continental shelf (sea bed and sub-soil);

(c) The areas lying south of Slovenia's junction to the High Sea and beyond the limits of Croatia's territorial sea are high seas and shall remain so as between the Parties up to the point where the interests of third States are affected.[292]

217. In its oral submissions at the hearing, Slovenia requested that the Tribunal adjudge and declare that:

2. The Bay of Piran has the status of Slovenian internal waters and is closed by a straight baseline connecting the most prominent points on the coasts of the Madona and Savudrija promontories.

3. The course of the maritime boundary between the Republic of Slovenia and the Republic of Croatia is constituted by a series of geodetic lines connecting the following points, as illustrated on Figure 11.1 of Slovenia's Memorial:

(a) Starting at Point P1, which is situated on the low-water line at the point where the closing line across the Bay of Piran meets the coast at the Savudrija Promontory, the maritime boundary proceeds to Point P2, which is the easternmost point of Slovenia's junction to the High Sea;

(b) From Point P2, the maritime boundary proceeds in a south-westerly direction, at a distance of three nautical miles from the Treaty of Osimo line, until it reaches Point P3, which is located 12 nautical miles from Croatia's coast;

(c) From Point P3, the maritime boundary follows a line running parallel to, and at a constant distance of three nautical miles from, the 1968 continental shelf boundary between the former Yugoslavia and Italy, until it intersects the 45°10′ N parallel of latitude at Point P4.

4. Slovenia's junction to the High Sea is a geodetic line connecting Point P2, which lies along the southern limits of Slovenia's territorial sea, with Point T4 bis, which is the point where the southern limits of Slovenia's territorial sea intersects the 1975 Treaty of Osimo boundary line agreed between the former Yugoslavia and Italy.

5. The regime for the use of the relevant maritime areas comprises the following:

(a) With the exception of the area described in paragraph (b) below, the areas lying within 12 nautical miles of the Parties' respective baselines and delimited in accordance with paragraph 3 above constitute the territorial seas of Slovenia and Croatia, respectively. Slovenian fishermen will continue to enjoy their historical fishing rights in Croatia's territorial waters, which are also guaranteed by the Accession Treaty between Croatia

[292] Slovenia's Memorial, pp. 619-623; Slovenia's Counter-Memorial, pp. 531-533.

and the European Union and by the 1997 Agreement on Border Traffic and Cooperation between the Parties;

(b) The maritime area lying within the corridor circumscribed by the lines connecting Points P2 and T4 bis in the north, the Treaty of Osimo line in the west, and the line connecting Points P2 and P3 in the east constitutes high seas within which Slovenia possesses sovereign rights over the continental shelf (sea bed and sub-soil);

(c) The areas lying south of Slovenia's junction to the High Sea and beyond the limits of Croatia's territorial sea are high seas and shall remain so as between the Parties up to the point where the interests of third States are affected.

3. Objection to the Tribunal's Jurisdiction

218. In its Counter-Memorial and its oral submissions at the hearing, Slovenia further requested the Tribunal "to declare that 'Point 2 of the Submissions made by the Republic of Croatia is not within the task of the Arbitral Tribunal set out in the Arbitration Agreement'."[293]

[293] Slovenia's Counter-Memorial, p. 533; Transcript, Day 8, p. 179:8-12.

IV. DETERMINATIONS IN RESPECT OF THE LAND BOUNDARY

219. The Tribunal first considers the course of the land boundary between Croatia and Slovenia. In this regard, the Tribunal will address its function under the Arbitration Agreement before addressing the disputed segments of the land boundary.

A. THE TASK OF THE TRIBUNAL AND THE APPLICABLE LAW

1. The Parties' Positions

(a) Task of the Tribunal

220. Pursuant to Article 3(1) of the Arbitration Agreement, the Tribunal's task consists of the determination of the course of the maritime and land boundary between Croatia and Slovenia, Slovenia's junction to the High Sea, and the regime for the use of the relevant maritime areas.

221. In addition, Article 3(2) of the Arbitration Agreement provides:

> The Parties shall specify the details of the subject-matter of the dispute within one month. If they fail to do so, the Arbitral Tribunal shall use the submissions of the Parties for the determination of the exact scope of the maritime and territorial disputes and claims between the Parties.[294]

222. The Parties did not specify the details of the subject-matter of the dispute within one month. Following consultation with the Parties at the First Procedural Meeting, the Tribunal therefore noted in its Procedural Order No. 1:

> The Arbitral Tribunal takes note of the Parties' joint view that, pursuant to Article 3(2) of the Agreement, it shall fall to the Arbitral Tribunal to determine the exact scope of the maritime and territorial disputes and claims between the Parties, taking into consideration the entirety of the Parties' written and oral submissions.[295]

223. As has become apparent from the Parties' written and oral submissions, the Parties' perception of the Tribunal's task in relation to the land boundary differs to a certain extent. The Parties' approaches are described in the following paragraphs.

i. Croatia's Position

224. Croatia emphasises that the Parties agree that their respective internal legislation, even if it did not as such delimit the boundary, "constitutes valuable evidence of their respective understanding

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294 Arbitration Agreement, Article 3(2).

295 Procedural Order No. 1, para. 1; *see also* Croatia's Memorial, para. 4.2; Slovenia's Memorial, para. 1.05.

and interpretation of the existing boundary" as of the critical date.[296] Croatia states that the Parties further agree that in order to interpret such legislation, "the cadastral records of both republics are of valuable help" and that "the legislation on territorial organization together with the cadastral records evidences the 'view of all the competent authorities of the administration' concerning the legal title delimiting their respective boundaries."[297] Thus "in both Croatia and Slovenia, at the critical date, internal legislation defined the republican territory in terms of specific municipalities whose precise geographical contours and limits were set forth in cadastral records and maps."[298] By virtue of such legislation, "the republican territory in each of the two republics consisted of the aggregate of its municipalities" and such municipalities "themselves included one or more cadastral districts, the geographic limits of which were specifically defined and mapped."[299] For this reason, Croatia considers the work of the parties between 1992 and 1997 on the comparison and reconciliation of their respective cadastral district boundaries to be of great relevance to the task of the Tribunal.[300]

225. According to Croatia, "[i]t should not be difficult" for the Tribunal to determine the parts of the land boundary that are disputed.[301] Croatia points to the 1996 Report of the Expert Group as a jointly-prepared document pre-dating the Arbitration Agreement, and identifying the parts of the boundary that are disputed.[302] Relying mainly on the 1996 Report, Croatia considers that the subject-matter of the dispute with regard to the land boundary corresponds to the areas where, according to the 1996 Report, the boundaries claimed by the Parties overlap and are separated by more than 50 m.[303]

226. In the 1996 Report, the Expert Group identified twenty such areas, extending over approximately 60 km of the land boundary. In its Memorial, "to avoid overburdening the Arbitral Tribunal,"[304] Croatia addresses eight such areas, accounting for more than 47 km of the border, and 733.9 of

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296 Transcript, Day 1, pp. 58:23-59:9, *citing* Slovenia's Memorial, para. 5.19.

297 Slovenia's Memorial, para. 5.19, *citing Case concerning the frontier dispute (Benin/Niger)*, Judgment, I.C.J. Reports 2005, p. 90 at p. 148, para. 139.

298 Transcript, Day 1, pp. 59:22-60:1.

299 Transcript, Day 1, p. 60:2-11.

300 Transcript, Day 1, p. 66:19-25.

301 Croatia's Memorial, para. 4.3; *see also* Croatia's Memorial, para. 1.15.

302 Croatia's Memorial, para. 4.3.

303 Croatia's Memorial, paras 1.15, 4.6; Croatia's Counter-Memorial, paras 3.82-83.

304 Croatia's Memorial, para. 4.7; *see also* Croatia's Memorial, para. 1.16.

the 797.9 ha (92%) of the disputed territory.[305] It addresses the twelve remaining areas in its Counter-Memorial.[306]

227. Croatia notes that "a full and final delimitation of the entire border"[307] would also require a delimitation in a further twelve areas, where the boundaries claimed by the Parties overlap and are separated by *less* than 50 m (as well as the few areas not included in a cadastral district of either State[308]). Croatia suggests in its Memorial that such "minor discrepancies" be left to the Parties to resolve after the Tribunal has determined the remainder of the boundary.[309] This proposition is based on the "impracticality of imposing on the Tribunal the burden of delimiting every disputed square met[re]" and the likelihood of eventual agreement on minor discrepancies once the vast majority of the border is delimited.[310]

228. Croatia proposes that the Tribunal "delimit the land boundary in the same way the parties set out to do in 1992, that is by alignment of their respective cadastral district boundaries, and by reconciliation of the discrepancies that exist along the 9% of the boundary that the Parties' experts found not to be aligned."[311] Croatia contends that in most of the cases where there are discrepancies, such reconciliation would involve no more than technical adjustments, based on modern geodetic analysis. In other cases, "it would be a matter of comparing the parties' respective cadastral boundaries with the historic source of title . . . and then determining which party's cadastral boundary is more faithful to the proper historic source of title."[312]

229. Croatia states that, shortly after independence, the Parties "set out to confirm precisely where the [land boundary] was agreed and where it was disputed."[313] It emphasises that Slovenia "acknowledges" that the definition of cadastral boundaries was to be considered "the point of departure" for the delimitation of the land boundary.[314] Further, Slovenia "accepts" that the Expert Group aimed at identifying the disputed parts of the land boundary on the basis of cadastral

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305 Croatia's Memorial, para. 4.7; *see also* Croatia's Memorial, para. 1.16.

306 Croatia's Counter-Memorial, para. 1.21.

307 Croatia's Memorial, para. 4.6; *see also* Croatia's Memorial, para. 1.17.

308 Croatia's Memorial, para. 4.6.

309 Croatia's Memorial, para. 4.6; *see also* Croatia's Memorial, para. 1.17.

310 Croatia's Memorial, para. 4.6; *see also* Croatia's Memorial, para. 1.17; Croatia's Counter-Memorial, paras 1.22, 3.82.

311 Transcript, Day 1, pp. 82:22-83:2, pp. 89:22-90:17.

312 Transcript, Day 1, p. 83:8-15.

313 Croatia's Counter-Memorial, paras 3.27-28.

314 Croatia's Counter-Memorial, para. 3.28; Slovenia's Memorial, paras 3.16, 5.73; *see also* Aide- Mémoire of the Meeting of Surveying and Mapping Expert Delegations of the Republic of Slovenia and the Republic of Croatia for the Definition of the Border, June 1992, Annex SI-257.

boundaries, and that they did so.[315] Croatia finds support in the Minutes from a 15 March 1993 meeting of the Parties' Expert Groups[316] and the Joint Statement of the Parties' Expert Groups following their meeting on 7 May 1993.[317]

230. Croatia notes that these efforts culminated in the 1996 Report.[318] Croatia asserts that Slovenia "accepts" that this report "identified the disputed parts of the boundary."[319] The 1996 Report identified 32 discrepancies, and Croatia notes that Slovenia refers to a joint statement by the two Foreign Ministers mentioning "32 unresolved situations".[320]

231. Croatia contends that the work of the Expert Group after the completion of their report confirms that the only disputed areas are the areas where the cadastral boundaries are not aligned.[321] Croatia notes that, between 1996 and 1998, the Expert Group conducted "a series of site visits to certain of the disputed areas" with the aim of determining the actual border.[322] According to Croatia, that work came to an end in 1998 because Slovenia "unilaterally refused to allow its experts to participate in any further field work."[323]

232. Finally, Croatia notes that Slovenia agrees that, at a ministerial-level meeting of the two States on 30 November 1998, "[t]he Ministers agreed that 91.1% of the land boundary was coordinated."[324] As a result, Croatia concludes, "[i]t was only the uncoordinated remainder that required resolution. And it is only that part of the boundary that requires resolution in these proceedings."[325]

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315 Croatia's Counter-Memorial, paras 3.29-31, 3.34-35; Slovenia's Memorial, paras 3.23-24; *see* Joint Statement of the First Meeting of the Expert Groups of the Republic of Slovenia and the Republic of Croatia on Frontier Issues, held at Otočec, 9 December 1992, Annex SI-266.

316 Croatia's Counter-Memorial, paras 3.32-33; Minutes of the Meeting of Geodetic Experts from Expert Groups of the State Commissions of the Republic of Croatia and the Republic of Slovenia, Zagreb, 15 March 1993, Annex HR-289.

317 Croatia's Counter-Memorial, para. 3.36; Slovenia's Memorial, para. 3.25; Minutes of the Meeting of Geodetic Experts from Expert Groups of the State Commissions of the Republic of Croatia and the Republic of Slovenia, Zagreb, 15 March 1993, Annex HR-289.

318 Croatia's Counter-Memorial, para. 3.37; Joint Croatian-Slovenian Expert Group for Collating Unaligned Borders of Cadastral Districts, *State Border, Republic of Croatia – Republic of Slovenia: Joint Report on the Results of the Collation of the Records of Cadastral District Borders in Areas of Greater Discrepancies,* 20 December 1996, Annex HR-80.

319 Croatia's Counter-Memorial, paras 3.39-40; Slovenia's Memorial, paras 3.38, 5.74.

320 Croatia's Counter-Memorial, paras 3.41-42; Slovenia's Memorial, para. 3.40.

321 Croatia's Counter-Memorial, para. 3.44.

322 *Ibid.*

323 *Ibid.*; Report of the Croatian Members of the Joint Expert Group, 12 October 1998, p. 4, Annex HR-308.

324 Croatia's Counter-Memorial, para. 3.45; Slovenia's Memorial, para. 3.42.

325 Croatia's Counter-Memorial, para. 3.45.

233. In response to Slovenia's attempt to discount the significance of the 1996 Report, Croatia seeks to demonstrate that Slovenia's own annexes confirm that the Parties compared their cadastral district boundaries in order to identify the parts of the boundary that were agreed and the parts that were disputed.[326]

234. Croatia asserts that the minutes of a meeting of the Parties that occurred in March 1997 and where the 1996 Report was formally adopted confirm that the 1996 Report determined the agreed and the disputed parts of the boundary.[327] Croatia points to the following language:

> The border line between the Republic of Slovenia and the Republic of Croatia has been agreed in borders of up to 50 metres and in the length of 610 kilometres, and not yet agreed in the length of 60 kilometres. The surface area of the disputed territory amounts to 828 hectares, 804 hectares of which is land with dual records, and 24 hectares without records.[328]

235. In response to Slovenia's suggestion that the 1996 Report was not based on a comparison of all cadastral districts along the border, Croatia explains that the Parties completed their comparison of the border in 1994 and presented their results in a report dated 2 June 1994, on which the Expert Group subsequently relied.[329]

236. Croatia faults Slovenia for conflating the process of comparing cadastral district boundaries to determine the agreed and disputed parts of the boundary with subsequent efforts to negotiate a resolution of the Parties' boundary disputes.[330] Croatia asserts that the course of the cadastral district boundaries was the only relevant criterion in the former process, but only one of multiple criteria in the latter process.[331] Thus, according to Croatia, the reference to the "future state border" in the minutes referred to earlier concerns a possible future boundary resulting from a negotiated settlement.[332] Croatia suggests that further attempts at a global negotiated settlement implied the possibility of modifying parts of the undisputed boundary.[333] Croatia states:

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326 Croatia's Reply, paras 2.6-7.

327 Minutes of the Third Regular Meeting of the Mixed Slovenian-Croatian Commission for the Demarcation, Maintenance and Restoration of the State Border, 4-7 March 1997, Annex SI-762.

328 *Ibid.*; Croatia's Reply, para. 2.12.

329 Joint Report of the Surveying and Mapping Experts of the Republic of Slovenia and the Republic of Croatia on the Basis of Past Meetings, 2 June 1994, Annex SI-282; Croatia's Reply, para. 2.13.

330 Croatia's Reply, para. 2.14.

331 *Ibid.*

332 Minutes of the Third Regular Meeting of the Mixed Slovenian-Croatian Commission for the Demarcation, Maintenance and Restoration of the State Border, 4-7 March 1997, Annex SI-762; Croatia's Reply, para. 2.15.

333 *See* Croatia's Reply, paras 2.16-17; Criteria for the Determination of the Border Line, 14 May 1997, Annex SI-764; Joint Minutes and Joint Statement of the 4th meeting of the Mixed Diplomatic Commission for the

> Proposing a territorial exchange indicates only that a State is willing to give up something that it already has to obtain something that it wants from the other State. It is not an admission by the first State that it does not already possess the territory it seeks to exchange. On the contrary.[334]

237. In any event, Croatia emphasises that these attempts at a negotiated settlement did not produce an agreement and that these negotiations did not change the reality as at the critical date.[335]

238. Addressing Slovenia's contention that the subject-matter of the present arbitration is the delimitation of the entire land border, Croatia states in its Counter-Memorial that a full and final delimitation of the entire land border will also require a delimitation of all the areas where the Parties' cadastral district boundaries are separated by less than 50 m.[336] Accordingly, should the Tribunal be minded to do so, Croatia submits in Volume III of its Counter-Memorial a series of 45 maps depicting its representation of the course of the entire land boundary between the Parties.[337] Croatia submits:

> Under Article 3(1)(a) of the Arbitration Agreement, the land boundary between the Republic of Croatia and the Republic of Slovenia follows the line depicted in the series of maps comprising Volume III of this Reply.[338]

Finally, at the hearing, Croatia noted that the task of the Tribunal is to "delimit the entire land boundary across all three regions, from the tri-point with Hungary in the east to the land boundary terminus at the mouth of the Dragonja River in the west."[339]

ii. Slovenia's Position

239. Slovenia considers that the subject-matter of the dispute with regard to the land boundary is the entire land border, and its submissions accordingly contain a description of the course of the entire land boundary.[340] Slovenia characterizes Croatia's approach to the task of the Tribunal in respect of the land boundary as "unduly restrictive".[341]

Definition and Demarcation of the State Border between the Republic of Croatia and the Republic of Slovenia, 21 July 1998, Annex SI-298.

334 Croatia's Reply, para. 2.19.

335 *Ibid.*

336 Croatia's Counter-Memorial, para. 1.22.

337 Croatia's Counter-Memorial, para. 1.44.

338 Croatia's Counter-Memorial, Submissions.

339 Transcript, Day 1, p. 82:14-17.

340 Slovenia's Memorial, para. 1.27; *see also* Slovenia's Memorial, para. 6.261; Slovenia's Counter-Memorial, para. 3.02.

341 Slovenia's Counter-Memorial, para. 3.01.

240. Slovenia recalls that the Arbitration Agreement states that the Tribunal shall determine "the course of the land boundary between the Republic of Slovenia and the Republic of Croatia."[342] It asserts that the Parties' dispute in relation to the land boundary cannot be "reduced to . . . a comparison of cadastral maps."[343] Quoting language used by Croatia, Slovenia avers that the Tribunal must make "a full and final delimitation of the entire land boundary."[344] The Arbitration Agreement, Slovenia points out, provides that the Tribunal's Award "shall be binding on the Parties and shall constitute a definitive settlement of the dispute."[345]

241. Slovenia specifically notes that the Tribunal must determine the land boundary even in areas not included in the cadastral districts of either Party.[346] The Tribunal "could not simply leave some parts of the land boundary in limbo."[347] Slovenia refers to the Parties' extensive negotiations and their ultimate failure.[348] It submits that it is "wishful thinking" to assume an eventual hypothetical agreement concerning "minor discrepancies".[349]

242. Slovenia explains that the Tribunal is not asked to determine "every metre of the land boundary": the Tribunal must delimit the land boundary and not demarcate it.[350] A "limited margin of appreciation" will be left for "the implementation of the Award through the demarcation process."[351]

243. Slovenia also notes that the Arbitration Agreement provides that "[t]he Arbitration Tribunal may at any stage of the procedure with the consent of both Parties assist them in reaching a friendly settlement."[352] It contends that such settlement would have to be reached "within the arbitral process" and with the assistance of the Tribunal, and would have to be part of the Tribunal's Award.[353] According to Slovenia, in the absence of agreement on the course of the land boundary,

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342 Arbitration Agreement, Article 3(1)(a); Slovenia's Counter-Memorial, para. 3.06.

343 Slovenia's Counter-Memorial, para. 3.07.

344 Slovenia's Counter-Memorial, para. 3.11 [emphasis added by Party]; *see* Croatia's Memorial, para. 1.17. Transcript, Day 3, pp. 48:18-49:22.

345 Arbitration Agreement, Article 7(2) [emphasis added]; Slovenia's Counter-Memorial, para. 3.11.

346 Slovenia's Counter-Memorial, para. 3.12.

347 Slovenia's Counter-Memorial, para. 3.12. Slovenia relies on *Frontier Dispute (Burkina Faso/Niger)*, Judgment, I.C.J. Reports 2013, p. 44 at p. 78, para. 74.

348 Slovenia's Counter-Memorial, para. 3.15.

349 *Ibid*.

350 Slovenia's Counter-Memorial, para. 3.16.

351 *Ibid*. Slovenia relies on *Eritrea-Ethiopia Boundary Commission*, Observations of 21 March 2003, R.I.A.A. Vol. XXV, p. 218, para. 8.

352 Arbitration Agreement, Article 6(8); Slovenia's Counter-Memorial, para. 3.17.

353 Slovenia's Counter-Memorial, para. 3.17. Slovenia refers to PCA Optional Rules for Arbitrating Disputes between two States Article 34(1) and *Free Zones of Upper Savoy und the District of Gex*, Order of 19

the Tribunal not only has the power but also the duty to resolve the dispute.[354] In this regard, Slovenia refers to a statement by the ICJ to the effect that "[t]he Court must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent."[355]

244. Discussing Croatia's evidence for its land boundary claim, Slovenia submits that Croatia "places excessive weight" on the 1996 Report.[356] Slovenia contends that the 1996 Report does not establish any "agreed boundary" and cannot be used to determine the scope of the land boundary dispute.[357]

245. First, Slovenia asserts that the Expert Group did not examine the entire length of the land boundary.[358] Rather, the task of the Expert Group was "determined with precision"[359] in the Instructions for Work of the Expert Group adopted by the Mixed Slovenian-Croatian Commission:

> A collation [comparison] of official valid cadastral plans and other documentation from both sides is conducted in office <u>for that area for which the Joint Group of Geodetic Experts established in its minutes that it is "unaligned", i.e. that there are "greater discrepancies."</u>[360] [emphasis added]

246. Slovenia thus argues that the Expert Group's mission was limited to a re-examination of the "greater discrepancies" identified in 1993/1994 by the Parties' Expert Groups.[361] Slovenia asserts that this is confirmed by the 1996 Report itself.[362]

August 1929, P.C.I.J., Series A, No. 22, p. 13; *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 554 at p. 577, para. 46; *Passage through the Great Belt (Finland v. Denmark), Provisional Measures*, Order of 29 July 1991, I.C.J. Reports 1991, p. 12 at p. 20; *Aerial Incident of 10 August 1999 (Pakistan v. India), Jurisdiction of the Court*, Judgment, I.C.J. Reports 2000, p. 12 at p. 33, para. 52.

354 Slovenia's Counter-Memorial, para. 3.18.

355 *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 13 at p. 23, para. 19; Slovenia's Counter-Memorial, para. 3.18.

356 Slovenia's Counter-Memorial, para. 3.21.

357 Slovenia's Counter-Memorial, para. 3.34.

358 *See* Slovenia's Counter-Memorial, paras 3.22-26; but *see* Croatia's Memorial, para. 4.3.

359 *See* Slovenia's Counter-Memorial, para. 3.22.

360 Minutes of the First Regular Session of the Joint Croatian-Slovenian Commission for Border Demarcation, Maintenance and Renewal of the State Border, Sremič [Krško], 14 September 1995, Annex III, point 3.1, Annex HR-75.

361 Slovenia's Counter-Memorial, para. 3.23.

362 *Ibid.*; *see* Mixed Slovenian-Croatian Expert Group for the Comparison of Cadastral Boundaries Displaying Discrepancies, State Border Republic of Slovenia-Republic of Croatia, Joint Report on the Results of the Comparison of Cadastral Boundaries in the Areas Displaying Significant Discrepancies, Zagreb, 20 December 1996, Annex SI-293.

247. Slovenia notes that the members of the Parties' Expert Groups compared 244 sheets of topographic maps at a scale of 1:5,000.[363] Despite this effort, the 1994 Report "does not contain a full comparison of the limits of the cadastral municipalities (cadastral maps are at a scale of 1:2,880)" and provides a "limited amount of information . . . concerning the documents actually used."[364]

248. Slovenia claims that, in 1994, Croatia had in several instances presented only "outdated data", despite the existence of more recent cadastral records showing different cadastral limits.[365] Thus, the "inaccuracies" in the findings of the Parties' Expert Groups, as recorded in the 1994 Report, "give rise to considerable doubts" concerning the totality of their work.[366] These doubts remain until today as the Expert Group did not re-examine the areas where the cadastral boundaries were considered aligned in the 1994 Report.[367]

249. Second, Slovenia contends that the 1996 Report was not intended to establish a boundary.[368] Slovenia calls the comparison of cadastral records a "technical step, often carried out in the office and not on the spot, for the delimitation and demarcation of the boundary."[369] Slovenia argues that the Parties' Expert Groups confirmed this understanding.[370] Slovenia adds that both exercises "at best" could establish "a match" of the limits of cadastral municipalities but could not establish "the accuracy" of the cadastral boundary in relation to the land boundary.[371]

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363 Slovenia's Counter-Memorial, para. 3.25; Joint Report of the Surveying and Mapping Experts of the Republic of Slovenia and the Republic of Croatia on the Basis of Past Meetings, 2 June 1994, Annex SI-282.

364 Slovenia's Counter-Memorial, para. 3.25.

365 Slovenia's Counter-Memorial, para. 3.26, *citing* Section 1, Cases 1, 2 and 3, Mixed Slovenian-Croatian Commission for the Demarcation, Maintenance and Restoration of the State Border, Comparison of Data on Cadastral Boundaries in the Areas of Significant Discrepancies, 1996, Annexes SI-755, SI-756 and SI-757; Section 3, Cases 1 and 3, Mixed Slovenian-Croatian Commission for the Demarcation, Maintenance and Restoration of the State Border, Comparison of Data on Cadastral Boundaries in the Areas of Significant Discrepancies, Annexes SI-753 and SI-754; Section 4, Case 2, Mixed Slovenian-Croatian Commission for the Demarcation, Maintenance and Restoration of the State Border, Joint Report of the Mixed Slovenian-Croatian Expert Group, 25 October 1995, Annex SI–289.

366 Slovenia's Counter-Memorial, para. 3.26.

367 Slovenia's Counter-Memorial, para. 3.26; *see* Minutes of the First Regular Session of the Joint Croatian-Slovenian Commission for Border Demarcation, Maintenance and Renewal of the State Border, Sremič [Krško], 14 September 1995, Annex III, point 1.2, Annex HR-75.

368 *See* Slovenia's Counter-Memorial, paras 3.27-29.

369 Slovenia's Counter-Memorial, para. 3.27.

370 *Ibid.*; *see* Joint Statement of the First Meeting of the Expert Groups of the Republic of Slovenia and the Republic of Croatia on Frontier Issues, held at Otočec, 9 December 1992, Annex SI-266; Minutes of the Meeting of Surveying and Mapping Experts, Members of the Expert Groups of the State Commissions of the Republic of Slovenia and the Republic of Croatia, 15 March 1993, Annex SI-740.

371 Slovenia's Counter-Memorial, para. 3.28; *see* Joint Statement of the Third Meeting of the Expert Groups of the Republic of Slovenia and the Republic of Croatia on Border Issues, Ljubljana, 7 May 1993,

250. Third, Slovenia submits that the Mixed Diplomatic Commission's work shows that the comparison of cadastral records was not the determinative criterion for the delimitation of the land boundary.[372] According to Slovenia, this is confirmed by the practice of the Expert Group itself, as it decided to re-examine the Prezid/Draga discrepancy in a field survey in July 1997.[373] Thus, Slovenia asserts:

> An existing discrepancy of the cadastral records does not mean that there is a dispute concerning the course of the State boundary, just as a perfect match of the cadastral limits cannot always be considered to constitute an 'agreement' on the State boundary.[374]

251. Slovenia asserts that the 45 maps newly submitted in Volume III of Croatia's Counter-Memorial represent an important change of Croatia's position concerning the extent of the dispute and the task of the Tribunal.[375] Slovenia notes that Croatia's maps do not distinguish between the 20 "discrepancies" exceeding 50 m, the 12 "discrepancies" of up to 50 m, and the rest of the boundary, and that Croatia asks the Tribunal to adjudge and declare that "the land boundary between the Republic of Croatia and the Republic of Slovenia follows the line depicted in the series of maps comprising Volume III of this [Counter-Memorial]."[376]

252. Slovenia states:

> Croatia cannot have it both ways: it cannot, on the one hand, absolve the Tribunal from its task of determining the entire land boundary, by only requesting it to decide upon some "cadastral discrepancies" Croatia deems most important and, on the other hand, request the Tribunal to adjudge and declare the course of the entire land boundary as depicted in the 45 maps in Volume III of its Counter-Memorial.[377]

Slovenia's Annex SI-274; Joint Minutes of the Third Meeting of the Mixed Diplomatic Commission for the Establishment and Demarcation of the State Border between the Republic of Slovenia and the Republic of Croatia, Otočec (Slovenia), 23 February 1995, Annex SI-285; Minutes of the Third Regular Meeting of the Mixed Slovenian-Croatian Commission for the Demarcation, Maintenance and Restoration of the State Border, Čatež ob Savi, 4-7 March 1997, Annex SI-762; Joint Minutes and Joint Statement of the 4th meeting of the Mixed Diplomatic Commission for the Definition and Demarcation of the State Border between the Republic of Croatia and the Republic of Slovenia (hereinafter: the Mixed Diplomatic Commission), 21 July 1998, Zagreb, Annex SI-298.

372 Slovenia's Counter-Memorial, para. 3.30; *see* Joint Minutes and Joint Statement of the 4th Meeting of the Mixed Diplomatic Commission, 21 July 1998, Zagreb, Annex SI-298; Criteria for the Determination of the Border Line, Annex SI-764.

373 Slovenia's Counter-Memorial, para. 3.31; *see* Mixed Slovenian-Croatian Expert Group for the Comparison of Discrepancies in the Course of Cadastral Boundaries, Report on the Fieldwork Conducted from 8 to 10 July 1997 in the Area of the Discrepant Boundaries of the Cadastral Municipalities of Draga and Prezid, 11 December 1997, Annex SI-296.

374 Slovenia's Counter-Memorial, para. 3.32.

375 Slovenia's Reply, para. 2.25.

376 Slovenia's Reply, para. 2.26; Croatia's Counter-Memorial, Submission 1.

377 Slovenia's Reply, para. 2.27; *see ibid.*, para. 2.28.

253. Slovenia welcomes Croatia's oral submission that the Tribunal's task includes delimiting the entire land boundary, but submits that Croatia's proposed approach is "untenable" in that the Tribunal cannot be required to delimit the entire land boundary and leave some issues of delimitation to the Parties.[378]

254. Slovenia claims that the lack of conformity between Croatia's claimed land boundary and the cadastre further confirms that the 1996 Report did not incorporate a comparison and even less an agreement on the entire cadastral boundaries between Slovenia and Croatia, and that it was neither final nor intended to determine an agreed State boundary.[379]

255. Finally, Slovenia objects to the jurisdiction of the Tribunal in one respect: It argues that point 2 of Croatia's formal Submissions referring to Sveta Gera and Sveti Martin na Muri is "outside the Tribunal's task" and that the Tribunal lacks jurisdiction to address it.[380]

(b) Applicable Law

i. *Uti possidetis*

256. The Parties agree that the principle of *uti possidetis*—a well-established principle of international law—governs the determination of their land boundary. The Parties also agree on the fundamental aspects of its application.[381] *Uti possidetis* governs the transformation of administrative borders into international boundaries following the dissolution of a State. While the principle was established in the context of decolonization in Latin America in the 19th century[382] and was later applied to decolonization in Africa and Asia in the 20th century,[383] its scope of application is broader. As a Chamber of the ICJ noted, the "application of the principle of *uti possidetis* result[s]

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378 Transcript, Day 3, p. 71:2-21; *see* Transcript, Day 1, p. 82:9-13.

379 Slovenia's Reply, paras 2.29-31.

380 Slovenia's Counter-Memorial, paras 3.47; 3.52; *see The Government of Sudan and the Sudan People's Liberation Movement/Army ("Abyei Arbitration")*, Final Award of 22 July 2009, R.I.A.A. Vol. 30, p. 145, para. 411; *see also Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 177 at p. 203, para. 60; Case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 13 at p. 23, para. 19.

381 *Compare* Croatia's Memorial, para. 3.19 with Slovenia's Memorial, paras 5.08-10; *see* Croatia's Counter-Memorial, para. 3.54; Slovenia's Counter-Memorial, para. 3.58; Transcript, Day 1, p. 15:1-3; Transcript, Day 3, p. 15:9-11; Transcript, Day 3, p. 68:23-24.

382 *See Colombo-Venezuelan Boundaries case* (*Colombia v. Venezuela*), Arbitral Award of 24 March 1922, R.I.A.A., Vol. I, p. 228 (cited at Slovenia's Memorial, para. 5.02 n.1); *see also* Croatia's Memorial, para. 3.6.

383 *See Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 544 at p. 565, para. 21; *Frontier Dispute (Benin/Niger)*, Judgment, I.C.J. Reports 2005, p. 90 at p. 108, para. 23 (cited at Slovenia's Memorial, para. 5.02 n.2); *see also* Croatia's Memorial, para. 3.6.

in administrative boundaries being transformed into international frontiers in the full sense of the term."[384] The Chamber underlined that the principle is "a general principle, which is logically connected with the phenomenon of obtaining independence, wherever it occurs."[385] Its effect is to "freez[e] the territorial title"[386] and to give "pre-eminence" to "legal title over effective possession as a basis of sovereignty."[387]

257. In respect of the former republics of the SFRY, the Badinter Commission found the *uti possidetis* principle to be applicable to the determination of the boundaries between the successor States to the SFRY.[388] In its answer to the question: "Can the internal boundaries between Croatia and Serbia and between Bosnia-Herzegovina and Serbia be regarded as frontiers in terms of public international law?,"[389] it stated: "Except where otherwise agreed, the former boundaries become frontiers protected by international law."[390]

258. Similarly, both Croatia and Slovenia have endorsed the application of the *uti possidetis* principle to the determination of their borders.[391] As regards Croatia, the Constitutional Decision on the Sovereignty and Independence of the Republic of Croatia provided:

> The state borders of the Republic of Croatia are the internationally recognized state borders of the former SFRY in the part where they relate to the Republic of Croatia and the borders

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384 *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 554 at p. 566, para. 23; *see* Croatia's Memorial, para. 3.7; Slovenia's Memorial, para. 5.07. "The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term. . . . *Uti possidetis*, as a principle which upgraded former administrative delimitations, established during the colonial period, to international frontiers, is therefore a principle of general kind . . . ."

385 *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 554 at p. 566, para. 20; *see* Croatia's Memorial, para. 3.9; Slovenia's Memorial, para. 5.02; *see also Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Separate Opinion of Judge Ajibola, I.C.J. Reports 1994, p. 6, para. 127.

386 *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 554 at p. 568, para. 30; *see* Croatia's Memorial, para. 3.9; Slovenia's Memorial, para. 5.07.

387 *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 554 at p. 566, para. 23 (quoted at Croatia's Memorial, para. 3.7, Slovenia's Memorial, para. 5.08); *see Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 659 at p. 706, paras 152-53, *citing Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 554; *see also Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, I.C.J. Reports 1992, p. 351 at p. 388, para. 45; *Frontier Dispute (Benin/Niger)*, Judgment, I.C.J. Reports 2005, p. 90 at p. 120, para. 47.

388 Transcript, Day 1, p. 14:12-14.

389 Badinter Commission, Opinion No. 3, p. 1499, Annex HRLA-61.

390 Badinter Commission, Opinion No. 3, p. 1500 (quoted at Croatia's Memorial, para. 3.13, Slovenia's Memorial, para. 5.03). The Badinter Commission noted: "This conclusion follows from the principle of respect for the territorial status quo ante and, in particular, from the principle of *uti possidetis*." *See* Croatia's Counter-Memorial, para. 3.8; Transcript, Day 1, p. 14:16-22.

391 Transcript, Day 1, p. 14:24-15:1.

> between the Republic of Croatia and the Republic of Slovenia, Bosnia and Herzegovina, Serbia and Montenegro within the hitherto SFRY.[392]

259. The Parliament of the Republic of Croatia's Declaration on the Proclamation of the Sovereign and Independent Republic of Croatia provided that "[b]y the Constitutional Decision the present borders of the Republic of Croatia have become State borders with other republics and with the countries adjoining the former Socialist Federal Republic of Yugoslavia."[393]

260. As regards Slovenia, the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia provided that "the frontier with the Republic of Croatia is the frontier within the hitherto SFRY."[394] Slovenia's Constitutional Court stated that "[i]n terms of international law, at the moment of the creation of the independent and sovereign Slovenia, its former republican border with Croatia 'in the framework of the former SFRY' became its State border, on the basis of the *uti possidetis* principle"[395] and that the *uti possidetis* principle is "a generally recognized principle of international law and is, as such, also binding on Slovenia."[396]

261. The *uti possidetis* principle applies as of the date of independence.[397] The Parties are in agreement that the relevant date is 25 June 1991, when both Parties declared independence.[398]

262. There is also agreement between the Parties that, pursuant to the *uti possidetis* principle, evidence of title includes "all formal acts adopted in the pre-independence era."[399] *Effectivités* can "support

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392 Constitutional Decision on the Sovereignty and Independence of the Republic of Croatia, 25 June 1991, *Official Gazette of the Republic of Croatia*, No. 31/1991, Article V, Annex HRLA-58 (quoted at Croatia's Memorial, para. 3.14, Slovenia's Memorial, para. 5.06).

393 Declaration on the Proclamation of the Sovereign and Independent Republic of Croatia, *Official Gazette of the Republic of Croatia*, Article IV, No. 31/1991, Annex HRLA-56 (quoted at Croatia's Memorial, para. 3.15, Slovenia's Memorial, para. 5.06). *See* Croatia's Counter-Memorial, para. 3.6.

394 Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia, *Official Gazette of the Republic of Slovenia*, No. 1/91-I, Annex SI-234 (quoted at Croatia's Memorial, para. 3.16, Slovenia's Memorial, para. 5.05). *See* Croatia's Counter-Memorial, para. 3.7.

395 Opinion Rm-1/00, SOPS Agreement between the Republic of Slovenia and the Republic of Croatia on Border Traffic and Cooperation, 19 April 2001, para. 24, *Official Gazette of the Republic of Slovenia*, No. 43/2001, Annex SI-312; Opinion Rm-1/09, Arbitration Agreement, 18 March 2010, para. 43, *Official Gazette of the Republic of Slovenia*, No. 25/2010, Annex SI-402 (quoted at Slovenia's Memorial, para. 5.05).

396 Opinion Rm-1/00, SOPS Agreement between the Republic of Slovenia and the Republic of Croatia on Border Traffic and Cooperation, 19 April 2001, para. 24, *Official Gazette of the Republic of Slovenia*, No. 43/2001, Annex SI-312 (quoted at Croatia's Memorial, para. 5.05). *See* Croatia's Counter-Memorial, para. 3.9.

397 *See Frontier Dispute* (*Benin v. Niger)*, Judgment I.C.J. Reports 2005, p. 90 at p. 120, para. 46 (quoted at Croatia's Memorial, para. 3.20 n.108); *see also* Slovenia's Memorial, para. 5.08.

398 Transcript, Day 1, p. 14:20-23.

399 Croatia's Memorial, para. 3.22; *see* Slovenia's Memorial, para. 5.11. The Parties refer to *Frontier Dispute (Burkina Faso/Republic of Mali)*, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras*), Judgment, I.C.J. Reports 1992, p. 351, and *Frontier Dispute (Benin v. Niger)*, Judgment, I.C.J. Reports

and detail" title but cannot serve as a substitute for it.[400] A "wide range of acts"[401]—legislative, executive or judicial—may qualify as *effectivités* and "[l]egislation is accorded special weight."[402]

263. In addition, Slovenia places particular emphasis on "the view of all the competent authorities of the . . . administration" [a reference to the *Frontier Dispute (Burkina Faso/Mali)* judgment of the ICJ] in appreciating legal title and administrative boundaries.[403]

ii. Domestic Law Governing the Boundaries of the Former Republics on the Critical Date

Federal Rules of the FPRY and the SFRY

264. The Constitution of the Federal People's Republic of Yugoslavia was adopted in 1946 by the People's Assembly of the FPRY and established a federal State. Article 2 stated: "The Federal People's Republic of Yugoslavia consists of: the People's Republic of Serbia, the People's

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2005, p. 90 at p. 114 to substantiate that proposition. *Case concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 544 at pp. 580-82, paras 51-53 (quoted at Croatia's Memorial, para. 3.23); *see* Slovenia's Memorial, para. 5.11 n.24. *Case concerning Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras)*, Judgment, I.C.J. Reports 1992, p. 351 at p. 387, paras 43-45 (quoted at Croatia's Memorial, para. 3.24). Frontier Dispute (*Benin v. Niger)*, Judgment, I.C.J. Reports 2005, p. 90 at p. 114, para. 38 (quoted at Croatia's Memorial, para. 3.25); *see* Slovenia's Memorial, para. 5.11 n.24.

400 Slovenia's Memorial, para. 5.12; "[1] Where the act corresponds exactly to law [title], where effective administration is additional to the *uti possidetis juris*, the only role of *effectivité* is to confirm the exercise of the right derived from a legal title. [2] Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title. [3] In the event that the *effectivité* does not co-exist with any legal title, it must invariably be taken into consideration. Finally, [4] there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The *effectivités* can then play an essential role in showing how the title is interpreted in practice." *Case concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 554 at p. 586, para. 63 (quoted at Croatia's Memorial, para. 3.27); *see also Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 303 at p. 353, para. 68; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, Judgment, I.C.J. Reports 2002, p. 625 at p. 678, para. 127. *See* Croatia's Counter-Memorial, para. 3.11.

401 Croatia's Memorial, para. 3.29.

402 Croatia's Memorial, para. 3.29; *see Denmark v. Norway*, 1933 P.C.I.J. Series A/B, No. 53, p. 48, Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I. C. J. Reports 2002, p. 625 at p. 684, para. 145; *see also The Minquiers and Ecrehos Case (France/United Kingdom)*, Judgment of November 17th, 1953: I.C.J. Reports 1953, p. 47 at pp. 47, 57, 65, 66, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment, I.C.J. Reports 2001, p. 40 at p. 99, para. 197; *Case Concerning the Indo-Pakistan Western Boundary (Rann of Kutch)*, Award (19 February 1968), 17 R.I.A.A. 1, Vol. 17, p. 1, pp. 557-58, *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, I.C.J. Reports 2008, p. 12 at p. 85, paras 240-43.

403 Slovenia's Memorial, para. 5.13.

Republic of Croatia, the People's Republic of Slovenia, the People's Republic of Bosnia and Herzegovina, the People's Republic of Macedonia and the People's Republic of Montenegro."[404]

265. While Article 12(1) of the 1946 Constitution provided that "delimitation of territories of people's republics" was within the competence of the People's Assembly of FPRY, Article 12(2) provided that the "[b]orders of a people's republic cannot be altered without its consent."[405]

266. In 1953, Yugoslavia adopted the Constitutional Law on the Social and Political Organization of the Federal People's Republic of Yugoslavia.[406] Article 15 provided that the federation had within its exclusive competences the "approval of changes of borders between people's republics which they propose jointly, and the resolution of disputes over their delimitation."[407]

267. In 1963, a new federal Constitution was adopted for Yugoslavia under its new name, Socialist Federal Republic of Yugoslavia.[408] Its Article 109 provided that "[t]he territory of the republic cannot be changed without the consent of the republic" and that the "[b]orders between republics can change only on the basis of a decision adopted in agreement by the republican assemblies."[409]

268. A third federal Constitution was adopted in 1974.[410] It remained in effect until the independence of Croatia and Slovenia in 1991.[411] It provided that "[t]he territory of a republic cannot be altered

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404 Constitution of the Federal People's Republic of Yugoslavia (1946), *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 10/1946, Article 2, Annex HRLA-12; Croatia's Memorial, para. 3.32; Slovenia's Memorial, para. 5.21.

405 Constitution of the Federal People's Republic of Yugoslavia (1946), *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 10/1946, Article 12, Annex HRLA-12; Croatia's Memorial, para. 3.34; Slovenia's Memorial, para. 5.22.

406 Constitutional Law on the Basis of Social and Political Organization of the Federal People's Republic of Yugoslavia and Federal Authorities (1953), *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 3/1953, Annex HRLA-25.

407 Constitutional Law on the Basis of Social and Political Organization of the Federal People's Republic of Yugoslavia and Federal Authorities (1953), *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 3/1953, Article 15, Annex HRLA-25; Croatia's Memorial, para. 3.36; Slovenia's Memorial, para. 5.24.

408 Constitution of the Socialist Federal Republic of Yugoslavia (1963), *Official Gazette of the Socialist Federal Republic of Yugoslavia*, No. 14/1963, Article 109, Annex HRLA-40; Croatia's Memorial, para. 3.37, Slovenia's Memorial, para. 5.25.

409 Constitution of the Socialist Federal Republic of Yugoslavia (1963), *Official Gazette of the Socialist Federal Republic of Yugoslavia*, No. 14/1963, Article 109, Annex HRLA-40; Croatia's Memorial, para. 3.37.

410 Constitution of the Socialist Federal Republic of Yugoslavia (1974), *Official Gazette of the Socialist Federal Republic of Yugoslavia*, No. 9/1974, Article 2, Annex HRLA-46; Croatia's Memorial, para. 3.38; Slovenia's Memorial, para. 5.25.

411 Croatia's Memorial, para. 3.41.

without the consent of that republic" and that "[t]he border between the republics can be altered only on the basis of their agreement."[412]

Applicable Rules in Croatia

269. As is common ground between the Parties, Croatia's constitutions and constitutional acts, all adopted within the federal framework of Yugoslavia, did not themselves define the boundaries of Croatia. The People's Republic of Croatia promulgated its first Constitution in 1947.[413] Articles 13 and 46(3) provided that the boundaries of Croatia could not be altered without its consent.[414] Article 21(6) of the 1953 Constitutional Act on the Foundations of the Social and Political System and of the Republic Authorities confirmed the competence of the Croatian Parliament on issues relating to the modification of the boundaries of Croatia (subject to the approval of the Federal People's Assembly).[415] Article 5 of the 1963 Croatian Constitution provided: "The borders of the Republic may only be changed on the basis of a decision made by the Parliament of the Socialist Republic of Croatia and in accordance with the expressed will of the population affected by the change."[416] Article 4 of the 1974 Croatian Constitution was virtually identical to Article 5 of the 1963 Constitution.[417] Article 8 of the 1990 Croatian Constitution provided that "[t]he borders of the Republic of Croatia may only be changed by a decision of the Croatian Parliament."[418]

270. The 1947 Croatian Constitution provided: "The People's Republic of Croatia includes the territory of the present province of Dalmatia and the present districts of Osijek, Slavonski Brod, Daruvar, Bjelovar, Varaždin, Zagreb, Sisak, Karlovac, Sušak and Gospić, and the area of the City

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412 Constitution of the Socialist Federal Republic of Yugoslavia (1974), *Official Gazette of the Socialist Federal Republic of Yugoslavia*, Articles 5(2), 5(4), No. 9/1974, Article 2, Annex HRLA-46; Croatia's Memorial, para. 3.39; Slovenia's Memorial, para. 5.25; Slovenia's Counter-Memorial, para. 3.13.

413 Constitution of the People's Republic of Croatia (1947), *Official Gazette of the People's Republic of Croatia*, No. 7/1947, Article 3, Annex HRLA-13; Croatia's Memorial, para. 3.42; Slovenia's Memorial, para. 5.34.

414 Constitution of the People's Republic of Croatia (1947), *Official Gazette of the People's Republic of Croatia*, No. 7/1947, Article 3, Annex HRLA-13; Slovenia's Memorial, para. 5.34.

415 Constitutional Act of the People's Republic of Croatia on the Foundations of the Social and Political System and on the Republic Authorities, *Official Gazette of the People's Republic of Croatia*, No. 9/1953, Annex SI-130; Slovenia's Memorial, para. 5.35.

416 Constitution of the Socialist Republic of Croatia, *Official Gazette of the Socialist Republic of Croatia*, No. 15/1963, Annex SI-163; Slovenia's Memorial, para. 5.36.

417 Constitution of the Socialist Republic of Croatia, *Official Gazette of the Socialist Republic of Croatia*, No. 8/1974, Annex SI-184.

418 Constitution of the Republic of Croatia, *Official Gazette of the Republic of Croatia*, No. 56/1990, Annex SI-226; Slovenia's Memorial, para. 5.38.

of Zagreb."[419] In 1947, Croatia also enacted the Law on Administrative and Territorial Subdivision of the People's Republic of Croatia, dividing Croatian territory into administrative units.[420]

271. The 1974 Croatian Constitution provided that "the territory of the Socialist Republic of Croatia consists of the areas of municipalities stipulated by law."[421] The 1962 Law on Areas of Municipalities and Districts provided that "[t]he areas of the municipalities and districts, their names and the seats of the people's committees shall be determined by law" and that "[t]he borders of municipalities shall be determined in the statutes of the municipalities."[422] The 1962 Law also listed the districts constituting Croatia, in addition to the municipalities and associated settlements located in those districts.[423]

272. The statutes of Croatia's municipalities enumerated the settlements located within them. Under Croatia's 1974 Law on Geodetic Land Survey and Cadastre, each settlement generally had a corresponding cadastral district, *i.e.* a territorial unit used for the land registration.[424] Article 36 of the 1974 Law provided that the "[c]adastral district is the basic territorial unit for which land cadastre is set up" and "[a]s a rule it includes one settlement with adjacent land."[425]

273. In December 1990, Croatia adopted a new Constitution that changed the laws governing local administration. However, these changes did not come into effect until 29 December 1992, after

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419 Constitution of the People's Republic of Croatia (1947), *Official Gazette of the People's Republic of Croatia*, No. 7/1947, Article 3, Annex HRLA-13; Croatia's Memorial, para. 3.42.

420 Law on Administrative and Territorial Subdivision of the People's Republic of Croatia, *Official Gazette of the People's Republic of Croatia*, No. 60/1947, Annex HRLA-16; Croatia's Memorial, para. 3.43. The following districts abutted Slovenia: Delnice, Karlovac, Jastrebarsko, Samobor, Zagreb, Klanjec, Pregrada, Krapina, Ivanec, Varaždin and Čakovec. Croatia's Memorial, para. 3.43. *See also* Slovenia's Memorial, para. 5.52.

421 Constitution of the Socialist Republic of Croatia, *Official Gazette of the Socialist Republic of Croatia*, No. 8/1974, Article 4(1), Annex HRLA-45; Croatia's Memorial, para. 3.45; *see* Slovenia's Memorial, para. 5.54. *See* Slovenia's Counter-Memorial, para. 3.18.

422 Law on Areas of Municipalities and Districts, *Official Gazette of the People's Republic of Croatia*, Articles. 1(2), 5, No. 39/1962, Annex HRLA-39; Croatia's Memorial, para. 3.45. Croatia notes: "None of the subsequent amendments to the 1962 Law (*Official Gazette of the People's Republic of Croatia*, Nos. 5/1963, 13/1965, 54/1965, 27/1967, 8/1968, 20/1968, 21/1968, 30/1970, 44/1970, 48/1970, 11/1973, 8/1974, 42/1974, 1/1975, 9/1978, 31/1980, 41/1981, 8/1986, 27/1988, 47/1990) until 25 June 1991 modified the legal framework described above." Croatia's Memorial, para. 3.45 n.150.

423 Croatia's Memorial, para. 3.45; Law on Areas of Municipalities and Districts, *Official Gazette of the People's Republic of Croatia*, Article 3, Annex HRLA-39.

424 Croatia's Memorial, para. 3.46 (footnotes omitted); Law on Geodetic Survey and Land Cadastre, *Official Gazette of the Socialist Republic of Croatia*, No. 16/1974, Article 36, Annex HRLA-47; *see* Croatia's Memorial, paras 3.46 n.154, 7.9-7.11; Slovenia's Memorial, paras 5.69-72.

425 Law on Geodetic Survey and Land Cadastre, Article 36(1); Croatia's Memorial, para. 3.46.

the critical date.[426] Consequently, on the critical date, the 1974 Croatian Constitution was in force. On 25 June 1991, the municipalities of Buje, Buzet, Opatija, Rijeka, Čabar, Delnice, Vrbovsko, Duga Resa, Ozalj, Jastrebarsko, Samobor, Zaprešić, Klanjec, Pregada, Krapina, Ivanec, Varaždin and Čakovec bordered on Slovenia.[427]

Applicable Rules in Slovenia

274. Slovenia promulgated its first Constitution in 1947.[428] Article 11 provided: "The borders of the People's Republic of Slovenia may not be changed without the consent of the People's Republic of Slovenia."[429] The 1953 Constitutional Act on the Foundations of the Social and Political System and on the Authorities of the People's Republic of Slovenia entrusted the People's Assembly with the competence to agree to territorial changes (subject to approval by the Federal People's Assembly).[430] The 1963 Slovenian Constitution reiterated that the boundaries of the Republic could not be changed without its consent.[431] The 1974 Slovenian Constitution, in force on 25 June 1991, provided: "The borders of the Socialist Republic of Slovenia may not be changed without the consent of the Socialist Republic of Slovenia."[432]

275. Slovenia's first Act on Administrative Division,[433] adopted in 1945, established the first territorial division for administrative purposes.[434] The Act on the Administrative Division of Slovenia of 3 April 1946, as modified by the Act of 14 September 1946, introduced important modifications concerning the administrative division.[435] The Slovenian territory was divided into counties,

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426 Croatia's Memorial, para. 3.49.

427 Croatia's Memorial, para. 3.51.

428 Constitution of the People's Republic of Slovenia, *Official Gazette of the People's Republic of Slovenia*, Special Issue, No. 4A/1947, Annex SI-98; Slovenia's Memorial, para. 5.28.

429 Constitution of the People's Republic of Slovenia, *Official Gazette of the People's Republic of Slovenia*, Article 11, Special Issue, No. 4A/1947, Annex SI-98; Slovenia's Memorial, para. 5.28.

430 Constitutional Act on the Foundations of the Social and Political System and on the Authorities of the People's Republic of Slovenia, *Official Gazette of the People's Republic of Slovenia*, Article 21(6), No. 3/1953, Annex SI-129; Slovenia's Memorial, para. 5.30.

431 *Ustava Socialistične republike Slovenije* [Constitution of the Socialist Republic of Slovenia], Časopisni zavod "Official Gazette SRS", Ljubljana, 1963, Article 5, pp. 9, 38, 56-58, 63, Annex SI-162; Slovenia's Memorial, para. 5.31.

432 Slovenia's Memorial, para. 5.32; Constitution of the Socialist Republic Slovenia, *Official Gazette of the Socialist Republic of Slovenia*, No. 6/1974, Annex SI-185.

433 Slovenia's Memorial, para. 5.43; Act on the Administrative Division of the Federal Slovenia, *Official Gazette of the Slovenian People's Liberation Council and the People's Government of Slovenia*, No. 33/1945, Annex SI-80.

434 Slovenia's Memorial, para. 5.43.

435 Slovenia's Memorial, para. 5.44 (footnotes omitted); Act on the Administrative Division of the People's Republic of Slovenia, 2 April 1946, *Official Gazette of the People's Republic of Slovenia*, No. 26/1946,

which were in turn divided into districts, composed of localities; the localities were described by reference to cadastral municipalities and settlements.[436] A new Act on Administrative Division abolished counties in 1948.[437]

276. The organization was again modified in 1952, with the Act dividing the People's Republic of Slovenia into Towns, Districts and Municipalities.[438] Slovenia's territory was divided into three towns and 19 districts, composed of municipalities; the municipalities were described by reference to cadastral municipalities and settlements.[439] Towns as administrative units were abolished in 1955.[440]

277. On the critical date, pursuant to the 1980 Act on the Procedure for Establishing, Merging or Shifting Municipal Boundaries, in its 31 July 1990 version, the territory of the Republic of Slovenia was divided into 62 municipalities covering the entire territory.[441] The 1980 Act provided that "[t]he areas of municipalities shall be determined on the basis of cadastral municipalities."[442]

278. On 25 June 1991, the municipalities of Piran, Koper, Sežana, Ilirska Bistrica, Cerknica, Ribnica, Kočevje, Črnomelj, Metlika, Novo Mesto, Krško, Brežice, Šmarje pri Jelšah, Ptuj, Ormož, Ljutomer and Lendava, bordered on Croatia.[443]

Annex SI-86; Act on the Administrative Division of the People's Republic of Slovenia, 14 September 1946, *Official Gazette of the People's Republic of Slovenia*, No. 62/1946, Annex SI-96.

436 Slovenia's Memorial, para. 5.44.

437 Act on the Administrative Division of the People's Republic of Slovenia, *Official Gazette of the People's Republic of Slovenia*, No. 9/1948, Annex SI-113; Slovenia's Memorial, para. 5.46.

438 Act Dividing the People's Republic of Slovenia into Towns, Districts and Municipalities, *Official Gazette of the People's Republic of Slovenia*, No. 11/1952, Annex SI-120; Slovenia's Memorial, para. 5.47.

439 Slovenia's Memorial, para. 5.47.

440 Act on the Geographical Scope of Districts and Municipalities in the People's Republic of Slovenia, *Official Gazette of the People's Republic of Slovenia*, No. 24/1955, Annex SI-143; Slovenia's Memorial, para. 5.48.

441 Slovenia's Memorial, para. 5.49 (footnotes omitted); Act on the Procedure for Establishing, Merging or Shifting Municipal Boundaries and Municipal Boundaries, *Official Gazette of the Socialist Republic of Slovenia*, No. 28/1980, Annex SI-203; *See Official Gazette of the Socialist Republic of Slovenia*, Nos. 9/1982, 27/1984, 38/1989, 30/1990; Slovenia's Counter-Memorial, para. 3.20.

442 Act on the Procedure for Establishing, Merging or Shifting Municipal Boundaries and Municipal Boundaries, *Official Gazette of the Socialist Republic of Slovenia*, No. 28/1980, Annex SI-203; Slovenia's Memorial, para. 5.50; Croatia's Memorial, para. 3.53.

443 Slovenia's Memorial, para. 5.72; Croatia's Memorial, para. 3.55.

iii. The Parties' Interpretations of the Legal Framework

279. While there is agreement as to the legal instruments that are relevant to the Tribunal's determination of the land boundary, each of the Parties presents its own interpretation of this legal framework.

Croatia's Position

280. On the basis of the legal framework described above, Croatia concludes that:

> [T]he boundary between Croatia and Slovenia at independence was the outer limit of their respective border municipalities. In Croatia, the borders of these municipalities were *described most precisely* in cadastral records. In Slovenia, they were *defined by reference to* specific cadastral districts within a municipality. In each republic, cadastral districts were geographically defined, mapped and delimited in the field. Accordingly, the outer boundaries of each republic's cadastral districts, adjacent to another republic, established where, according to the Parties' own legislation, their boundaries were located on the critical date. The international boundary between Croatia and Slovenia, therefore, is in principle located along the "line" established by the outer limits of the Croatia cadastral districts bordering Slovenia and the Slovenian cadastral districts bordering Croatia's as of 25 June 1991.[444]

281. Croatia notes that the federal 1946 Constitution left it to the individual republics themselves to determine their own boundaries.[445]

282. Croatia also points out that Croatia and Slovenia became part of Yugoslavia "with their respective historic territories."[446] In other words, "Croatia re-established itself in much of the same territory that had formed the autonomous Kingdom of Croatia, including its historic regions of Slavonia and Dalmatia, within Austria-Hungary."[447] Therefore, in the corresponding areas, the territorial limits of the areas and districts that historically comprised the Kingdom of Croatia constituted Croatia's borders with Slovenia.[448] As Croatia contends:

> These limits (some of which had existed for centuries) had been formally established by official Austro-Hungarian surveyors in the 19th and early 20th centuries, and were well known to, and respected by, the authorities on both sides of the border when Croatia and Slovenia became republics within the Yugoslav Federation following World War II.[449]

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444 Croatia's Memorial, para. 3.56 (emphasis added); *see also* Croatia's Memorial, para. 3.3; Croatia's Counter-Memorial, para. 3.22.

445 Croatia's Memorial, para. 3.33.

446 Croatia's Memorial, para. 3.35.

447 Croatia's Memorial, para. 3.42.

448 *Ibid*.

449 Croatia's Memorial, para. 3.42; *see also* Croatia's Counter-Memorial, para. 3.71; *see also* Transcript, Day 1, pp. 69:19-71:5, *citing* Slovenia's Counter-Memorial, para. 3.61, Slovenia's Memorial, paras 5.58, 5.69. Transcript, Day 5, pp. 151:4-154:7. Slovenia disagrees with Croatia's method of taking "some quasi-

283. Croatia thus contends that there was a border separating their two territories on the date of independence, and that,[450] by virtue of the principle of *uti possidetis*, it became a fixed international boundary.[451]

284. At the same time, Croatia states:

> the Constitution and laws in force in the Republic of Croatia on 25 June 1991 defined its territory as the sum of the territories of its municipalities. The territory of each municipality was defined in its municipal statute as consisting of the territories of its constituent settlements, whose territory was *described most precisely* in cadastral records. The cadastral records included maps and detailed descriptions of the territorial extension of each cadastral district, the limits of which were in most cases marked in the field. Thus, at independence, Croatia's boundaries with other Yugoslav republics, including Slovenia, were *described most precisely* in its cadastral records.[452]

285. Croatia contends that Parties are in agreement that the cadastre constitutes valuable evidence of the boundaries as they had been fixed and understood, and that it is evidence of the legal title underlying these boundaries.[453]

286. Croatia asserts that Slovenian law provided that the territory of the Slovenian Republic consisted of the sum of the territory of its municipalities.[454] Besides, Slovenian law provided that the territorial extent of each municipality was determined by its constituent cadastral districts.[455] Therefore, at the critical date, the cadastral district borders not only constituted the municipal borders; when adjacent to other republics, they also constituted the republican borders.[456] Croatia contends that this was agreed between Parties.[457]

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coinciding most faithful cadastral boundary" rather than the historic source of title itself: Transcript, Day 3, p. 127:9-12.

450 Transcript, Day 1, p. 56:15-17, *citing* Slovenia's Memorial, para. 5.10; Transcript, Day 5, pp. 143:25-144:3, *citing* Transcript, Day 3, p. 90:18-19.

451 Transcript, Day 1, p. 57:17-21, *citing* Annex SI-312 to Slovenia's Memorial. Transcript, Day 5, p. 144:3-8, *citing* Transcript, Day 3, p. 19:22-23.

452 Croatia's Memorial, para. 3.50 (emphasis added); *see* Croatia's Reply, para. 2.3; *see* Transcript, Day 1, pp. 58:23-62:3, *citing* Slovenia's Memorial, paras 5.49, 5.50, 5.57; Transcript, Day 5, pp. 144:14-146:16, *citing* Slovenia's Memorial, paras 5.49-50, Annex SI-203; Slovenia's Memorial, para. 5.19. Slovenia disagrees that the precise geographical contours of the municipalities are described in cadastral records and maps: Transcript, Day 3, pp. 78:17-18, 75:9-12, 76:2-3.

453 Transcript, Day 1, pp. 71:6-76:16, *citing* Slovenia's Memorial, paras 5.67, 5.77; 1931 Constitution of Kingdom of Yugoslavia, Annex SI-65, Slovenia's Memorial, para. 6.03; Transcript, Day 5, p. 154:8-16.

454 Croatia's Memorial, para. 3.53.

455 Croatia's Memorial, para. 3.53.

456 Croatia's Memorial, para. 3.53; *see* Croatia's Reply, para. 2.3.

457 *See* Transcript, Day 1, p. 62:4-10, *citing* Slovenia's Memorial, paras 3.23, 5.55, 5.73; Constitutional Court of Slovenia, Opinion Rm 1-09, Arbitration Agreement, 18 March 2010, Operative Part, *Official Gazette of the Republic of Slovenia*, No. 25/2010, Annex SI-402; Draft Border Agreement between the Republic of Slovenia and the Republic of Croatia, 26 March 1992, Annex SI-253; Surveying, Mapping and Cadastral

287. Croatia argues that the Parties' joint efforts between 1992 and 1997 to determine the location of the boundary at independence proceeded on the basis that the land portion of the boundary would be determined by a comparison and reconciliation of their respective cadastral district boundaries as at 25 June 1991.[458] The Parties' respective cadastral district boundaries were considered by them to be "aligned" with each other for 91% of the land border.[459]

288. For the reasons explained above, Croatia relies on the 1996 Report to identify the parts of the boundary where the cadastral boundaries are aligned, and where the boundary is agreed. Where the cadastral boundaries are not aligned, Croatia considers that the boundary is disputed.[460]

289. In order to resolve the disputes in the 20 areas where the cadastral boundaries diverge, Croatia contends that one should rely on that Party's cadastral district boundary which follows an expressly agreed boundary, or the historic Croatian-Austrian boundary that both Parties considered authoritative. Where the cadastral district boundaries diverge, in Croatia's view, legal title should follow the cadastral boundary that conforms most closely to either an express agreement or, absent one, to that historic boundary.[461]

290. Thus, Croatia claims that, to determine the boundary in the disputed areas, the Tribunal should give effect to agreements between the Parties. It is in the absence of agreements or where title is "otherwise ambiguous because it cannot be determined which Party's cadastral records accurately

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Authority of Republic of Croatia, Description of the course of the border according to the border cadastres - Preposition of the Republic of Croatia, 1 July 1992, Annex SI-258; Draft Agreement between the Republic of Slovenia and the Republic of Croatia on the Common State Border adopted by the Government of the Republic of Slovenia, 24 September 1992, Annex SI-262; Transcript, Day 5, pp. 146:17-149:15, *citing, further*, Slovenia's Memorial, paras 5.73, 5.67; Letter from the Republican Geodetic Administration of the Socialist Republic of Slovenia to the Republican Geodetic Administration of the Socialist Republic of Croatia Concerning the Meeting of the Representatives of the Republican Geodetic Administrations of Croatia and Slovenia, Ljubljana, 26 January 1988, Annex HR-367; Slovenia's Memorial, paras 5.50-54. Slovenia contests that this point is agreed: Transcript, Day 3, pp. 90:8-11, 89:10-12, 76:21-22, 81:1-3.

458 Transcript, Day 1, p. 66:19-25, *citing* Slovenia's Memorial, paras 5.73, 5.74; Joint Statement of the Third Meeting of Expert Groups of the Republic of Slovenia and the Republic of Croatia on Border Issues, Ljubljana, 7 May 1993, Annex SI-274; Transcript, Day 5, pp. 149:16-150:17. Slovenia does not agree that the experts compared the cadastral records for the entire land boundary: Transcript, Day 3, p. 89:8-9.

459 Transcript, Day 1, p. 68:15-18, *citing* Joint Report of the Mixed Slovene-Croatian Expert Group for the Comparison of Cadastral Boundaries Displaying Discrepancies, Zagreb, 20 December 1996, Annex SI-293; Slovenia's Memorial, para. 3.42; Transcript, Day 5, pp. 150:18-151:3, *citing* Minutes of the Third Regular Meeting of the Mixed Slovenian-Croatian Commission for the Demarcation, Maintenance and Restoration of the State Border, 4-7 March 1997, Annex SI-762; Slovenia's Memorial, para. 3.42.

460 *See* Croatia's Counter-Memorial, para. 3.82.

461 Croatia's Counter-Memorial, para. 3.88.

reflect the boundary" that the Tribunal may consider *effectivités*.[462] Croatia contends that disputed areas in the Istria Region and in the Mura River Region have been the object of boundary agreements.[463] In the Central Region, Croatia asserts that the Parties agreed that the boundary between them would follow the historic Croatian-Austrian boundary. According to Croatia, this is manifest in the remarkable alignment of their cadastral boundaries in that region. This phenomenon "did not happen by coincidence" and "could have happened only by design,"[464] as confirmed by relevant *effectivités*.[465]

291. Turning to its rebuttal of Slovenia's arguments in respect of the matters in dispute between the Parties, Croatia asserts:

> Slovenia's *Memorial* argues that (i) there were border disputes with Croatia, "not unknown in 1991," that existed in areas where the Parties' cadastral-based boundaries *coincided*; (ii) that, notwithstanding Slovenian law on territory and boundaries, in some areas the boundary with Croatia was determined by *"geography" rather than cadastral districts*; and (iii) that the boundary between Slovenia and Croatia today should be *identical to the 1931 boundary* between the Sava and Drava Provinces of the late and unlamented Kingdom of Yugoslavia. It is difficult to say which of these three arguments is the most preposterous. It is a tough call.[466]

292. Croatia addresses, specifically, Slovenia's contention that there were border disputes not identified in the Expert Report.[467] Croatia calls this statement "cryptic".[468] It underlines that "the only document Slovenia cites for this assertion is an internal Slovenian memorandum" dated 29 March 1972.[469] Croatia avers that the document not only does not support Slovenia's claim; it

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462 Croatia's Counter-Memorial, para. 3.83; *see* Sir Robert Jennings & Sir Arthur Watts, *Oppenheim's International Law Vol. 1*, pp. 677 *et seq* (2008); *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 554 at pp. 586-87, para. 63. *See also* Croatia's Memorial, paras 3.26-30.

463 Croatia's Counter-Memorial, paras 3.84-85. Note that these statements concern the regions as defined by Croatia.

464 Croatia's Counter-Memorial, para. 3.86.

465 Croatia's Counter-Memorial, para. 3.87.

466 Croatia's Counter-Memorial, para. 3.46.

467 Slovenia's Memorial, para. 5.74 (footnote omitted): "There are nevertheless other, more important differences, which were not unknown, but which were never remedied comprehensively between Slovenia and Croatia before 1991"; Croatia's Counter-Memorial, para. 3.47.

468 Croatia's Counter-Memorial, para. 3.47.

469 Croatia's Counter-Memorial, para. 3.48; *see* Surveying and Mapping Authority of the Socialist Republic of Slovenia, Information on Problems caused by the undefined Boundary with the Socialist Republic of Croatia, No. 45-d-25/25-70, 29 March 1972, Annex SI-181 (*cited at* Slovenia's Memorial, para. 5.74 n.100).

"*confirms*" that disputed areas are determined solely by reference to unaligned cadastral district boundaries[470] by addressing difficulties presented by "undefined cadastral boundaries."[471]

293. In response to Slovenia's assertion that, during the 1970s, the Parties undertook measures that demonstrate the poor quality of their cadastres, Croatia contends that, on the contrary, when the Parties attempted to fix their republican boundary in the 1970s, they used "exactly the same criterion and methodology as they did following independence in the 1990s": A comparison of cadastral boundaries.[472]

294. According to Croatia, the process began with the Parties' geodetic administrations sending letters to their respective cadastral officials, directing them on how to conduct the comparison. A letter sent by Slovenia's geodetic administration on 2 April 1971 states: "[T]he geodetic administrations of S.R. Croatia and S.R. Slovenia have decided to compare the entire delineation of the republican border as represented in official cadastral maps, and then thoroughly examine the inconsistencies revealed."[473] A letter that Croatia sent to its cadastral officials contains similar language.[474] Croatia submits that the Parties did then compare their cadastral districts.[475] According to Croatia, this is further confirmed by various official documents, some of which were annexed to Slovenia's pleadings.[476]

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470 Croatia's Counter-Memorial, para. 3.48.

471 Croatia's Counter-Memorial, para. 3.48 (*quoting* Surveying and Mapping Authority of the Socialist Republic of Slovenia, Information on Problems caused by the undefined Boundary with the Socialist Republic of Croatia, No. 45-d-25/25-70, 29 March 1972, Annex SI-181).

472 Croatia's Reply, paras 2.20-21.

473 Letter to the Cadastral Offices from the Surveying and Mapping Authority of Socialist Republic of Slovenia, 2 April 1971, Annex SI-536.

474 Letters to the Administration of Cadastral and Surveying Affairs from the Surveying and Mapping Authority of the Socialist Republic of Croatia, 26 March 1971, Annex SI-535; Croatia's Reply, para. 2.23.

475 Croatia's Reply, paras 2.24-27; Memorandum from the Geodetic Administration of Socialist Republic of Slovenia to the Republican Geodetic Administration of Socialist Republic of Croatia Concerning the Draft Information on Problems Caused by the Undefined Boundary with Socialist Republic of Croatia, Ljubljana, 6 March 1972, Annex HR-349; *see* Graphical Presentation of Disagreements on the Republic Border between SRS and SRC displaying the discrepancies in the cadastral records and boundaries between Slovenia and Croatia (1972), Annex SI-M-57; Minutes on the Comparison of Cadastral District Boundaries between the Municipality of Varaždin (Croatia) and the Municipality of Ptuj, Slovenia, Ptuj, 23 April 1971, Annex HR-348.

476 Croatia's Reply, paras 2.28-33; Surveying and Mapping Authority of Socialist Republic of Croatia, Information on the Difficulties Arising from the Non-Defined Border of the Socialist Republic of Croatia, 25 January 1972, Annex SI-543; Assembly of the Socialist Republic of Slovenia, Proposal Concerning the Act on the Conditions and the Procedure for the Establishment, the Merger or the Change of the Municipal Boundaries and on the Municipal Boundaries, 12 July 1979 (emphasis added), Annex SI-572; Letter from the Geodetic Administration of Socialist Republic of Slovenia to the Republican Geodetic Administration of the Socialist Republic of Croatia Concerning the Border between Croatia and Slovenia in Prekmurje, Ljubljana, 22 December 1970, Annex HR-345; Letter from the Republican Geodetic Administration of the Socialist Republic of Croatia to the Geodetic Administration of the Socialist Republic of Slovenia

295. Croatia faults Slovenia for suggesting that other types of "districts" were relevant for the determination of the boundary and for invoking "an eclectic assortment of laws, including those for managing water resources, fishing, and even the hunting and breeding of wild animals."[477] Croatia asserts that Slovenian law defined its territory solely by reference to cadastral districts and that, in any event, the laws Slovenia relies upon restrict their application to the territory of Slovenia, as defined by Slovenia's cadastral districts.[478]

296. Croatia takes issue with Slovenia's treatment of cadastral evidence, as expressed in the Slovenian Memorial:

> [T]he cadastral evidence needs to be interpreted in good faith in order to determine the boundary within the former SFRY, with regard to the relevant geographical circumstances and, in particular, changes that have occurred since the cadastre was established. This i[s] in particular true with regard to natural changes which have not been included in the cadastre and in the course of the boundary shown on the cadastre. The cadastre might, for several reasons, deviate from the legally relevant delimitation irrespective of whether the cadastral records from Slovenia and Croatia actually match or not. The record has to be put in its relevant context in order to identify the course of the boundary.[479]

297. In response, Croatia argues that the cadastre cannot "deviate from the legally relevant delimitation" because the cadastre *is* the "legally relevant delimitation."[480] It adds that, while the forces of nature may have changed the topography along certain parts of border,[481] the laws of both Parties defined their territorial limits "not by reference to rivers or other natural features, but to cadastral districts," many of which were initially determined during the Austro-Hungarian period.[482] Croatia asserts that Slovenia cannot find support in the judgment by a Chamber of the International Court of Justice in the *Gulf of Fonseca* case, as the Chamber said in that case that

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Concerning the Border between Croatia and Slovenia in Međimurje (manuscript), Zagreb, 3 February 1971, Annex HR-346; Letter from the Republican Geodetic Administration of the Socialist Republic of Slovenia to the Republican Geodetic Administration of the Socialist Republic of Croatia Concerning the Meeting of the Representatives of the Republican Geodetic Administrations of Croatia and Slovenia, Ljubljana, 26 January 1988 (emphasis added), Annex HR-367.

477 Croatia's Reply, para. 2.34.

478 Croatia's Reply, paras 2.34-37; Freshwater Fisheries Act, *Official Gazette of the Socialist Republic of Slovenia*, No. 25/1976, Annex SI-564; Act Regulating the Protection, Breeding and Hunting of Wild Animals and the Management of Hunting Grounds, *Official Gazette of the Socialist Republic of Slovenia*, No. 25/1976, Annex SI-563; Water Act, *Official Gazette of the Socialist Republic of Slovenia*, No. 38/1981, Article 10, Annex SI-596.

479 Slovenia's Memorial, para. 5.75; Croatia's Counter-Memorial, para. 3.49.

480 Croatia's Counter-Memorial, para. 3.50.

481 Croatia's Counter-Memorial, para. 3.51.

482 *Ibid*.

"topography" may be considered only if there is "no clear and unambiguous indication" of title.[483] Croatia also emphasises that it would be impermissible to disregard the applicable law on "equitable" grounds, "for geographical or other reasons."[484] Croatia declares that Slovenia's "newly minted" topographical argument "suffers from the infirmity of selective application"[485] and characterizes Slovenia's argument in the Istria region as a "singular spasm of apostasy from riverine boundary orthodoxy."[486] Croatia further criticizes Slovenia's "newly claimed riverine boundaries" in respect of the Mura River and Central Regions and submits that there can be no justification for "updating" the cadastral boundaries to account for changes in the course of a river in places where neither the 1991 nor the historical cadastral boundaries themselves followed a river.[487]

298. Croatia is particularly critical of Slovenia's statement that "the legal title of the boundary at the critical date was the 1931 Constitution, which . . . continued to be in effect between the two *banovine* in 1931 and the two republics . . . up until the dissolution of Yugoslavia."[488] In relation to what it perceives to be "Slovenia's most extreme argument,"[489] Croatia first notes that the critical date is 1991 and not 1931.[490] It adds that "[w]hat is claimed to have been the law in 1931 (but in fact was not) is irrelevant."[491] Second, Croatia argues that all of the legal and administrative acts of the former Kingdom of Yugoslavia, which both Croats and Slovenes perceived as "a ruthless and brutal dictatorship," were "expressly annulled" by the federal Yugoslav State after the war."[492] Croatia relies on the Preamble of the November 1945 Proclamation of the Federal People's Republic of Yugoslavia[493] and the June 1946 Law on the

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483 *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening)*, Judgment, I.C.J. Reports 1992, p. 351 at pp. 389-90, para. 46; *see* Slovenia's Memorial, para. 5.75; Croatia's Counter-Memorial, para. 3.53.

484 Croatia's Counter-Memorial, para. 3.53; *see* Case concerning *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgement, I.C.J. Reports 1986, p. 554 at pp. 567-68 para. 28; *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Judgment, I.C.J. Reports 1974, p.3 at pp. 30, 33, paras 69, 78.

485 Croatia's Counter-Memorial, para. 3.54.

486 *Ibid*.

487 Transcript, Day 1, p. 94:6-16.

488 Slovenia's Memorial, para. 6.35.

489 Croatia's Counter-Memorial, para. 3.55.

490 Croatia's Counter-Memorial, para. 3.56.

491 *Ibid*.

492 Croatia's Counter-Memorial, para. 3.58; *see* Ben Riley and Rhys J. Davies, The Croats under Yugoslavian Rule, Annex HR-162 (cited at Croatia's Counter-Memorial, para. 3.58 n.83).

493 Preamble, Proclamation of the Federal People's Republic of Yugoslavia, 29 November 1945, Annex HRLA-79; Croatia's Counter-Memorial, para. 3.59.

Nullity of Laws and Regulations Adopted prior to 6 April 1941 to support that proposition.[494] Further, Croatia claims that the legal divisions adopted by the Kingdom of Yugoslavia "ignor[ed] historical boundaries" and quotes from an interview where a "senior Slovenian boundary expert" states that cadastral boundaries are "truly the most reliable basis for the definite determination of the boundary."[495]

299. Croatia also contests the relevance that Slovenia attributes to a 1945 AVNOJ decision in support of its claim that the title at the critical date was the 1931 Constitution.[496] Moreover, Croatia contends that the Minutes of the session where the "decision" was supposedly made, which Slovenia does append, show that it concerned elections to the membership of AVNOJ, not territorial delimitation, and that no "decision" was made.[497] According to Croatia, the basis of Slovenia's assertion is a *proposal* by one Mile Peruničić and is to be found in a *footnote* to a statistical table concerning a 1931 census.[498] Croatia concludes that the AVNOJ "decision" simply "*does not exist*".[499] Croatia underlines that, in any event, the alleged AVNOJ decision predates the November 1945 Proclamation and the June 1946 Law annulling the former Kingdom's 1931 Constitution and laws.[500]

300. In its Memorial, Slovenia also relies on a 1990 letter by the Federal Secretariat for Justice and Administration to support its claim that title at the critical date was the 1931 Constitution.[501] Croatia asserts that Slovenia's reliance on the letter is "surprising", given that Slovenia recognizes that, pursuant to the constitutional framework then in effect, the federal government did not have the authority to delimit the republican boundaries.[502] Croatia contends that, had the Federal

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494 Law on the Nullity of Laws and Regulations Adopted prior to 6 April 1941, 23 October 1946, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 86/1946, 25 October 1946, Annex HRLA-80; Croatia's Counter-Memorial, para. 3.60.

495 Croatia's Counter-Memorial, para. 3.61; *see* Miroslav Stiplovšek, "*Abolition of district local self-government and the shaping of the provincial administration of the Drava Province in 1929*," *Contributions to Contemporary History: Ferenc Collected Papers*, Vol. 2 (1997) (*cited at* Croatia's Counter-Memorial, para. 3.61 n.89); *see also* Croatia's Counter-Memorial, para. 3.62; "The Southern Border: A border man and border signs [Interview with Jože Rotar]," *Mladina*, 4 May 1995, Annex HR-294.

496 *See* Slovenia's Memorial, paras 5.17-18.

497 Croatia's Counter-Memorial, para. 3.63; Fifth Meeting of the Antifascist Council of People's Liberation of Yugoslavia, Legislative Work of the Presidency of the Provisional People's Assembly of Democratic Federal Yugoslavia, 24 February 1945, Annex HR-139.

498 Croatia's Counter-Memorial, paras 3.63-64; Fifth Meeting of the Antifascist Council of People's Liberation of Yugoslavia, Legislative Work of the Presidency of the Provisional People's Assembly of Democratic Federal Yugoslavia, 24 February 1945, Annex HR-139.

499 Croatia's Counter-Memorial, para. 3.65 (emphasis in the original); *see* Croatia's Reply, paras 2.40-43.

500 Croatia's Counter-Memorial, para. 3.66.

501 Slovenia's Memorial, paras 5.17-18.

502 Croatia's Counter-Memorial, para. 3.69; Croatia refers to Slovenia's Memorial, para. 5.25.

Secretariat had the authority to answer the question in the first place, it should have answered that the boundary was defined by reference to cadastral boundaries.[503]

301. Further, Croatia submits that Slovenia has failed to provide "reliable evidence" that the 1931 administrative border between the Sava and Drava provinces followed geographic features rather than cadastral district limits.[504] According to Croatia, the very text of the 1931 Constitution—particularly Article 83 thereof, which describes the borders of the *banovine* by reference to the district boundaries, not rivers—disproves Slovenia's riverine boundary theory.[505] In any event, Croatia asserts that in post-war Yugoslavia and most relevantly on the critical date, the boundaries between Croatia and Slovenia followed cadastral district boundaries, not rivers, as evidenced *inter alia* by Slovenian maps.[506]

302. Croatia considers that Slovenia's own Constitutional Court supported Croatia's position when it reviewed the constitutionality of the Arbitration Agreement.[507] The Constitutional Court found that the border ran "along the borders of municipalities or cadastral municipalities, as they existed on the day of the establishment of the new states."[508] Moreover, it found that areas of cadastral overlap were the "disputable sections" of the boundary.[509]

303. Croatia concludes that Slovenia's assertion of territorial claims "that go far beyond the areas that were 'disputable' on the critical date" would lead to an enlargement of the disputed area from the 797.9 ha identified by the Expert Group to over 3,000 ha. At the same time, Slovenia's claims would result in shortening the border between the two States to 605 km, although Slovenia itself considered in its submission that the border runs for 670 km.[510]

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503 Croatia's Counter-Memorial, para. 3.69.

504 Croatia's Counter-Memorial, para. 3.72; *see also* Croatia's Counter-Memorial, paras 3.73-75.

505 Croatia's Reply, paras 2.47-49; *see* Constitution of the Kingdom of Jugoslavia, *Official Gazette of the Kingdom of Yugoslavia (Dravska banovina)*, No. 53/1931, Annex SI-65.

506 *See* Croatia's Reply, paras 2.44-46; Figures R2.1-2.6; Map of Slovenske Gorice, Prekmurje, Dravsko-ptujsko polje, Haloze, 1955, Annex SI-M-49.

507 Croatia's Counter-Memorial, para. 3.76; Opinion Rm-1/09, Arbitration Agreement, 18 March 2010, para. 43, *Official Gazette of the Republic of Slovenia*, No. 25/2010, para. 26, Annex SI-402; *see* Croatia's Reply, para. 2.4.

508 Croatia's Counter-Memorial, para. 3.77, *quoting* Opinion Rm-1/09, Arbitration Agreement, 18 March 2010, para. 43, *Official Gazette of the Republic of Slovenia*, No. 25/2010, para. 26, Annex SI-402; *see also* Slovenia's Memorial, para. 5.73 n.96.

509 Croatia's Counter-Memorial, para. 3.77, *quoting* Opinion Rm-1/09, Arbitration Agreement, 18 March 2010, para. 43, *Official Gazette of the Republic of Slovenia*, No. 25/2010, para. 26, Annex SI-402.

510 Croatia's Counter-Memorial, para. 3.80.

304. Concerning the cadastral maps annexed to its Reply, Croatia notes that it submitted its cadastral maps at this stage only because it was challenged on the accuracy of its representation of the boundary claim line in its Counter-Memorial on maps at a scale of 1:25,000.[511] Croatia suggests that Slovenia has not submitted its own cadastral maps to the Tribunal for two reasons. The first is that Slovenia's claim is based on its "newly invented riverine boundaries" rather than on cadastral boundaries. The second is that "Slovenia's actual cadastral maps would coincide very closely with Croatia's," supporting Croatia's claim in almost all of the 32 areas comprising the 9% of the land boundary where discrepancies remain.[512] Croatia invites the Tribunal to infer from the omission of Slovenia's cadastral maps from its pleadings that such maps undermine, rather than support, its boundary claim. Moreover, it submits that in any event, the official maps of Slovenia's State Surveying and Mapping Authority "eviscerate" Slovenia's boundary claim.[513]

Slovenia's Position

305. For its part, Slovenia concludes on the basis of the legal framework described above:

> The relevant domestic laws of the FPRY and the SFRY did not determine the boundaries of Slovenia and Croatia anew. It [*sic*] guaranteed existing boundaries, which, in turn, were determined by reference to the legal situation existing before the establishment of the Federation, i.e., under the *banovine* system of the Kingdom of Yugoslavia. These boundaries were themselves established with reference to the existing boundaries of the former provinces of Austria-Hungary and the Austrian Empire.[514]

306. Slovenia places considerably less emphasis on cadastral records than Croatia—although it does not deny their value as evidence.[515] On the relevance of the cadastral records, Slovenia specifically notes:

> The existence and the content of the delimitation resulting from the different legal sources, dating back in time, is reflected to some extent by the territorial legislation and the cadastral records of Slovenia and Croatia, as they existed at the critical date. They constitute *valuable evidence* concerning the source and the content of the territorial rights of Slovenia and Croatia, at the critical date.[516]

307. In this regard, Slovenia emphasises the distinction between, on the one hand, evidence which may establish the existence of legal title and, on the other, the actual source of such legal title.[517] It

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511 Transcript, Day 5, p. 164:19-20.

512 Transcript, Day 1, pp. 97:2-98:22.

513 Transcript, Day 5, p. 165:8-19.

514 Slovenia's Memorial, para. 5.77.

515 *See* Slovenia's Counter-Memorial, para. 3.60.

516 Slovenia's Memorial, para. 5.77 (footnote omitted) (emphasis added).

517 Transcript, Day 8, pp. 77:22-79:10.

contends that in this case the cadastres remain only evidence of the Parties' title, and do not themselves constitute title, nor are they the only legally relevant criterion.[518]

308. Slovenia asserts that no general act delimiting the boundary between the Parties has ever been adopted at the federal level.[519] Rather, the republics' and relevant Yugoslav authorities decided that the republics would be "established within the existing boundaries of pre-administrative units under the 1931 Constitution of the Kingdom of Yugoslavia."[520] Slovenia claims that this was still the understanding of the federal authorities in 1990, as evidenced by a reply of the Federal Secretariat for Justice and Administration to a parliamentary question concerning the definition of the inter-republican boundaries. The Federal Secretariat stated:

> The territorial delimitation of federal units in the new Yugoslavia is addressed in the reconstructed minutes of the AVNOJ Presidency of 24 February 1945 (Source: a legislative document by the AVNOJ Presidency and the Presidency of the People's Assembly, from 19 November 1944 to 27 October 1945, Belgrade, Presidency of the People's Assembly p. 52).
>
> According to these minutes, "Slovenia covers the territory of the former Drava Banate, Croatia the territories of the former Sava Banate and the Dubrovnik District of the former Zeta Banate, Bosnia and Herzegovina the territory defined in accordance with the Berlin Agreement, Serbia the territory within the pre-Balkan wars borders, including the districts gained from Bulgaria with the Treaty of Versailles, Macedonia the territory south of Kačanik and Ristovac, and Montenegro the territory within the pre-Balkan wars borders, including the districts of Berane and Kotor, and Plav and Gusinje."[521]

309. Slovenia asserts that the reasons invoked by Croatia to downplay the 1945 AVNOJ Presidency decision are not convincing.[522] In response to Croatia's argument that the legal acts adopted by the Kingdom of Yugoslavia, including the territorial reorganization of the Kingdom in 1931, were criticized for ignoring historical boundaries, Slovenia points out that the AVNOJ Presidency never intended to preserve the entire territorial organisation of the Kingdom of Yugoslavia but only determined that Slovenia should be constituted within the territory of the former *Dravska banovina*.[523] To Croatia's suggestion that the decision was merely a footnote reference, Slovenia responds that, whatever the form of the decision, its very existence was never questioned by the federal authorities or the SFRY, but to the contrary was specifically referred to in 1990, in a reply to a parliamentary question.[524] The fact that the Federal Government did not have, in 1990, the

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518 Transcript, Day 8, pp. 79:11-82:8, pp. 84:10-85:22.

519 Slovenia's Memorial, para. 5.16.

520 Slovenia's Memorial, para. 5.18.

521 Slovenia's Memorial, paras 5.17-18; *see also* Slovenia's Counter-Memorial, paras 3.62 and 3.103-04; the decision of the AVNOJ Presidency is recorded in the Reconstructed Minutes of the 5th Session of the AVNOJ Presidency, 24 February 1945, Annex SI-461.

522 Slovenia's Reply, para. 2.32.

523 Slovenia's Reply, para. 2.33.

524 Slovenia's Reply, para. 2.34.

competence to delimit republic boundaries is, according to Slovenia, irrelevant: in responding to the parliamentary question, the federal authorities did not delimit the boundary, but simply "explained the basis for the delimitation of the boundary in the first place."[525] Concerning Croatia's reliance on the 1946 Act on Invalidation of Legal Regulations Issued prior to 6 April 1941 and During Enemy Occupation, Slovenia suggests that Croatia's translation of the Act is misleading and attaches its own translation; it argues that the Act, properly understood, confirms Slovenia's position that the boundaries established through and on the basis of legal regulations issued well before 1945 continued to be governed by these regulations.[526]

310. Slovenia submits that Croatian and Slovenian Acts and Decrees are only "the expression of a unilateral understanding" concerning the course of the boundary.[527] That said, they are nevertheless important to the extent that they "demonstrate a common understanding of both Parties" with regard to the course of the boundary.[528]

311. Using a metaphor borrowed from *El Salvador/Honduras*,[529] Slovenia explains that the respective territories of Croatia and Slovenia "were composed of municipalities just like pieces of a jigsaw puzzle."[530] The Croatian and Slovenian Acts only determined which pieces of the jigsaw puzzle were part of Slovenia and which were part of Croatia; but did not determine "the shape of the relevant pieces as such."[531] The question of the shape of the pieces leads to the question of the relevance of the cadastral records.

312. Slovenia recalls that the Slovenian and Croatian cadastres have their origin in the land surveys carried out under Maria Theresa (from 1748 to 1756), Joseph II (from 1785 to 1789) and the Franciscan cadastre created under Emperor Francis I in the 19th century.[532]

313. Slovenia submits that:

> The cadastre does not constitute a legal title delimiting the boundaries relevant for the application of the uti *possidetis juris* principle. It is only an instrument which should, in principle, reflect the legal situation on the ground and, as such[,] an element of proof. It is

525 Slovenia's Reply, para. 2.34.

526 Slovenia's Reply, paras 2.35-36.

527 Slovenia's Memorial, para. 5.41.

528 Slovenia's Memorial, para. 5.41, *quoting Frontier Dispute (Benin v. Niger)*, Judgment, I.C.J. Reports 2005, p. 90 at p. 148, para. 139.

529 *See Case concerning Land, Island and Maritime Frontier Dispute* (*El Salvador v. Honduras: Nicaragua intervening)*, Judgment, I.C.J. Reports 1992, p. 351 at p. 388, para. 44.

530 Slovenia's Memorial, para. 5.55.

531 *Ibid*.

532 Slovenia's Memorial, para. 5.58; *see* Slovenia's Memorial, para. 5.63.

> therefore of minor importance in the case the legal source of the boundary between Slovenia and Croatia is readily identifiable. In other cases, however, the cadastre can provide an element of proof for determining the course of the land boundary and the underlying legal source.[533]

314. Slovenia adds that the cadastre remains relevant as "a valuable element of proof" of legal title.[534] Slovenia emphasises two points. First, the cadastre constitutes in principle "a contemporaneous official description of the existing reality on the ground."[535] Second, despite its quite limited initial purpose, the cadastre "as a detailed description of the territory" gained in importance for the administrative division and as an instrument for the determination of boundaries.[536] In that regard, Slovenia asserts that it is "noteworthy" that, at the beginning of the bilateral negotiations between the Parties, the surveying and mapping experts agreed that the cadastral boundaries would be "the point of departure" for the final decision on the border.[537]

315. Slovenia also acknowledges the existence and work of the Expert Group, on which Croatia puts much emphasis.[538] However, Slovenia contends that the Expert Group was just one of a number of joint bodies established by the Parties, responsible for one part of the work. Moreover, Slovenia emphasises that the task of the Mixed Expert Group was technical in nature and was not intended to determine the land boundary based on the *uti possidetis* principle. Rather, it aimed at examining one among a number of criteria that could be relevant for identifying the boundary.[539] In this connection, Slovenia disagrees with Croatia concerning the conclusions it draws from the 1996 Expert Report. According to Slovenia, the experts did not actually compare the cadastral records for the entire land boundary, or even the cadastral maps, but only compared the interpretation of this evidence by Croatia and Slovenia respectively, and only in the 50 areas where major discrepancies were established in 1994.[540] Slovenia adds that it is because Slovenia does not agree that the cadastre was the relevant criterion for determining the land boundary that it did not consider it necessary to submit its entire cadastral records to the Tribunal.[541]

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533 Slovenia's Memorial, para. 5.76. Slovenia quotes a Chamber of the International Court of Justice: "the concept of title may also, and more generally, comprehend both any evidence which may establish the existence of a right, and the actual source of that right." *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 554 at p. 564, para. 18 (*quoted at* Slovenia's Memorial, para. 5.76). *See also* Transcript, Day 8, pp. 94:1-96:6.

534 Slovenia's Memorial, para. 5.62.

535 Slovenia's Memorial, para. 5.67.

536 Slovenia's Memorial, para. 5.68.

537 Slovenia's Memorial, para. 5.73.

538 Slovenia's Memorial, paras 5.74-76. Transcript, Day 3, pp. 21:19-22:3.

539 Transcript, Day 3, pp. 31:24-32:4.

540 Transcript, Day 8, pp. 97:14-91:14.

541 Transcript, Day 3, p. 73:17-22.

316. While the Parties agree that the boundaries of the republics of the SFRY were never delimited at the federal level, Slovenia faults Croatia for asserting that this implies that Croatia and Slovenia determined themselves their respective boundaries.[542]

317. Slovenia recalls that, until 1963, the constituent republics were not entitled to delimit their boundaries by agreement alone.[543] Under the 1946 Constitution, the People's Assembly of the FPRY had the power to determine the boundaries of a republic, subject to that republic's consent.[544] From that, Slovenia infers that republican boundaries *already existed*, and not, as Croatia does, that they were "left [for] the individual republics themselves to determine."[545] Under the 1953 Constitutional Act, the Federation had to approve boundary modifications "proposed consensually" by the republics.[546] Slovenia submits that Croatia ignores that constitutional framework, in particular when it comes to its analysis in the Mura River Region,[547] and it asserts that the only change concerning the boundary enacted under that framework concerned the Gradin area in Istria.[548]

318. As noted above, under the 1963 Constitution, the republics could delimit their boundaries by agreement alone, and this remained the law until the critical date.[549] Slovenia stresses that such agreement nevertheless remained "legally regulated": constitutional provisions identified the bodies with the authority to consent to any boundary modification.[550] According to Slovenia, the boundary between Slovenia and Croatia was never changed after 1963.[551] Cadastral authorities could not consent to any boundary modification because they did not have the authority to do so, as shown by a 1964 letter from the Federal Surveying and Mapping Authority.[552] Thus, the

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542 Slovenia's Counter-Memorial, para. 3.67; *see* Croatia's Memorial, para. 3.31.

543 Slovenia's Counter-Memorial, para. 3.68.

544 *See* Constitution of the Federal People's Republic of Yugoslavia, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 10/1946, Article 12, Annex SI-85; Slovenia's Counter-Memorial, para. 3.69.

545 *See* Croatia's Memorial, para. 3.34; Slovenia's Counter-Memorial, para. 3.70. Slovenia refers to Letter to the General Secretariat of the Federal Executive Council from the Federal Secretariat for Justice and Administration, No. 2/1-010/1-1990-05, 2 June 1990, Annex SI-224.

546 Constitutional Act on the Foundations of the Social and Political System of the Federal People's Republic of Yugoslavia and on Federal Authorities, Article 15, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 3/1953, Slovenia's Memorial, Annex SI-126; Slovenia's Counter-Memorial, para. 3.71.

547 Slovenia's Counter-Memorial, para. 3.71.

548 Slovenia's Memorial, paras 6.175-79; Slovenia's Counter-Memorial, para. 3.71.

549 *See* Constitution of the Socialist Federal Republic of Yugoslavia, *Official Gazette of the Socialist Federal Republic of Yugoslavia*, No. 14/1963, Annex SI-161; *Official Gazette of the Socialist Federal Republic of Yugoslavia*, No. 9/1974, Annex SI-183; Slovenia's Counter-Memorial, para. 3.72.

550 *See* Slovenia's Memorial, paras 5.27-40; Slovenia's Counter-Memorial, para. 3.73.

551 Slovenia's Counter-Memorial, para. 3.73.

552 Slovenia's Counter-Memorial, para. 3.74; Letter to the Surveying and Mapping Authority of the Socialist Republic of Croatia from the Federal Surveying and Mapping Authority, 19 June 1964, Annex SI-513.

cadastral authorities could only change the cadastral boundaries "to reflect" the existing boundaries;[553] conversely, the absence of cadastral change constitutes evidence of boundary stability.[554]

319. Slovenia next argues that Croatia misinterprets the role of the republics' legislation on administrative division and cadastral records.[555] Slovenia says that the republics' legislation on administrative division had the "sole purpose" of subdividing the territories into administrative units.[556] Slovenia points out that there were numerous territorial units created for various purposes, at the federal level,[557] in Slovenia,[558] and in Croatia.[559] The cadastres and cadastral municipalities of the Parties were "only one part of these different territorial and spatial divisions and units."[560] The 1953 Federal Decree on the Land Cadastre provides that the cadastre was used for "technical, economic and statistical purposes, for creating land registry and as a basis for taxation of income from land."[561] The cadastre was never intended to fix an "agreed boundary", as Croatia asserts in its Memorial.[562] Slovenia also underlines that there are various kinds of

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553 Slovenia's Counter-Memorial, para. 3.74. Slovenia provides the settlement of Drage in the Gorjanci/Žumberak area as an example of such change.

554 Slovenia's Counter-Memorial, para. 3.74.

555 Slovenia's Counter-Memorial, para. 3.76.

556 Slovenia's Counter-Memorial, para. 3.77.

557 *See* Slovenia's Counter-Memorial, para. 3.78; 1988 Federal Act on the Registry of Spatial Units, *Official Gazette of the Socialist Federal Republic of Yugoslavia*, No. 18/1988, Annex SI-659.

558 *See* Slovenia's Counter-Memorial, para. 3.78; 1980 Act on the Procedure for Establishing, Merging or Shifting Municipal Boundaries and Municipal Boundaries, *Official Gazette of the Socialist Republic of Slovenia*, No. 28/1980, Annex SI-203; 1980 Slovenian Act on the Denomination and the Evidencing of Settlements, *Official Gazette of the Socialist Republic of Slovenia*, No. 5/1980, Annex SI-581; 1976 Freshwater Fisheries Act, *Official Gazette of the Socialist Republic of Slovenia*, No. 25/1976, Annexes SI-192 and SI-564; 1959 Decree Establishing Fishing Districts and Fishing Environs, *Official Gazette of the People's Republic of Slovenia*, No. 17/1959, Annex SI-156; 1976 Act Regulating the Protection, Breeding and Hunting of Wild Animals and the Management of Hunting Grounds, *Official Gazette of the Socialist Republic of Slovenia*, No. 25/1976, Annex SI-563; 1981 Waters Act, *Official Gazette of the Socialist Republic of Slovenia*, No. 38/1981, Annex SI-596; 1975 Decree Defining the Boundaries of River Basin districts, Annex SI-189.

559 *See* Slovenia's Counter-Memorial, para. 3.78; 1962 Act on the Territories of the Municipalities and Districts, *Official Gazette of the People's Republic of Croatia*, No. 39/1962, Annex SI-160; 1988 Croatian Act on Settlements, Annex SI-665; 1986 Freshwater Fisheries Act, *Official Gazette of the Socialist Republic of Croatia*, No. 18/1986, Annex SI-637, and 1989 Decree on Fishing Districts in the Open Freshwaters of the Socialist Republic of Croatia, *Official Gazette of the Socialist Republic of Croatia*, No. 49/1989, Annex SI-677; 1976 Hunting Act, *Official Gazette of the Socialist Republic of Croatia*, No. 25/1976, Annex SI-561; 1990 Waters Act, *Official Gazette of the Socialist Republic of Croatia*, No. 53/1990, Annex SI-693.

560 Slovenia's Counter-Memorial, para. 3.79.

561 Article 3, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 43/1953, Annex SI-133; *see also* Article 2 of the Basic Law on the Land Survey and Land Cadastre, *Official Gazette of the Socialist Federal Republic of Yugoslavia*, No. 15/1965, Annex SI-167, and Slovenia's Memorial, para. 5.61; Slovenia's Counter-Memorial, para. 3.79.

562 Croatia's Memorial, para. 4.3; Slovenia's Counter-Memorial, para. 3.79.

"cadastres": land cadastres of course, but also fishing cadastres[563] and hunting cadastres.[564] In any event, the cadastral authorities did not have the power to modify the boundaries of the republics. Slovenia relies on a 1902 arbitral award concerning the course of the boundary between Austria and Hungary as constituent units of the Austro-Hungarian Empire for its proposition that the cadastre cannot determine the boundary because it was not established by the authority competent to modify the boundary.[565]

320. Slovenia claims that both Parties' understanding has been that the cadastres are "one element in order to describe the boundary."[566] Slovenia refers to Croatia's 1962 Act on the Territories of the Municipalities and Districts (defining municipalities by listing settlements),[567] the 1992 Act on the Territories of the Counties, Towns and Municipalities in the Republic of Croatia (again referencing settlements),[568] Article 20 of Croatia's Regulation on the Contents and Means of Keeping the Records of the State Border of 2000 (stating that the border "shall be determined on the basis of the data of the land cadastre, the land register, the spatial units records and register, and other data").[569] Slovenia also refers to the legislation on territorial division adopted in Slovenia in 1946,[570] 1948,[571] 1952,[572] 1955,[573] and 1964,[574] using both cadastral municipalities

563 Freshwater Fisheries Act, *Official Gazette of the Socialist Republic of Slovenia*, No. 26/1976, Article 35, Annexes SI-125 and SI-564; Freshwater Fisheries Act, *Official Gazette of the Socialist Republic of Croatia*, No. 18/1986, Article 9, Annex SI-637; Slovenia's Counter-Memorial, para. 3.79.

564 Act Regulating the Protection, Breeding and Hunting of Wild Animals and the Management of Hunting Grounds, *Official Gazette of the Socialist Republic of Slovenia*, No. 25/1976, Article 39, Annex SI-563; Croatian Hunting Act, *Official Gazette of the Socialist Republic of Croatia*, No. 32/*1973*, Article 8, Annex SI-561; Slovenia's Counter-Memorial, para. 3.79.

565 *Decision of 13 September 1902*, R.I.A.A., Vol. 28, pp. 379-96, at p. 388; Slovenia's Counter-Memorial, para. 3.79.

566 Slovenia's Counter-Memorial, para. 3.80. Transcript, Day 3, pp. 77:8-90:11.

567 Act on the Territories of the Municipalities and Districts in the People's Republic of Croatia, *Official Gazette of the People's Republic of Croatia*, No. 39/1962, Article 3, Annex SI-160.

568 Slovenia's Counter-Memorial, para. 3.80.

569 Regulation on the Contents and Means of Keeping the Records of the State Border, *Official Gazette of the Republic of Croatia*, No. 26/2000, Annex SI-772.

570 Act on the Administrative Division of the People's Republic of Slovenia, 2 April 1946, *Official Gazette of the People's Republic of Slovenia*, No. 26/1946, Annex SI-86, and Act on the Administrative Division of the People's Republic of Slovenia, 14 September 1946, *Official Gazette of the People's Republic of Slovenia*, No. 62/1946, Annex SI-96.

571 Act on the Administrative Division of the People's Republic of Slovenia, *Official Gazette of the People's Republic of Slovenia*, No. 9/1948, Annex SI-113.

572 Act dividing the People's Republic of Slovenia into Towns, Districts and Municipalities, *Official Gazette of the People's Republic of Slovenia*, No. 11/1952, Annex SI-120.

573 Act on the Geographical Scope of Districts and Municipalities in the People's Republic of Slovenia, *Official Gazette of the People's Republic of Slovenia*, No. 24/1955, Annex SI-143.

574 Act defining the Territories of Districts and Municipalities in the Socialist Republic of Slovenia, *Official Gazette of the Socialist Republic of Slovenia*, No. 35/1964, Annex SI-165.

and settlements.[575] While the 1980 legislation defined the municipality with reference to cadastral municipalities alone,[576] the arrangement was based on practical considerations; it was never understood that the cadastral municipalities would constitute the border.[577] The 2006 Slovenian Real Estate Registration Act also confirms that the State border is not determined exclusively by the cadastral records.[578]

321. The understanding of the Parties that cadastres do not define the boundary is further confirmed, according to Slovenia, by the fact that the competent authorities well knew that their respective cadastres "were poorly updated and maintained."[579] Slovenia refers to statements by the Slovenian Surveying and Mapping Authority[580] and the Croatian authorities.[581] Slovenia also notes that its cadastral municipalities bordering Italy do not correspond to the boundary established under the Treaty of Osimo.[582]

322. According to Slovenia, "[i]t is the cadastre that has to be aligned to the legally existing boundaries of the republic. If it is not so aligned, it is not the boundary which has to be changed, but the cadastre. The cadastre has to follow the boundary, and not *vice versa*."[583] This, Slovenia claims,

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575 Slovenia's Counter-Memorial, para. 3.81; *see* Slovenia's Memorial, para. 5.44.

576 *See* Act on the Procedure for Establishing, Merging or Shifting Municipal Boundaries and Municipal Boundaries, *Official Gazette of the Socialist Republic of Slovenia*, No. 28/1980, Article 7, Annex SI-203.

577 Slovenia's Counter-Memorial, para. 3.81; Assembly of the Socialist Republic of Slovenia, Proposal concerning the Act on the Conditions and the Procedure for the Establishment, the Merger or the Change of the Municipal Boundaries and on the Municipal Boundaries, 12 July 1979, Annex SI-572; *see also* the 1994 Slovenian Act on the Establishment of Municipalities and Municipal Boundaries, *Official Gazette of the Republic of Slovenia*, No. 60/1994, Annex SI-750.

578 Slovenia's Counter-Memorial, para. 3.81; Real Estate Registration Act (2006) *Official Gazette of the Republic of Slovenia*, No. 47/2006, Annex SI-798.

579 Slovenia's Counter-Memorial, para. 3.82.

580 Surveying and Mapping Authority of the Socialist Republic of Slovenia, Information on Problems Caused by the Undefined Boundary with the Socialist Republic of Croatia, No. 45-d-25/25-70, 29 March 1972, Annex SI-181; *see also* the *Graphical Presentation of Disagreements on the Republic Border between Socialist Republic of Slovenia and Socialist Republic of Croatia* displaying the discrepancies in the cadastral records and boundaries between Slovenia and Croatia, SI-M-57; Letter to the Cadastral Offices from the Surveying and Mapping Authority of Socialist Republic of Slovenia, 2 April 1971, Annex SI-536. *See also* Letters to the Administration for Cadastral and Surveying Affairs from the Surveying and Mapping Authority of the Socialist Republic of Croatia, 26 March 1971, Annex SI-535.

581 Surveying and Mapping Authority of Socialist Republic of Croatia, Information on the Difficulties Arising from the Non-Defined Border of the Socialist Republic of Croatia, 25 January 1972, Annex SI-543. *See also Graphical Presentation of Disagreements on the Republic Border between Socialist Republic of Slovenia and Socialist Republic of Croatia*, Annex SI-M-57.

582 Slovenia's Counter-Memorial, para. 3.85; Treaty on the Delimitation of the Frontier for the Part not Indicated as such in the Peace Treaty of 10 February 1947, done in Osimo on 10 November 1975, U.N.T.S., Vol. 1466, No. 24848, p. 72, Annex SI-190; Letter to the Executive Council of the Assembly of the Socialist Republic of Slovenia, Office for Assembly Affairs from the Surveying and Mapping Authority of the Socialist Republic of Slovenia, 20 January 1982, Annex SI-598.

583 Slovenia's Counter-Memorial, para. 3.86; Transcript, Day 8, pp. 92:18-94:16.

was the understanding of Yugoslavia's Federal Surveying and Mapping Authority,[584] is confirmed by Croatia's legislation,[585] by the Expert Group, and by Croatia's own position during the negotiations concerning the land boundary.[586] Slovenia therefore asserts:

> An unqualified transposition of the cadastral limits evidenced in the cadastral records, which were not updated, ignoring the change of the course of the river or other natural changes would not create an "identifiable and convenient" State boundary and would ignore the intention of those who delimited these boundaries along certain topographical features.[587]

323. Slovenia further submits that Croatia's detailed depiction of its claimed land boundary on 45 maps at the scale of 1:25,000, in Volume III of its Counter-Memorial, actually undermines Croatia's argument that its cadastre constitutes the relevant legal title for the determination of the land boundary on the critical date.[588]

324. Slovenia notes that Croatia has not provided the full cadastral documentation, records and maps allegedly relevant for its claim.[589] Slovenia has compared Croatia's claim as depicted on the 45 maps at the scale of 1:25,000 to the "official data of the Republic of Croatia" contained in the Geoportal of Croatia's State Surveying and Mapping Authority.[590] According to Slovenia, Croatia's claim departs, sometimes extensively, from the cadastral limits in the publicly available documentation.[591] Slovenia points out that Croatia has not submitted a corrected version of the 1:25,000 maps annexed to its Counter-Memorial.[592]

325. Slovenia asserts that the official data contained on Croatia's Geoportal in fact confirms Slovenia's claimed land boundary.[593]

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584 Letter to the Surveying and Mapping Authority of the Socialist Republic of Croatia from the Federal Surveying and Mapping Authority, 19 June 1964, Annex SI-513; Slovenia's Counter-Memorial, para. 3.86.

585 Regulation on the Contents and Means of Keeping the Records of the State Border, *Official Gazette of the Republic of Croatia*, No. 26/2000, Article 19, Annex SI-772.

586 "Croatia is of the opinion that boundaries of cadastral municipalities are only one among the essential criteria in the definition of the border line . . . ." (Joint Minutes of the Third Meeting of the Mixed Diplomatic Commission for the Establishment and Demarcation of the State Border between the Republic of Slovenia and the Republic of Croatia, Otočec, (Slovenia), 23 February 1995, Annex SI-285).

587 Slovenia's Counter-Memorial, para. 3.88 (*quoting Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, I.C.J. Reports 1992, p. 351 at p. 390 at para. 46).

588 Slovenia's Reply, para. 2.08.

589 *Ibid*.

590 Slovenia's Reply, para. 2.09; *see Geoportal* website, Conditions of use, <http://geoportal.dgu.hr/uvjeti-koristenja/>, Annex SI-1000.

591 Slovenia's Reply, paras 2.10-13; *see* Slovenia's Reply, Figures 2.1-2.7.

592 Transcript, Day 8, p. 83:19-23.

593 Slovenia's Reply, para. 2.14; *see* Slovenia's Reply, Figures 2.8-15.

326. Slovenia also seeks to counter Croatia's allegation of a:

> [C]ommon understanding between Croatia and Slovenia, since their establishment as republics within Yugoslavia, that their boundary followed the historic border that had been delimited with precision in the 19th century to separate the Kingdom of Croatia (then an autonomous kingdom within Austria-Hungary in state union with Hungary) from the Austrian Crown Lands of Carniola (Krain) and Styria (Steiermark).[594]

327. Slovenia claims that Croatia's only support for this proposition is an inference from the alleged alignment of the cadastral limits of the Parties' municipalities.[595] Slovenia argues that Croatia's own claim does not correspond to the 1918 historical boundary between the Austrian Crown Lands and the Kingdom of Croatia, in particular in the Slovenske gorice.[596] Further, the Expert Group on which Croatia heavily relies confirms that the cadastral records of Croatia "did not entirely correspond" to the historical boundary.[597] Moreover, Slovenia asserts that the entire boundary had not been delimited and demarcated during the Austro-Hungarian period.[598] Slovenia specifically discusses the Gorjanci/Žumberak region[599] and the Mura River Region.[600]

328. Accordingly, Slovenia rejects Croatia's assertion that there was a "common understanding" that the 1946 boundary corresponded to the 1918 historical boundary, for three reasons: first, Croatia's own cadastral records do not entirely correspond to the 1918 historical boundary; second, in some areas, the boundary was not determined until after 1918; third, Croatia fails to explain why the period of the two Yugoslav kingdoms (1918-1945) should be ignored.[601]

329. Slovenia further notes that Croatia's claimed boundary as depicted in the 45 maps submitted in Volume III of its Counter-Memorial does not conform to the Austro-Hungarian historic boundary, for instance on the Kolpa river.[602]

330. Slovenia faults Croatia for reducing the cadastre to a set of maps and ignoring that the outer limits of a cadastral municipality as depicted on the cadastral map do not necessarily correspond to the

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594 Croatia's Memorial, para. 6.3; *see* Slovenia's Counter-Memorial, para. 3.89.

595 Slovenia's Counter-Memorial, para. 3.89, *citing* Croatia's Memorial, para. 4.13.

596 Slovenia's Counter-Memorial, para. 3.90.

597 Slovenia's Counter-Memorial, para. 3.91; Mixed Slovenian-Croatian Expert Group for the Comparison of Discrepancies in the Course of Cadastral Boundaries, Report on the Fieldwork Conducted from 8 to 10 July 1997 in the Area of the Discrepant Boundaries of the Cadastral Municipalities of Draga and Prezid, 11 December 1997, Annex SI-296. In particular, Slovenia refers to plot No. 1648.

598 Slovenia's Counter-Memorial, para. 3.92.

599 Slovenia's Counter-Memorial, para. 3.93.

600 Slovenia's Counter-Memorial, para. 3.94.

601 Slovenia's Counter-Memorial, para. 3.96.

602 Slovenia's Reply, para. 2.15.

boundary of that cadastral municipality with its neighbouring cadastral municipality.[603] Slovenia asserts that this mistake is particularly striking where the land boundary runs on rivers or roads.[604] It notes that the experts who compared the cadastral records of the Parties in 1993 and 1994 recognized the "necessity of interpreting the cadastral evidence in its entirety, rather than relying on a simple line on a map."[605]

331. Slovenia further criticizes Croatia for including 516 new cadastral maps into the proceedings in its Reply, on the grounds that Croatia had previously submitted that a third round of pleadings would be unnecessary, but then proceeded to "overburden" the land boundary case with the additional maps and to introduce confusion by correcting four out of six volumes.[606]

332. Reiterating the proposition that the boundary was based on the *banovine* division established in 1929 and confirmed in 1931, Slovenia proceeds to summarize its analysis of legal title in each of the three regions.[607] In the Mura River Region, the 1931 Constitution establishes the boundary, which is the Mura River.[608] In the Central Region, the legal provisions establishing the *banovine* system "referred back" to previous administrative limits from the days of the Austro-Hungarian Empire.[609] With the exception of the area of the Military Frontier, the entire boundary was determined with great care, and runs mainly along rivers.[610] In the Istria Region, the boundary was established after 1945, "in two steps".[611] In Eastern Istria, the boundary was fixed through the implementation of the 1947 Peace Treaty and the incorporation of most of the former Zone B of the Julian March into Yugoslavia. The course of the boundary is determined by the relevant cadastral limits of the relevant cadastral municipalities.[612] In Western Istria, the boundary was established in 1954 when the FTT was dissolved and the authority over former Zone B of the FTT (and some small parts of former Zone A) was transferred to Yugoslavia. The course of the boundary is determined by the boundary of the districts of Koper and Buje, as evidenced by the

603 Slovenia's Reply, para. 2.18; Transcript, Day 8, pp. 82:9-84:9.

604 Slovenia's Reply, para. 2.19.

605 Slovenia's Reply, para. 2.20.

606 Transcript, Day 3, pp. 14:12-15:15.

607 Slovenia's Counter-Memorial, paras 3.105-09; Transcript, Day 3, pp. 90:15-99:11.

608 Slovenia's Counter-Memorial, para. 3.110; Transcript, Day 3, p. 96:7-23; Transcript, Day 8, p. 165:14-17.

609 Slovenia's Counter-Memorial, para. 3.111; Transcript, Day 3, p. 97:3-12.

610 Slovenia's Counter-Memorial, paras 3.112-13.

611 Slovenia's Counter-Memorial, para. 3.116.

612 Slovenia's Counter-Memorial, para. 3.117; Transcript, Day 3, p. 92:10-17; Transcript, Day 8, pp. 165:26-166:5.

relevant cadastral limits[613] (except in the vicinity of Hrvoji, where a 1956 Federal decree modified the boundary).[614]

2. The Tribunal's Analysis

333. The Tribunal shall now proceed to examine the Parties' positions as to the Tribunal's task and the applicable law in respect of the land boundary.[615]

(a) The Obligation to Follow the Pre-independence Boundary

334. The Tribunal recalls that the fundamental principle applicable to the establishment of land boundaries between sovereign States is consent. If the States agree upon the location of the boundary as a matter of international law, the agreed location is the boundary. Equally, if the States agree upon the manner in which the boundary is to be determined, the boundary determined in accordance with that agreement is the boundary, as a matter of international law.

335. In the present case the Parties have agreed, in the Arbitration Agreement, that the boundary should be determined in accordance with international law.[616] That agreement has immediate consequences. First, it defines the powers and duties of the Tribunal. The Tribunal has neither the right nor the legal power to decide upon the course of the boundary except by applying the rules and principles of international law. Factors that are legally irrelevant, or which the Parties have expressly decided should be excluded from consideration, must not be taken into account by the Tribunal in reaching its decision. The Tribunal is required to decide the matter from the legal, and not from the historical or political or sociological perspective. That is what the two Governments have chosen and mandated.

336. Furthermore, as discussed in paragraphs 256 *et seq.*, the Parties are agreed upon more specific elements of the mandate to the Tribunal. They agree that the Tribunal shall apply the principle of *uti possidetis*, which stipulates that the present land boundary between the two States is the same

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613 Slovenia's Counter-Memorial, para. 3.119; Transcript, Day 3, pp. 91:15-92:7; Transcript, Day 8, p. 166:6-12.

614 Slovenia's Counter-Memorial, para. 3.120.

615 The geographical coordinates used in this Award are referenced to the European Terrestrial Reference System 1989 ("ETRS89"), unless otherwise indicated. The Parties' current datums (HTRS96 for Croatia and D96 for Slovenia) are ETRS89 realisations. ETRS89 geographic coordinates are determined on the International Association of Geodesy-Geodetic Reference System 1980 ellipsoid ("IAG-GRS80") with 6 378 137 m semi-major axis and a 1/298.257222101 flattening. For practical purposes, the coordinates provided in this Award may be used on nautical charts drawn up in, or identifying as their datum, the World Geodetic System 1984 ("WGS84").

616 Arbitration Agreement, Article 4(a).

as the pre-independence boundary between the two Republics when they were constituent republics of the SFRY. The Parties are also agreed that the Tribunal must determine the course of that boundary as it existed on 25 June 1991.

337. The Parties are agreed upon two further, and important, principles. The first is that the course of the pre-independence boundary is the course that was stipulated by the law applicable to that matter—that is, the municipal law applicable in Croatia and Slovenia as constituent republics of the SFRY immediately prior to 25 June 1991.[617] That legal boundary is not necessarily the same as what might be called the "practical" boundary. In any particular place, it may have been the habit to treat that location as part of one or other republic—for example, for the purpose of allocating postal codes or connecting to public utilities such as gas, electricity, water and sewage—on the basis of practical convenience or local traditions or preferences, and without regard to the precise location of the legal boundary.

338. Where such circumstances arise, the two Governments are agreed that the Tribunal must determine the legal and not the "practical" boundary.[618] In other words, Croatia and Slovenia agreed that it is possible that the boundary determined by the Tribunal may not correspond in every detail to what persons in some locations treat as the boundary for day-to-day purposes. That is what has been agreed between the Parties, and the Tribunal will act in accordance with that instruction.

339. Second, both States are agreed that the course of the boundary should not be determined by the wishes of the inhabitants of the areas in question.[619] The wishes and interests of the inhabitants were, of course, a matter of concern within the political and legal structure of the SFRY and within the mechanisms that were provided for taking those wishes and interests into account when adopting and applying the laws and regulations of the SFRY and of its constituent republics concerning the drawing of boundaries. It is on the basis of those laws and regulations as they stood at 25 June 1991 that the Tribunal must decide.

340. It is common ground that legal title takes precedence over *effectivités*. Where no legal title can be established, or where legal title is established but not with sufficient precision to establish the

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617 *See supra*, para. 258-262.

618 Croatia's Memorial, para. 3.9; Slovenia's Memorial, para. 5.08.

619 Transcript Day 2, pp. 196-97 (Croatia); Transcript Day 6, pp. 18-19 (Croatia); Transcript Day 8, pp. 132-33 (Slovenia).

exact location of the boundary, the *effectivités* play a crucial role. It is, however, necessary to handle the evidence of *effectivités* with considerable caution.

341. The Permanent Court of International Justice ("PCIJ") referred in the *Eastern Greenland* case to the two elements of *effectivités*, "the intention and the will to act as sovereign and some actual exercise of or display of such authority."[620] Those elements "must be appraised in relation to the legal and political context of the relevant period and of the region concerned."[621] The rich historical context in this case includes in particular periods when the Parties were within the Austrian and Austro-Hungarian Empires, the Kingdom of the Serbs, Croats and Slovenes, the Kingdom of Yugoslavia, and the Yugoslav Federation. In addition, the implication of the existence within a federal State of several layers of local, regional, republican and federal government must be borne in mind.

342. Evaluation of *effectivités* is not a matter of counting or comparing instances of the exercise or display of authority *à titre de souverain*. Each instance—and the number of relevant instances put before an international tribunal in cases such as this tends to be low—must be examined in order to identify precisely what can properly be inferred from it. For example, a payment of taxes to an authority of State A and not of State B may evidence a belief that State A and no other State has authority over a particular place, or it may evidence no more than the fact that although both State A and State B maintained claims to the location in question, it was decided that the tax-payer should not (at least on that occasion) be required to pay twice. To take another example, the referral of a dispute to a particular court may be based upon the presence of the property in question or one or both of the litigating parties, or the making of a relevant legal instrument such as a will, within the jurisdiction of the court; or upon an agreement between the litigating parties. An exercise of sovereign authority with respect to facts or things at a particular location should not be assessed in isolation: it does not necessarily evidence the existence of exclusive sovereign authority at that location.

343. The Tribunal has accordingly taken particular care to look for evidence that points clearly to the assertion of the public power of the State at the location in question, to the exclusion of the public power of other States. In doing so, it has been mindful of the fact that some activities, such as the levying of taxes, the organization of elections, conscription for military service, and law

620 *Legal Status of Eastern Greenland*, P.C.I.J., Series A/B, No. 53, pp. 45-46.

621 *Maritime Delimination and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)*, I.C.J. Reports 2001, p. 40 at p. 114, para. 244.

enforcement, are more likely to demonstrate the exercise of authority *à titre de souverain* than others, such as the delivery of mail or the provision of telephone or other services.

(b) Areas of the Land Boundary Not in Dispute

344. In their submissions the Parties proceeded on the basis that most of the land boundary is not in dispute. The two States agree on the location of over 90% of the land boundary between them. The undisputed segments of the boundary constitute a considerable part of the boundary between the tripoint with Hungary in the east and the terminus in the mouth of the Dragonja River in the west.

345. The areas that are not in dispute had been identified by both Parties as those in which the cadastral limits of neighbouring Croatian and Slovenian districts coincided and were "aligned". The same position was taken in the exercise undertaken in 1991-1996 by the Expert Group established by the Parties.

346. The Tribunal infers from this practice that the Parties were agreed that the cadastral limits in principle represent the boundaries of the Republics. Accordingly, there is a working presumption that the boundary of each Republic is the outer limit of the peripheral districts as indicated on the relevant cadastre.[622]

347. This approach is consistent with the fact that, under the applicable municipal law, cadastral limits were required to conform to the boundaries of the republics, so that if a cadastral limit diverged from the legal limits of the republic it was the cadastral limit, and not the republican boundary, that had to be adjusted.[623] The consistency is secured by the fact that the boundary of each republic was defined in terms of the boundaries of the constituent municipalities, and the municipalities were themselves defined in terms of the boundaries of their constituent cadastral districts. It is well-established in international law that tribunals should presume, in the absence of evidence to the contrary, that States act consistently with their legal obligations, and that steps that have been taken, and instruments that have been adopted by States are consistent with those obligations. This is sometimes expressed in the Latin maxim *omnia praesumuntur rite esse acta:* all acts are

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622 The cadastres include two components: first, the verbal description of the limits of the cadastral district; and second, the map on which those limits are depicted. Those two elements are complementary and must be interpreted together. The Parties did not, however, submit a complete set of cadastral records to the Tribunal.

623 Article 7, Law on the Procedure to Establish, Merge and Change the Area of Municipality, *Official Gazette of the Socialist Republic of Slovenia*, No. 28/1980, Annex HRLA-52; Decree on the Land Cadastre, 1953, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 43/1953, Annex SI-133.

presumed to have been duly done.[624] The Tribunal considers that this principle can and should be applied to the instruments that establish the cadastral limits relevant to the boundaries between the two Parties.

348. The cadastres evidence title to land and the location of the boundary: but as a matter of international law they do not definitively constitute either title or the boundary. The alignment of the cadastres creates no more than a working presumption, providing a *prima facie* indication of the boundary between the two Republics in 1991. The cadastral limits do not have any inherent special status that entitles them to prevail automatically over any evidence that indicates that the administrative or "political" boundary of a republic is different from that of a cadastral district.

349. In any case, if the Parties are agreed that the boundary is not disputed in segments where their cadastral limits are aligned, that agreement is itself sufficient to establish that the aligned limits constitute the boundary. Whether that agreement is based upon nothing more than an inspection of cadastral maps, and whether that agreement overlooks or disregards any argument that might be made that the cadastres are incorrect, is not material. It is the agreement of the two Parties, and not the cadastres themselves, that constitutes the basis of the determination of the location of the boundaries of the Parties as a matter of international law.

350. The Tribunal is directed to determine the course of the whole of the land boundary.[625] The Tribunal therefore determines that in the undisputed segments the boundary follows the agreed course.

(c) The Disputed Segments of the Land Boundary

351. In the segments of the boundary where there is no agreed line, the essential task of the Tribunal is the same as it is in all other segments of the boundary: To determine the line according to the criteria stipulated by the two Parties. The Tribunal must, therefore, determine in the disputed areas the course of the boundary prescribed by the law of the SFRY as at 25 June 1991.

352. It is practically helpful and in accordance both with the legal principles summarized above and with the position adopted by both Parties in this case to proceed by accepting that the cadastral limits are a *prima facie* indication of the boundary between the two Republics in 1991 and

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624 *See* Bin Cheng, *General Principles of Law as applied by international courts and tribunals*, (1994), pp.304-305, *citing* the *Valentiner Case* (1903), R.I.A.A., Vol. X, p. 403 at p. 405, and the *Salem* case (1932), R.I.A.A., Vol. II, p. 1161 at p. 1186.

625 *See supra*, paras 238-239.

therefore of the boundary between the two States now, and to consider in respect of each of the disputed areas whether there are reasons for applying a criterion other than the location of cadastral limits for the determination of the boundary.

353. The reasons for disagreement over the course of the boundary in the disputed areas are not the same in every case. In general terms, the following grounds for disagreement can be distinguished:

a. Cadastral limits depicted on cadastral maps overlap or leave gaps;
b. There is no cadastral limit;
c. The boundary must be determined by the application of some other instrument or criterion.

(d) Limits to the Tribunal's Determinations

354. While the Tribunal is mindful of the Parties' request that it determine the entirety of the land boundary,[626] there are limits as to the degree of detail into which any delimitation decision, including the following determinations in the present Award, can go.

355. First, both Parties agree that the Tribunal cannot be expected to determine "every metre" of the land boundary.[627] To the extent that the Tribunal determines the course of the land boundary by reference to evidence submitted by one of the Parties, such as a map or a document containing a verbal description, the precision of such determination is inherently limited by the scale and accuracy of the map or the detail and accuracy of the verbal description.[628] Accordingly, as with any delimitation by judicial decision or arbitral award, the implementation of the present Award will require the Parties to address minor points at the stage of demarcation. The Tribunal is satisfied that any such remaining points "would be matters . . . which the Parties, with the help of their experts, can certainly resolve."[629] Such limited flexibility during demarcation is without prejudice to the comprehensive and binding nature of the delimitation of the land boundary in the present Award.

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626 *See supra*, paras 238, 239.

627 Slovenia's Counter-Memorial, para. 3.16; *see also*, Croatia's Memorial, para. 1.17.

628 The Tribunal would note, however, that the cartographic materials (including topographic and cadastral maps) provided by the Parties were generally of good geometric quality.

629 *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, p. 38 at p. 78, para. 89.

356. Second, the Tribunal has been limited in its analysis by what the Parties, in their written and oral submissions and through documentary and cartographic evidence, have brought to the Tribunal's attention. While it is generally recognized that an international court or tribunal is vested with certain inherent powers to investigate the facts, Articles 24 and 25 of the PCA Optional Rules make it the primary responsibility of the Parties to adduce such evidence that they consider appropriate. In the present case, the Parties had the opportunity to present evidence in the context of three rounds of written submissions, including in rebuttal of evidence previously submitted by the other Party. Both Parties made ample use of this opportunity and submitted to the Tribunal detailed evidence in respect of the land boundary. The Tribunal further notes that the Parties agreed that the Tribunal should reach its decision without the Tribunal or its experts conducting any site visit of the border region. In these circumstances, the Tribunal considers that it ought to fulfil its task under the Arbitration Agreement by basing itself on the materials submitted by the Parties, without undertaking any independent investigation of its own.

357. The Tribunal finally notes that in some limited areas (such as the situations described in paragraphs 565 and 630) the course of the boundary, as it results from an application of the law, may not be considered the most practical boundary, whether for reasons of physical or human geography. For the avoidance of doubt, the Tribunal reiterates that, while the present Award fixes the boundary in such areas with binding effect (as the Parties have requested), the Award does not preclude the Parties from subsequently reaching agreement between themselves on practical arrangements concerning the boundary.

358. The Tribunal now proceeds to consider each of the disputed areas in turn.

B. DISPUTED SEGMENTS OF THE LAND BOUNDARY

359. Both Parties divide the land boundary into three regions or sectors—the Mura River Region, the Central Region and the Istria Region—each of which presents distinct historical characteristics.[630] Croatia defines the Istria Region consistently with the limits of historic Istria under the Austro-Hungarian Monarchy.[631] It thus divides the Istria Region from the Central Region at the tripoint of the border of the historical Kingdom of Croatia with the borders of the Austrian Crown Lands

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630 *Cf.* Croatia's Memorial, para. 4.8 and Figure 4.2; Slovenia's Memorial, para. 6.03 and Figure 6.1. Slovenia calls these geographical regions "sectors." For instance, Croatia discusses the Prezid area as part of the Central Region and Slovenia discusses that same area, calling it the Snežnik area, as part of the Istrian region. *See also* Transcript, Day 3, p. 15:12-16 ("sectors"). Croatia's Memorial, paras 6.24-34; *Cf.* Slovenia's Memorial, paras 6.180-87; *see also* Croatia's Counter-Memorial, paras 3.92-93. For a map illustrating the disagreement, *see* Slovenia Counter Memorial, Figure 3.5.

631 Croatia's Counter-Memorial, para. 3.92.

of the Littoral and Carniola.[632] The Central Region ends, and the Mura River Region begins, where Croatia's historic boundary with Austria ended and its boundary with the Kingdom of Hungary began.[633] Slovenia's definition of the three regions, on the other hand, is related to differences in the applicable law (or legal title) in each region.[634] Slovenia criticizes Croatia's historical approach and asserts that the division used by the Expert Group is more appropriate.[635]

360. In the following, the Tribunal will for practical reasons employ the division of the three geographic regions used by the Expert Group.[636]

361. The Parties have submitted numerous documentary exhibits and maps, and have presented extensive legal argument, in respect of particular segments of the border. The Tribunal has carefully considered the Parties' written and oral pleadings on each segment. In the following, it will summarise the Parties' positions only insofar as they are determinative for, or provide useful context for, the Tribunal's decisions.

1. Mura River Region

362. The first region in which the Tribunal must determine the course of the land boundary is the Mura River Region. The Mura River Region is the easternmost segment of the Croatia-Slovenia boundary, forming the southern border of Slovenia's Prekmurje region, and the northern border of Croatia's Medjimurje region.[637] The main geographic feature of the region is the Mura River, which generally runs from west to east.[638]

363. To give context to the Parties' arguments concerning legal title in the Mura River Region, the Tribunal will briefly recall relevant events in the history of the region. Under the 1920 Treaty of Trianon, the Mura River Region was incorporated into the Kingdom of Serbs, Croats and Slovenes.[639] It became part of the Maribor *oblast*.[640] After the *banovine* system replaced the

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632 *Ibid*.

633 Croatia's Counter-Memorial, para. 3.93.

634 Slovenia's Counter-Memorial, paras 3.99, 3.105-09; *see* Slovenia's Memorial, para. 6.03.

635 Slovenia's Counter-Memorial, para. 3.100.

636 Mixed Slovenian-Croatian Expert Group for the comparison of cadastral boundaries displaying discrepancies, State Border Republic of Slovenia – Republic of Croatia, Joint Report on the results of the comparison of cadastral boundaries in the areas displaying significant discrepancies, Zagreb, 20 December 1996, Annex SI-293.

637 Croatia's Memorial, para. 7.1; Slovenia's Memorial, para. 6.11.

638 Slovenia's Memorial, para. 6.07.

639 Croatia's Memorial, para. 7.5; Slovenia's Memorial, para. 6.15.

640 Slovenia's Memorial, para. 6.20.

oblasti system, Prekmurje was included within the *Dravska banovina* and Medjimurje was included within the *Savska banovina*.[641]

364. Hungary took control of the region during World War II. Pursuant to the 1947 Peace Treaty with Hungary,[642] the region was returned to the FPRY.[643]

365. According to Slovenia, the Mura River Region was not divided when it was incorporated in the Kingdom of Serbs, Croats and Slovenes.[644] Under the *oblasti* administrative system, both Medjimurje and Prekmurje were part of the Maribor *oblast*. Slovenia claims that the Mura River Region was first divided in 1929, with the establishment of the Kingdom of Yugoslavia and the adoption of the new *banovine* system.[645] Prekmurje was then included within the *Dravska banovina* (later Slovenia). Medjimurje was included in the *Savska banovina* (later Croatia).[646] After World War II, Slovenia was established within the territory of the *Dravska banovina*, and the *Savska banovina* became a part of Croatia. To support this claim, Slovenia relies on a reply to a parliamentary question by the Federal Secretariat for Justice and Administration, explaining that the reconstructed minutes of the AVNOJ Presidency of 24 February 1945 indicate that "Slovenia covers the territory of the former Drava Banate, Croatia the territories of the former Sava Banate and the Dubrovnik District of the former Zeta Banate."[647]

366. This boundary, Slovenia argues, was not subsequently altered.[648] Therefore, the legal title of the boundary at the critical date was the 1931 Constitution, which itself followed the 1929 Act.[649]

367. Slovenia disputes Croatia's assertion that "Croats and Slovenes accepted that Međjimurje on the Croatian side, and Prekmurje on the Slovenian side, would be separated by the same pre-World War I Austro-Hungarian administrative borders."[650] Slovenia points out that the assertion is not

641 Slovenia's Memorial, para. 6.21.

642 Peace Treaty between Federal People's Republic of Yugoslavia and Hungary, done in Paris on 10 February 1947, 41 U.N.T.S. 135.

643 Croatia's Memorial, para. 7.5.

644 Slovenia's Memorial, para. 6.19.

645 Slovenia's Memorial, para. 6.21; Transcript, Day 3, p. 102:23-25.

646 Slovenia's Memorial, para. 6.21.

647 Letter to the General Secretariat of the Federal Executive Council from the Federal Secretariat for Justice and Administration, No. 2/1-010/1-1990-05, 2 June 1990, Annex SI-224; Slovenia's Memorial, paras 5.17-18; *see also* Slovenia's Memorial, paras 6.31, 6.65; Transcript, Day 3, p. 101:20-24.

648 Slovenia's Memorial, para. 6.34.

649 Transcript, Day 3, p. 101:13-16.

650 Croatia's Memorial, para. 7.6; Slovenia's Counter-Memorial, para. 4.06.

supported by any evidence. It also denies that the area was "delimited with precision"[651] during the time of the Austro-Hungarian Empire.[652] Slovenia claims that no such delimitation took place and that the surveys carried out as part of the Franciscan land survey concerned cadastral municipalities, which were not considered political boundaries in the Austro-Hungarian Empire.[653] Moreover, Slovenia faults Croatia for failing to consider in its Memorial the 1920 Treaty of Trianon and the new division of the territory of the Kingdom of Yugoslavia, with its *banovine* system.[654]

368. Slovenia asserts that the boundary in the region is a "natural boundary" formed by the Mura River.[655] Slovenia submits that this boundary begins at Point B1, the Land Boundary Tripoint, and then follows the middle of the main channel of the Mura River until it reaches the municipality of Razkrižje and the Central Region in the vicinity of Gibina.[656]

369. Slovenia first avers that the Land Boundary Tripoint is located where the Lendava (or Krka) River meets the Mura River.[657] The Mura River marks the tripoint where the sectors of the Hungarian boundary bordering Slovenia and those bordering Croatia meet.[658] Slovenia notably relies on Article 27 of the 1920 Treaty of Trianon[659] as well documents relating to the determination of the border between Yugoslavia and Hungary.[660]

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651 Croatia's Memorial, para. 7.4.

652 Slovenia's Counter-Memorial, para. 4.09.

653 Slovenia's Counter-Memorial, para. 4.09; *see* Slovenia's Memorial, paras 2.42-43; *see also Decision of the arbitral tribunal established to settle the dispute concerning the course of the boundary between Austria and Hungary near the lake called the "Meerauge"*, 13 September 1902, R.I.A.A., Vol. XXVIII, p. 381 at pp. 379-96.

654 Slovenia's Counter-Memorial, paras 4.11-12.

655 Slovenia's Memorial, para. 6.06; *see* Slovenia's Memorial, paras 6.44-45.

656 Slovenia's Memorial, para. 6.44.

657 *See* Slovenia's Memorial, paras 6.15-18. Slovenia also observes that "Croatia does not explicitly challenge this point in its Memorial, yet its reliance on its cadastral maps in its cadastral community of Novakovec may imply disagreement with Slovenia's position regarding the tripoint with Hungary at Point B1," Slovenia's Counter-Memorial, para. 4.23 n.34. Slovenia also disagrees with Croatia's interpretation that district boundaries means cadastral boundaries; Transcript, Day 3, p. 106:1-3.

658 Transcript, Day 3, p. 106:10-14.

659 Treaty of Peace between the Allied and Associated Powers and Hungary, done in Trianon on 4 June 1920, *British and Foreign State Papers*, 1919, Vol. CXII (London, HM Stationery Office, 1922), p. 317, 6 U.N.T.S. 187; Slovenia's Memorial, para. 6.15.

660 *See* Agreement between the Government of the Socialist Federal Republic of Yugoslavia and the Government of the Hungarian People's Republic on the Method of Investigation and Resolution of Violations of the Border Regime on the Yugoslav-Hungarian Border, 2 July 1965, Article 3, Annex SI-170; *Plans of the Survey of Border Sections "A", "B", "D", "E" and "F" (prepared in 1921-1922)*, State Secretariat of Foreign Affairs, Annex SI-55; Decree ratifying the Final Protocol of the Yugoslav-Hungarian Mixed Commission for the Renewal and Marking of Border Markers, 2 April 1958, Article VII, Annex SI-

370. According to Slovenia, the 1929 Act on the Name and Division of the Kingdom to Administrative Territories created the *banovine* system and defined the boundaries of the *banovine*.[661] The 1931 Act amending the 1929 Act on the Name and Division of the Kingdom of Yugoslavia[662] "essentially repeated" Section 3 of the 1929 Act when it came to the description of the *Dravska banovina* and *Savska banovina*.[663] The Constitution of the Kingdom of Yugoslavia of 3 September 1931[664] likewise "repeated and confirmed" the 1929 Act.[665] Slovenia focuses on the text of Article 83 of the 1931 Constitution:

> The Kingdom of Yugoslavia shall comprise nine banovine . . .
>
> The Drava Banovina shall comprise the part of the territory delimited by the boundary running from the point where the northern boundary of the Čabar District intersects the state border and following the state border with Italy, Austria and Hungary all the way to the point where the state border with Hungary meets the Mura river (north-east of Čakovec). From the Mura river the boundary shall follow the east and south boundaries of the districts of Lendava, Ljutomer, Ptuj, Šmarje, Brežice, Krško, Novo mesto, Metlika, Črnomelj, Kočevje, and Logatec, encompassing all these districts.
>
> The Sava Banovina shall be delimited to the north by the above defined boundary of the Drava Banate all the way to the Mura river. The boundary shall then run along the Mura river, continuing along the state border with Hungary to the point where the state border leaves the Drava river. The boundary shall then follow the Drava river and the Danube river all the way to the northern boundary of the Ilok District. . . .[666]

371. Slovenia interprets this text in the following way:

> The two paragraphs containing the descriptions of the *Savska banovina* and *Dravska banovina* need to be read together. The northern boundary of *Savska banovina* is defined by reference to "the above defined boundary of the Drava banovina" (that is, the boundary of the *Dravska banovina* described in the preceding paragraph) "all the way to the Mura River. The boundary shall then run along the Mura river, continuing along the state border with Hungary . . . ." This sentence is clear […:] the Mura River, from a certain point near Gibina, formed the dividing line between part of Dolnja Lendava District (*Dravska banovina*, later

154; *Description of the Yugoslavian-Hungarian Boundary*, State Secretariat of Foreign Affairs, Belgrade, 1958, p. 156, Annex SI-153; Slovenia's Memorial, paras 6.16-17.

661 Act on the Name and Division of the Kingdom to Administrative Territories, *Official Gazette of the Kingdom of Yugoslavia (Dravska banovina)*, Article 3, No. 100/1929, Annex SI-61; Slovenia's Memorial, para. 6.21.

662 Act Amending the Act on the Name and Division of the Kingdom to Administrative Territories, 28 August 1931, *Official Gazette of the Kingdom of Yugoslavia (Dravska banovina)*, No. 53/1931, Annex SI-64.

663 Slovenia's Memorial, para. 6.23; *Cf.* Act on the Name and Division of the Kingdom to Administrative Territories, *Official Gazette of the Kingdom of Yugoslavia (Dravska banovina)*, Article 3, No. 100/1929, Annex SI-61 with Act Amending the Act on the Name and Division of the Kingdom to Administrative Territories, 28 August 1931, *Official Gazette of the Kingdom of Yugoslavia (Dravska banovina)*, Article 1, No. 53/1931, Annex SI-64.

664 Constitution of the Kingdom of Yugoslavia, *Official Gazette of the Kingdom of Yugoslavia (Dravska banovina)*, No. 53/1931, Annex SI-65.

665 Slovenia's Memorial, para. 6.24.

666 Constitution of the Kingdom of Jugoslavia, *Official Gazette of the Kingdom of Yugoslavia (Dravska banovina)*, Article 83, No. 53/1931, Annex SI-65; *see also* Slovenia's Counter-Memorial, para. 4.22; Transcript, Day 3, pp. 103:17-22 and 104: 2-7.

Slovenia) and Čakovec District (*Savska banovina*, later Croatia), until it meets point B1 at the international boundary with Hungary.[667]

372. That interpretation, according to Slovenia, is confirmed by various subsequent maps and documents, as well as the *effectivités* in the region.

373. Slovenia contends that the position of the boundary on the Mura River is confirmed by various official maps and almanacs.[668] Other documents describing the boundary on the Mura include various exchanges between Yugoslav and Hungarian authorities on the common border, which demonstrate the shared understanding that Slovenia ends and Croatia begins on the Mura River.[669]

374. Slovenia relies on *effectivités* to reinforce its argument—particularly Slovenian river fishing regulations[670] and Slovenian and Croatian river management regulations.[671] Other relevant

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667 Slovenia's Memorial, para. 6.25. *See also* Transcript, Day 3, pp. 104:13-26 and 105:1-13.

668 Slovenia's Memorial, paras 6.27-29; Transcript, Day 3, pp. 105, 117 and 118; *referring to* Maps published by the Military–Geographic Institute of the Kingdom of Yugoslavia (1937-1938), Annex SI-M-26; Water Management Utility Maribor, Revised Plan of Flood Defence for the Lendava Water Management Area, September 1988, Annex SI-218 and Annex SI-M-34; *Almanac of the Kingdom of Yugoslavia, General State Administration (Banovine, Districts, Municipalities and Towns)*, Editorial Board of the Almanac of the Kingdom of Yugoslavia, Zagreb, 1932, Annex SI-67; Map of Prekmurje (1955), Annex SI-M-48; Atlas of Slovenia, Mladinska knjiga and Surveying and Mapping Institute of the Socialist Republic of Slovenia (Ljubljana, 1985), Annex SI-922; Gazetteer of the Drava banovina places (1937), Annex SI-853; Map of Slovenske Gorice, Prekmurje, Dravsko-ptujsko polje, Haloze (1955), Annex SI-M-49.

669 Transcript, Day 3, pp. 117:20-23 and 118:1.

670 *Official Gazette of the People's Republic of Slovenia*, No. 17/1959, Article 1(a)(4), Annex SI-156; Slovenia's Memorial, paras 6.39-40.

671 *See* Notification of works on the Mura River, Section Benica-Križovec, Phase 2, by the Water Management Utility Maribor, No. 125/4-III-88, 28 November 1988, Annex SI-219; Preliminary Water Management Consent of the Republic of Slovenia for the Regulation of Mura River in the Section Miklavec–Mursko Središče, 29 June 1982, 324/A-98/82-KM/KM (consenting to Croatian regulation in accordance with already accepted practice, "regulation of the riverbed to the middle water" of the Mura), Annex SI-208; Republican Secretariat for Water Management of Croatia, Prior Consent to the Drava-Mura Water Management Society of Maribor for the project "Regulation of the Mura River with Canals at Hotiza from km 6 + 500 to km 63 + 700", 4 March 1967, Annex SI-174; *Official Gazette of People's Republic of Croatia*, No. 2/1962 (under item IV), Annex SI-158; *see also Official Gazette of the Socialist Republic of Croatia*, Nos. 1/1963, 3/1964, 1/1965, 5/1968, Nos. 2/1969, 47/1969, 53/1970, 1/1972, 52/1972 (under item VI), No. 50/1974 (under item VII); No. 2/1975 (under item VIII), Nos. 49/1975, 53/1976, 50/1977 (under item IX); Nos. 50/1978, 52/1979 (under item X); Nos. 51/1980, 55/1981 (under item XI) and No. 54/84 (under item XIII), Annex SI-209; Slovenia's Memorial, para. 6.41.

effectivités include, according to Slovenia,[672] police jurisdiction,[673] military recruitment,[674] fishing districts,[675] water management and regulation,[676] and permits for gravel works and

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672 Slovenia's Counter-Memorial, paras 4.34-60.

673 *See* Slovenia's Counter-Memorial, paras 4.35-39; Slovenia's Counter-Memorial, Annex SI-584, Articles 25(1) and 37(1); Decision Establishing Public Safety Administrations in the Socialist Republic of Slovenia (extracts) (1979) *Official Gazette of the Socialist Republic of Slovenia*, No. 34/1979, Annex SI-576; 1991 Croatian Internal Affairs Act, *Official Gazette of the Republic of Croatia*, No. 55/89, 16/90, 47/90 and 19/91, consolidated text published in the Official Gazette on 17 June 1991, Annex SI-716, and the 1991 Croatian Decree on the Headquarters and Areas of Police Directorates, *Official Gazette of the Republic of Croatia*, No. 30/1991, Annex SI-717; Internal Affairs Administration Murska Sobota: Plan of Police Action Kamen 1 and Kamen 2, 1991, Annex SI-696; Murska Sobota Internal Affairs Administration, Police Inspectorate, Strategy: Protection of the southern Boundary and Description of the Boundary with the Republic of Croatia, 18 September 1991, Annex SI-721; Internal Affairs Administration Murska Sobota: Plan of Complete Control of the Boundary with the Republic of Croatia, Level II, 1991, Annex SI-697; Murska Sobota Internal Affairs Administration, Strategy: Protection of the Border with the Republic of Croatia and Activities on Control Points, 6 October 1991, Annex SI-725; Murska Sobota Internal Affairs Administration: Duty Roster of the First Platoon – Second Unit on the Control Points Ferry at Benica-Križovec, Ferry at Hotiza and Ferry at Kot, 11 September 1991, Annex SI-719; Murska Sobota Internal Affairs Administration: Work Order for Performing Special Tasks at the Benica–Ferry Border Control Point, 8 October 1991, Annex SI-726; Murska Sobota Internal Affairs Administration: Work Order for Performing Special Tasks at the Hotiza – Ferry Border Control Point, 8 October 1991, Annex SI-727; Murska Sobota Police Station: Plan for the Positioning of Anti-Tank Obstacles in the Murska Sobota and Lendava Municipalities, 16 September 1991, Annex SI-720; Lendava Police Station: Misdemeanour Report on Violation of Mining Act, 7 February 1976, Annex SI-556; Misdemeanour Report by Lendava Police Station regarding excavation of gravel near Mura River, 12 January 1979, Annex SI-569; Police Station Lendava, Suicide Report, 23 October 1983, Annex SI-613; Report of Lendava Police Station regarding the Drowning in Gravel Pit, 7 August 1986, Annex SI-641, and Internal Affairs Administration Murska Sobota, Report on the Incident regarding the Dead Body found in the Mura River, 30 January 1989, Annex SI-666; Minutes of the Meeting between Representatives of the Murska Sobota Internal Affairs Administration and the Međimurje Police Administration from Čakovec concerning Border Issues on the common State Border, 6 October 1993, Annex SI-743.

674 *See* Slovenia's Counter-Memorial, paras 4.40-42; Article 39 (1)(3) of the 1971 Slovenian General People's Resistance Act, *Official Gazette of the Socialist Republic of Slovenia*, No. 28/1971, Annex SI-538; Article 28(2)(9) of the April 1991 Slovenian Defence and Protection Act, *Official Gazette of the Republic of Slovenia*, No. 15/1991, Annex SI-711; Article 7 (2) of the April 1991 Slovenian Military Service Act, *Official Gazette of the Republic of Slovenia*, No. 18/1991, Annex SI-714; Registration cards, evidentiary registers and military identification booklets issued to the residents of Brezovec-del by the Lendava Municipality from 1969 to 1976, Annex SI-554; Yugoslav Military Map – Lendava, Geographic Institute of the Yugoslav Army, Annex SI-M-51.

675 Slovenia's Counter-Memorial, paras 4.43-45; Slovenia's Memorial, para. 6.39; Decision of Municipal People's Committee Lendava on Entrusting of Lendava fishing Environ to the Management of the Lendava Fishing Club, 18 May 1962, Annex SI-509; Agreement on Entrusting the Lendava fishing Environ to the Management of the Lendava Fishing Club, 7 April 1983, Annex SI-609; Fish-Farming Plan for the Fishing Environ Lendava for the 1986 – 1990 Period, prepared by Lendava Fishing club, 24 February 1985, Annex SI-626; Fish-Farming Plan for the Fishing Environ Lendava for the 1991 – 1995 period, prepared by Lendava Fishing club, 3 March 1991, Annex SI-703; *see also* Slovenia's Counter-Memorial, paras 3.78-79.

676 Slovenia's Counter-Memorial, paras 4.46-55; Slovenia's Memorial, para. 6.41. *See also*, General Water Community Drava – Mura, Department for Studies and Prevention: Investigation of the appearance and movement of disastrous waters of the Drava and Mura Rivers in the year 1965/66, April 1968, and Water Community of the Drava Basin, Maribor: Drava River Regulation Works Programme, 1962, which was sent to Federal Water Management Committee Belgrade, 26 August 1961 (*See also* Maps in Volume II, Annex SI-M-55), Annex SI-508; *See e.g.*, Assembly of the Lendava Municipality: Certificate of Announcement of Construction Works, 17 May 1976 and Water management company Maribor: Announcement of works, 30 April 1976, Annex SI-559, Letter from Regional Water Management Society

transmission lines.[677] Slovenia submits that all these activities were undertaken or authorized by Slovenia on the north bank of the Mura River, *in toto*, and not on the south bank, in disregard of the cadastral limits.[678]

375. Croatia disagrees with Slovenia's assertion that the boundary in the region was determined in 1929-1931 as the boundary between the *banovine* and refers to pre-World War I Austro-Hungarian administrative borders instead. Croatia states that the cadastral districts constituting

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Mura, regarding limited Pest Control (Muskrats) on the Dykes along the Mura, 20 January 1977 and Letter from Regional Water Management Society Mura, regarding Muskrat Pest Control on the Dykes along the Mura, 4 February 1977, Annex SI-565; Lendava Municipality: Certificate for Maintenance Works on the Dyke along Mura, Section Benica – Petanjci, 14 June 1982 and Water Management Company Maribor: Announcement of Maintenance Works on the Dyke along Mura, Section Benica – Petanjci, 10 June 1982, Annex SI-601; Minutes of the Meeting of the Permanent Inter Republic Croatian – Slovenian Commission for the Drava and Mura Rivers, 19 December 1990, Annex SI-694; Ordinance of the Assembly of the Lendava Municipality on the Protection of Flood Control Dykes and the Definition of Protection Zone Boundary along Dykes, *Official Publications of Municipal Assemblies: Gornja Radgona, Lendava, Ljutomer and Murska Sobota*, No. 6, Year XXVII, 7 March 1991, Annex SI-706; Municipality Lendava: Decision on the Application for Maintenance Works on the Left-Bank, Dike *[sic]* Section from the Road Mursko Središče–Lendava to the Kot Settlement, 1 October 1991, Annex SI-724, Lendava Municipality, Decision on the Notification of Construction Work regarding the Maintenance Work on the Dike *[sic]* along the Mura River in Petišovci, 28 July 1993, Annex SI-742; Environmental Protection and Water Management Directorate, Branch Office Murska Sobota: Report on the Implementation of Agreements of the Slovene-Croatian Working Group for the Drava and Mura Rivers, 14 December 1993, Annex SI-745; Note No. P-1273/97 sent from Embassy of the Republic of Slovenia in Zagreb to the Ministry of Foreign Affairs of the Republic of Croatia, 10 November 1997, Annex SI-767; Ministry of the Interior of the Republic of Slovenia: Information regarding the Stoppage of Dike *[sic]* Construction Works on the Mura River, 28 July 1997, Annex SI-765; Letter from Mr. Sc. Kolinda Grabar Kitarović, Minister of Foreign Affairs of the Republic of Croatia to Dr. Dimitrij Rupel, Minister of Foreign Affairs of the Republic of Slovenia, 29 June 2006, Annex SI-799; Ministry of the Interior of the Republic of Slovenia, Police: Report on Work Projects at the Hotiza Water Protection Embankment, 28 August 2006, Annex SI-801; Croatia's Memorial, para. 7.34; Joint Statement of the Prime Minister of the Republic of Slovenia Janez Janša and the Prime Minister of the Republic of Croatia Ivo Sanader, 2 September 2006, Annex SI-802; Decision of the Republic Secretariat for Spatial Planning of Socialist Republic of Slovenia, regarding regulation of Mura River, 17 July 1968, Annex SI-528; Republican Committee for Environmental Protection and Physical Planning, Socialist Republic of Slovenia: Preliminary Water Management Consent to the Regulation of the Mura River in the Section Miklavec – Mursko Središče, 29 June 1982, Point 4, Annex SI-602; Republican Committee for Water Management, Socialist Republic of Croatia: Water Management Consent for Regulation of the Mura River from Miklavec to Mursko Središče, 1 July 1982, Annex SI-603.

677 Slovenia's Counter-Memorial, paras 4.56-60; Decision of Lendava Municipality regarding excavating gravel near Mura River, 13 September 1968, Annex SI-529; Water Management Consent of the Assembly of the Lendava Municipality regarding gravel pit near Mura, 27 March 1970, Annex SI-533; Decision of the Lendava Municipality regarding the Fee for Excavated Minerals in Mura Gravel Pit, 17 January 1980, Annex SI-580; Decision of the Lendava Municipality regarding the Fee for Excavated Minerals in Mura Gravel Pit, 3 January 1980, Annex SI-579; Republic Committee for Environmental Protection and Spatial Planning, Socialist Republic of Slovenia: Decision and Site Permit issued for Company Elektro Maribor, 18 May 1983 and Republic Committee for Industry and Building and Construction, Socialist Republic of Slovenia: Decision and Construction Permit issued for Company DO Elektro Maribor, DSSS Maribor, 21 May 1984, Annex SI-620; Technical Report with Annexes for Ljutomer – Lendava 110 kV Overhead Power Line, Project Design for Obtaining Construction Permit, and Sketch of Ljutomer – Lendava 110 kV Overhead Power Line, November 1981. *See also* map in Volume II, Annex SI-M-62.

678 Transcript, Day 3, p. 120:16-20; Transcript, Day 8, p. 114:15-18.

the Mura region on both sides of the present border were acquired by Yugoslavia from Hungary in the 1920 Treaty.[679] Croatia argues:

> In the Mura River Region, Croats and Slovenes accepted that Međimurje on the Croatian side, and Prekmurje on the Slovenian side, would be separated by the same pre-World War I Austro-Hungarian administrative borders that had historically divided these two territories. By virtue of those borders, Croatia's authority extended to some land on the left bank of the Mura River, while Slovenia's covered some land on the right bank.[680]

376. Croatia claims that, in the Mura River Region, its cadastral district boundaries as of the critical date accurately reflect the actual border between Croatia and Slovenia.[681] The boundary does not follow the Mura River, as Slovenia claims, except in those few places where the cadastral boundaries coincide with the river. On the critical date, both sides defined their territory by cadastral districts, and the line where their cadastral district boundaries were aligned became the international boundary by operation of *uti possidetis*.[682] Consistently with its analysis of the scope of the dispute and the applicable law, Croatia focuses on four[683] areas in the region in which the cadastral district boundaries overlap significantly.[684] Three of these areas are located in the Croatian cadastral districts of Podturen, Novakovec, and Ferketinec.[685] The fourth area is located in the cadastral districts of Mursko Središće and Peklenica.[686]

377. In addition to the four areas identified as disputed based on the cadastral record boundaries, Croatia separately discusses the situation of a settlement north of the Mura River in the district of Sveti Martin na Muri called by it " Murišće" and by Slovenia "Brezovec-del".[687] In that area, the cadastral district boundaries were aligned.[688] According to Croatia, Slovenia never objected to this boundary until 2006, fifteen years after the critical date.[689] Croatia therefore invites the

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679 Transcript, Day 1, pp. 76:17-78:7, *referring to* Map of District Boundaries within Zala County, Hungary (1880). Transcript, Day 5, pp. 154:17-155:7.

680 Croatia's Memorial, para. 7.6 (footnote omitted). Transcript, Day 2, p. 2:11-13.

681 Croatia's Memorial, para. 7.38; Transcript, Day 2, p. 1:22-23.

682 Transcript, Day 2, pp. 1:23-26 and 2:1-5.

683 Based on its own definition of the Mura River region, Croatia identifies five disputed areas. Considering the definition of the three regions adopted by the Tribunal, the Tribunal will discuss four disputed areas in the Mura River region section, and will address the fifth one (disputed area 2.1) in the Central Region section.

684 Croatia's Memorial, para. 7.1. *See also* Croatia's Counter-Memorial, para. 6.2; Transcript, Day 2, p. 3:1-7.

685 Croatia's Memorial, para. 7.13.

686 *See* Croatia's Counter-Memorial, para. 6.15.

687 Croatia's Memorial, para. 7.3.

688 *See* Croatia's Memorial, para. 7.29.

689 *Ibid*.

Tribunal to confirm the finding of the Expert Group that the international border follows the aligned cadastral district boundaries.[690]

378. Croatia faults Slovenia for asserting territorial claims "far in excess" of the areas identified in the 1996 Report as disputed, based on cadastral boundaries.[691] Croatia emphasises that Slovenia now "seeks to appropriate" 901 additional ha, shortening the length of the border in this region by 17 km.[692] Croatia submits that Slovenia's "new claim" is contrary to the principle of *uti possidetis* and Slovenia's own laws.[693]

379. Croatia also underlines that Slovenia's claim is "belied by its decades of uninterrupted acceptance of Croatia's sovereignty" over parts of the Mura's left bank,[694] and refers to the evidence adduced to support its claim in the Sveti Martin na Muri area.[695]

380. Croatia criticizes the evidence of *effectivités* relied on by Slovenia.[696] Croatia argues that Slovenia relies on self-serving documents drafted by Slovenian entities,[697] and that in any event Slovenia's reliance on alleged *effectivités* concerning fisheries and river management is "of no assistance" as international law gives primacy to title over *effectivités*.[698] Further, Croatia contends that Slovenia's alleged *effectivités* do not support Slovenia's claim that the boundary is the middle of the river[699] and that numerous documents prepared by Slovenia itself, or in cooperation with Croatia, show that the boundary does not follow the river.[700]

381. Finally, Croatia disputes Slovenia's claim that "[t]here was no boundary in this sector within Austria-Hungary."[701] Croatia reiterates that the boundary was surveyed and delimited "with precision" in 1858-59, when the Empire separated the Kingdom of Croatia from the Kingdom of Hungary.[702]

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690 Croatia's Memorial, para. 7.37.
691 Croatia's Counter-Memorial, para. 6.20.
692 Croatia's Counter-Memorial, para. 6.20.
693 Croatia's Counter-Memorial, para. 6.21.
694 Croatia's Counter-Memorial, para. 6.22.
695 *See* Croatia's Counter-Memorial, paras 6.22-25.
696 *See* Croatia's Reply, paras 5.15-27.
697 Croatia's Counter-Memorial, para. 6.26; *see* Slovenia's Memorial, para. 6.28.
698 Croatia's Counter-Memorial, para. 6.27; *see* Slovenia's Memorial, paras 6.39-41.
699 Croatia's Counter-Memorial, para. 6.28; *see* Slovenia's Memorial, paras 6.39-40.
700 Croatia's Counter-Memorial, para. 6.29.
701 Croatia's Counter-Memorial, para. 6.30; *see* Slovenia's Memorial, para. 6.08.
702 Croatia's Counter-Memorial, para. 6.30.

382. In respect of the delimitation in the Mura River Region as a whole, the Parties disagree on whether the Mura River constituted the boundary between the Republics.

383. Moreover, the Parties discuss several specific "disputed areas" in the Mura River Region. Croatia notes that, in that sector, the Joint Expert Group in 1996 identified three main areas (named in the Expert Group Report as areas 1.14, 1.15 and 1.16)[703] where the cadastral limits do not coincide.[704] Slovenia discusses the status of the three main disputed areas identified by Croatia and also addresses a fourth allegedly disputed area (Mursko Središće and Peklenica, area 1.11). A further disagreement is to be noted for the settlement of Brezovec-del/Murišće.

384. Before turning to those specific disputed areas, the Tribunal will first consider whether, as alleged by Slovenia, the boundary must be fixed on the Mura River in accordance with the 1931 Constitution and other related legislation.

(a) Delimitation in the Mura River Region as a Whole

i. The Parties' Positions

385. As noted earlier, Croatia contends that a boundary was fixed between Styria and Hungary in the region before 1861, the date on which the whole sector became Hungarian. Under Hungarian rule, this sector was subdivided into districts, namely, Prekmurje and Medjimurje. After 1920, the limits of the Hungarian districts became the limits of the Drava and Sava provinces (*Dravska banovina* and *Savska banovina*), and subsequent to World War II became the border between Slovenia and Croatia. This was reflected in the cadastres in both countries. The border thus fixed does not correspond exactly to the Mura River and gives to Croatia some territories to the north of the river.[705]

386. Slovenia agrees with Croatia that the Mura River Region was part of Hungary between 1861 and World War I and contends that the border was not delimited at that time. The Mura River Region was transferred to Yugoslavia in 1920. It was then divided in 1929 between *Dravska banovina* and *Savska banovina*. This was confirmed by Article 83 of the 1931 Constitution.[706] The limit,

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703 Mixed Slovenian-Croatian Expert Group for the comparison of cadastral boundaries displaying discrepancies, State Border Republic of Slovenia – Republic of Croatia, Joint Report on the results of the comparison of cadastral boundaries in the areas displaying significant discrepancies, Zagreb, 20 December 1996, Table 2, Annex SI-293.

704 Croatia's Memorial, para. 7.13.

705 Croatia's Counter-Memorial, para. 6.20; Transcript, Day 1, p. 77:13-17.

706 Constitution of the Kingdom of Yugoslavia, *Official Gazette of the Kingdom of Yugoslavia (Dravska banovina)*, No. 53/1931, Article 83, Annex SI-65.

thus established, became the boundary between Slovenia and Croatia under a decision taken by the AVNOJ Presidency in 1945.[707] The boundary follows the middle of the main channel of the Mura River.[708]

ii. The Tribunal's Analysis

387. The Tribunal recalls that an Act on the Names and Division of the Kingdom of Yugoslavia into Administrative Territories was enacted on 3 October 1929.[709] The Act divided the country into administrative divisions called *banovine*, the borders of which it defined.[710]

388. Article 83 of the Constitution of the Kingdom of Yugoslavia of 3 September 1931 repeated and confirmed the provision in the 1929 Act. It provided that:

> The Kingdom of Yugoslavia shall comprise nine banovine . . .
>
> The Drava Banovina shall comprise the part of the territory delimited by the boundary running from the point where the northern boundary of the Čabar District intersects the state border and following the state border with Italy, Austria and Hungary all the way to the point where the state border with Hungary meets the Mura river (north-east of Čakovec). From the Mura [R]iver the boundary shall follow the east and south boundaries of the districts of Lendava, Ljutomer, Ptuj, Šmarje, Brežice, Krško, Novo mesto, Metlika, Črnomelj, Kočevje, and Logatec, encompassing all these districts.
>
> The Sava Banovina shall be delimited to the north by the above defined boundary of the Drava Banate all the way to the Mura [R]iver. The boundary shall then run along the Mura [R]iver, continuing along the state border with Hungary to the point where the state border leaves the Drava [R]iver. The boundary shall then follow the Drava [R]iver and the Danube [R]iver all the way to the northern boundary of the Ilok District . . . .[711]

389. In the first quoted paragraph, Article 83 of the 1931 Constitution fixes the eastern and southern boundaries of the *Dravska banovina*. It provides that, from the point at which the State border with Hungary meets the Mura River, that boundary shall follow the eastern and southern boundaries of the relevant districts. In the Mura River Region, that southern boundary of the *Dravska banovina* is necessarily the northern boundary of the *Savska banovina*. This is made more explicit at the beginning of the second paragraph, which states that the "Sava Banate shall be delimited to the north by the above defined boundary of the Drava Banate." Therefore, the

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707 Transcript, Day 3, p. 94:6-9.

708 Slovenia's Memorial, para. 6.44; Transcript, Day 3, pp. 105:6-109:15.

709 Act on the Name and Division of the Kingdom to Administrative Territories, *Official Gazette of the Kingdom of Yugoslavia (Dravska banovina)*, No. 100/1929, Annex SI-61.

710 Act on the Name and Division of the Kingdom to Administrative Territories, *Official Gazette of the Kingdom of Yugoslavia (Dravska banovina)*, No. 100/1929, Annex SI-61.

711 Constitution of the Kingdom of Jugoslavia, *Official Gazette of the Kingdom of Yugoslavia (Dravska banovina)*, No. 53/1931, Article 83, Annex SI-65.

boundary of the *Savska banovina* follows the southern limits of the Drava districts mentioned in paragraph one, above.

390. The second paragraph then specifies that the delimitation thus made between the two *banovine* shall run "all the way to the Mura [R]iver," which means, all the way to the point at which the boundary between the districts of the two *banovine* meets the Mura River. Under the first paragraph, that is the point at which the Hungarian border meets the Mura River. In other words, it is the tripoint at which that border joins the boundary between the two *banovine*. Then, as stated in the second paragraph, the Mura, the Drava and the Danube Rivers constitute the boundary between Yugoslavia and Hungary and also constitute the eastern limit of the *Savska banovina*.

391. Thus, contrary to Slovenia's submissions, the boundary between the two *banovine* was not defined as the Mura River. Only where the southern limits of the *Dravska banovina* districts coincided with the river did the latter constitute a segment of the boundary.

392. The situation did not change within the SFRY. As already stated,[712] the boundary of each Republic before independence was the outer limit of its peripheral districts. In principle, the cadastral limits of these districts represented those outer administrative limits. If the cadastral limits effectively represented the administrative limits and if they coincided, the aligned line was the boundary and it remained so after independence.

393. In the Mura River Region, it is generally not disputed that the cadastral limits of the peripheral Croatian and Slovenian districts represented the administrative limits of those districts. Nor is it disputed that the cadastral limits were generally aligned at the time of independence. Therefore, the Tribunal determines that in all areas other than those discussed in the following subsections the international boundary follows the aligned cadastral limits.

394. It remains for the Tribunal to consider the areas where it is alleged that those conditions have not been fulfilled.

712 *See supra*, para. 346

(b) Brezovec-del/Murišće

395. The boundary is specifically in dispute near a settlement called Brezovec-del/Murišće, north of the Mura River, composed of some five houses[713] as well as the surrounding land. It is situated to the west of the road joining Sveti Martin na Muri (Croatia) to Hotiza (Slovenia).

i. The Parties' Positions

396. According to Croatia, the cadastral district limits are aligned in its favour in this area. Croatia contends that two Slovenian maps from the 1980s prove that Brezovec-del/Murišće was considered to be in Croatia.[714]

397. Croatia adds that Slovenia did not contest Croatian sovereignty before 2006 (after the critical date of 25 June 1991). According to Croatia, Slovenia "acknowledged Croatia's sovereignty"[715] in a letter by its Minister of Foreign Affairs dated 11 May 1999.[716] Croatia further relies on various exchanges of correspondence relating, in particular, to the construction of a joint border control facility[717] and of a bridge.[718] Only in 2006, 15 years after the critical date, did Slovenia start to claim that Croatia was encroaching on Slovenian territory, and to obstruct the road leading to the bridge.[719]

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713 Letter sent from Surveying and Mapping Authority of the Republic of Slovenia to Ministry of Foreign Affairs of the Republic of Slovenia regarding Recording of Brezovec-del Settlement in Surveying and Mapping Records, 4 January 2011, Annex SI-814.

714 Transcript, Day 6, pp. 4:7-17, 5:12-17, and 6:1-3.

715 Croatia's Memorial, para. 7.30; Transcript, Day 6, p. 4:12-14.

716 Letter from Mr. Boris Frlec, Foreign Minister of the Republic of Slovenia, to Dr. Franci Steinman, State Secretary, Ministry of the Environment and Spatial Planning, 11 May 1999, reproduced in *The Issue of Hotiza: Where Is the Border?*, Delo, 8 September 2006, Annex HR-109; Croatia's Memorial, para. 7.30.

717 Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia on the Simple Exercise of Border Control in Road and Railway Traffic, *Official Gazette of the Republic of Croatia (Treaties)*, No. 2/2004, Annex HRLA-68; Croatia's Memorial, paras 7.31-32.

718 Minutes of the 11th Meeting of the Sub-Commission for the Coordination of Traffic Links and the Construction of Local Border Crossings for Local Border Traffic, Rijeka, 3 March 2004, Annex HR-92; Croatia's Memorial, para. 7.33.

719 *Note verbale* No. ZDB-190/06 from the Ministry of Foreign Affairs of the Republic of Slovenia to the Embassy of the Republic of Croatia, 3 July 2006, Annex HR-106; *Note verbale* No. ZDB-198/06 from the Ministry of Foreign Affairs of the Republic of Slovenia to the Embassy of the Republic of Croatia, 6 July 2006, Annex HR-107; Note No. 4488/06 from the Ministry of Foreign Affairs and European Integration of the Republic of Croatia to the Embassy of the Republic of Slovenia, 1 September 2006, Annex HR-108; Croatia's Memorial, para. 7.34; Transcript, Day 6, p. 6:4-6.

398. Croatia contends that Slovenia's "*volte face*"[720] is a unilateral act posterior to the critical date, that should be given no legal significance.[721] Croatia asserts, on the other hand, that Slovenia's "admissions against interest",[722] continuing beyond 2006,[723] may be "highly probative".[724]

399. Croatia also invokes *effectivités* in the sense that Croatia "consistently, and without interruption or objection by Slovenia, administered the territory."[725] The exclusive jurisdiction of Croatian courts over the area, it alleges, has been recognized by courts in Slovenia.[726] In particular, the Croatian court in Čakovec exercised jurisdiction over an inheritance proceeding in regard to land in Murišće.[727] Although the matter was first raised before the Slovenian District Court in Lendava, it had no jurisdiction because the land was in Croatia and the Slovenian court therefore held that "it was necessary to file for probate proceedings in Croatia."[728]

400. For its part, Slovenia contends that the settlement was part of Slovenia in 1991 and was recognized as such by Croatia. It submits that the only cadastre for this area was and is a Croatian one; hence there cannot be any cadastral alignment.[729] Slovenia emphasises that, if the 1996 Expert Report does not mention a dispute in the area, it is because the only cadastre in the area was a Croatian one. Slovenia adduces cartographic evidence showing Brezovec-del/Murišće in Slovenia.[730]

401. Slovenia refers to a 1997 agreement with Croatia concerning border traffic, emphasising that Brezovec-del was listed in Annex A (Slovenian settlements) and not Annex B (Croatian

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720 Croatia's Memorial, para. 7.34.

721 Croatia's Memorial, para. 7.35; Arbitration Agreement, Article 5.

722 Croatia's Memorial, para. 7.35.

723 *See* Report from the Međimurje Police Administration to the Ministry of Interior Affairs of the Republic of Croatia, Directorate for the Border, No. 511-21-11-168/11. GC, 25 January 2011, Annex HR-133; Croatia's Memorial, para. 7.36.

724 Croatia's Memorial, para. 7.35; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, I.C.J. Reports 1986, p. 14 at p. 41, para. 64; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168 at p. 206, para. 77.

725 Croatia's Memorial, para. 7.29; Transcript, Day 6, p. 7:14.

726 Croatia's Reply, para. 5.27.

727 Transcript, Day 6, p. 6:16-18.

728 Transcript, Day 6, pp. 6:16-24 and 7:1-4.

729 Slovenia's Counter-Memorial, para. 4.79.

730 Map of Slovenske Gorice, Prekmurje, Dravsko-ptujsko polje, Haloze, 1955, Annex SI-M-49.

settlements) of that agreement.[731] It also demonstrates that the agreement was implemented in practice.[732]

402. Slovenia also contests the content and value of the exchanges of correspondence advanced by Croatia. Addressing the letter dated 11 May 1999 from Slovenia's Minister of Foreign Affairs, in which the Minister stated that the embankment of the Mura "lies on the Croatian territory,"[733] Slovenia argues that the Minister Frlec was "referring to the cadastre, not the political boundary" and points out that the letter makes clear that it will not "affect the negotiating positions of the Republic of Slovenia concerning the definite determination of the border."[734]

403. Turning to the agreement to build a joint border crossing on the north bank and the ensuing exchange of notes,[735] Slovenia claims that the agreement was based on the SOPS/LBTA.[736] Slovenia, therefore submits that the arrangement was of a provisional nature.[737] Slovenia argues that the Minutes concerning the building of a bridge over the Mura to which Croatia refers[738] only mention a Croatian plan to build a bridge, and do not indicate that both sides of the bridge would be on Croatian territory.[739]

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731 Slovenia's Counter-Memorial, para. 4.79; Agreement between the Republic of Slovenia and the Republic of Croatia on Border Traffic and Cooperation, 28 April 1997 ("SOPS Agreement"), Annex SI-295; Annex A and B of Agreement between Slovenia and Croatia on Border Traffic and Cooperation (1997), Annex SI-763.

732 Border Pass issued under the Agreement between the Republic of Slovenia and the Republic of Croatia on Border Traffic and Cooperation for a Resident of Brezovec-part, Annex SI-784.

733 Slovenia's Counter-Memorial, para. 4.82; *see* Croatia's Memorial, para. 7.30; Letter from Mr. Boris Frlec, Foreign Minister of the Republic of Slovenia, to Dr. Franci Steinman, State Secretary, Ministry of the Environment and Spatial Planning, 11 May 1999, *The Issue of Hotiza: Where Is the Border?*, Delo, 8 September 2006, Annex HR-109.

734 Slovenia's Counter-Memorial, para. 4.84.

735 *See* Slovenia's Counter-Memorial, paras 4.86-87; Croatia's Memorial, paras 7.31-32.

736 Slovenia's Counter-Memorial, para. 4.88; *see* Slovenia's Memorial, paras 9.133-65; *see also* Exchange of Notes Constituting an Arrangement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia on the Designation of a Zone and an Official Location for Conducting Border Control at the Local Border Crossing of Hotiza-Sveti Martin na Mura on the State Territory of the Republic of Croatia (25 January 2005), Annex HRLA-72.

737 Slovenia's Counter-Memorial, para. 4.89; Exchange of Notes Constituting an Arrangement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia on the Designation of a Zone and an Official Location for Conducting Border Control at the Local Border Crossing of Hotiza-Sveti Martin na Mura on the State Territory of the Republic of Croatia (25 January 2005), Annex HRLA-72; *Note verbale* No. ZDB-198/06 from the Ministry of Foreign Affairs of the Republic of Slovenia to the Embassy of the Republic of Croatia, 6 July 2006, Annex HR-107.

738 Croatia's Memorial, para. 7.33.

739 Slovenia's Counter-Memorial, para. 4.91; *see* Minutes of the 11th Meeting of the Sub-Commission for the Coordination of Traffic Links and the Construction of Local Border Crossings for Local Border Traffic, Rijeka, 3 March 2004, Annex HR-92; Joint Minutes and Joint Statement of the 4th meeting of the Mixed

404. Slovenia relies on *effectivités* to confirm its title,[740] including elections and censuses,[741] taxes,[742] personal documents,[743] policing,[744] and the Hotiza ferry.[745] For instance, Slovenia claims that the

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Diplomatic Commission for the Definition and Demarcation of the State Border between the Republic of Croatia and the Republic of Slovenia, 21 July 1998, Annex SI-298.

740 Slovenia's Counter-Memorial, para. 4.98. This is in addition to the examples referred to at Slovenia's Memorial, paras 6.38-41.

741 Slovenia's Counter-Memorial, paras 4.99-100; *See e.g.*, Permanent electoral registers and extracts from the electoral register for residents of Brezovec-del, Annex SI-480. *See also* the Ordinance on the Termination of Constituencies for the Election of Delegates to the Chambers of the Municipal Assembly of Lendava, *Official Gazette of Pomurje*, No. 2/1990, Annex SI-682; Electoral Register for Residents of Brezovec/del, 3 April 1990, Annex SI-684; Electoral Register for Lendava Municipality including Settlement Brezovec-del, 1994, Annex SI-747; *See e.g.*, Census of Population, Socialist Republic of Slovenia, 1981, Annex SI-585; Letter sent from Surveying and Mapping Authority of the Republic of Slovenia to Ministry of Foreign Affairs of the Republic of Slovenia Regarding Recording of Brezovec-del Settlement in Surveying and Mapping Records, 4 January 2011, Annex SI-814; Census of Population, Republic of Croatia, 1991, Annex SI-729.

742 Slovenia's Counter-Memorial, para. 4.101; Hotiza Local People's Committee: Lists of taxable Persons from Brezovec-del from 1948, 1949, 1950 and 1951, Annex SI-476; Gaberje Local People's Committee: List of farm holders who produced wine in 1953 and sales tax calculation, 20 November 1953, Annex SI-486; Tax Administration of the Republic of Slovenia, Murska Sobota Tax Office: Decision on the Calculation of Charges for the Year 2004 for the Use of Building Land by Taxpayer from Brezovec-del, 8 July 2004, Annex SI-787; Tax Administration of the Republic of Slovenia, Murska Sobota Tax Office: Decision on the Calculation of Charges for the Year 2002 for the Use of Building Land by Taxpayer from Brezovec-del, 26 July 2002, Annex SI-782; Tax Administration of the Republic of Slovenia, Murska Sobota tax office: Decision of Allocating Compensation for the Use of Land for Taxpayer from Brezovec-del, 23 January 2006, Annex SI-796; Murska Sobota Tax Office: Certificate of Entry into Tax Register of a Person living in Brezovec-del, Annex SI-737.

743 Slovenia's Counter-Memorial, paras 4.102-10; Applications for Residents from Brezovec-del for entry into the Register of Citizenship of the People's Republic of Slovenia, 15 April 1948, Annex SI-472; *See e.g.*, Ordinance Defining Register Office Areas in the Lendava Municipality, *Official Announcements of the Municipal Assemblies of: Gornja Radgona, Lendava, Ljutomer and Murska Sobota*, Vol. XXI, No. 31, 4 December 1986, Annex SI-642; Slovenian Identity Card Act, *Official Gazette of the Socialist Republic of Slovenia*, No. 16/74, 29/79 and 42/86, Article 3, Annex SI-549; Act on the Takeover of State Functions performed until 31 December 1994 by Municipal Bodies, *Official Gazette of the Republic of Slovenia*, No. 24/95, Article 3(5)(11), Annex SI-752; Passports of Residents from Brezovec-del issued by Lendava Administrative Unit in 2002, 2004 and 2012, Annex SI-780; Request for Grant from President of the Hotiza Local Community for the Funds for the Reconstruction of the Ferry on the Mura River, 27 February 1991, Annex SI-702; Republic of Slovenia, Ministry of the Interior: Certificate of Citizenship of Republic of Slovenia for a Citizen living in Brezovec-del, 11 September 1992, Annex SI-733; Firearm Permit for Resident of Brezovec-del issued by Lendava Administrative Unit in 2002 and 2012, Annex SI-781; Border Pass issued under the Agreement between the Republic of Slovenia and the Republic of Croatia on Border Traffic and Cooperation for a Resident of Brezovec-part, 2003, Annex SI-784; Identity Card Application Forms and Passport Applications for Residents of Brezovec-del from 1982 to 1997, Annex SI-618; Identity Cards for Residents of Brezovec-del issued by Lendava Administrative Unit in 2002 and 2012, Annex SI-783; Ordinance Defining Register Office Areas in the Lendava Municipality, *Official Announcements of the Municipal Assemblies of: Gornja Radgona, Lendava, Ljutomer and Murska Sobota*, Vol. XXI, No. 31, 4 December 1986, Annex SI-642; Assembly of the Lendava Municipality: Birth Registration of a Child living in Brezovec-del, 15 October 1987, Annex SI-653; Assembly of the Lendava Municipality: Birth Registration of a Child living in Brezovec-del, 31 March 1987, Annex SI-644; Extracts from Register of Households for Brezovec-del from 1980-2005, Annex SI-578.

744 Slovenia's Counter-Memorial, para. 4.111; *See e.g.*, Police Directorate Murska Sobota: Record of Interview with Police Officer of 2 November 2012, Annex SI-820.

745 Slovenia's Counter-Memorial, paras 4.112-17; *See* Letter from the Murska Sobota District People's Committee to the Municipal People's Committee Lendava, 23 December 1958, Annex SI-501; Article 8(5)

investigation following the discovery of the body of an elderly woman near Brezovec-del and the ensuing investigation by Slovenia demonstrate Slovenian *effectivités* in the area.[746]

ii. The Tribunal's Analysis

405. The Tribunal notes that the Croatian cadastre places Brezovec-del/Murišće on Croatian territory. It also notes that Croatia contends that the Slovenian cadastral limit is aligned with the Croatian one and recalls that the Expert Group, which compared the cadastres in the Mura River Region, did not mention the existence of a gap in the cadastral records. However, according to Slovenia, there is no Slovenian cadastre in this area and this is the reason why the Expert Group was not able to find a gap.

406. In support of its submission, Croatia provides two maps. However, the first of these maps is a Croatian cadastral map[747] and the second map was prepared in 1980 by the Yugoslav Bureau of Statistics on the basis of the Croatian cadastre.[748] Croatia further mentions two Slovenian maps. One of the maps is at a scale that makes it difficult to draw any conclusion from it.[749] The second map places Brezovec-del/Murišće on Croatian territory.[750] The Tribunal also notes that the limits

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of the Maritime and Inland Waterways Navigation Safety Act, *Official Gazette of the Socialist Republic of Slovenia*, No. 17/88, Annex SI-660; and Article 3 (1)(7) of the Act on the Takeover of State Functions performed until 31 December 1994 by Municipal Bodies, *Official Gazette of the Republic of Slovenia*, No. 24/95, Annex SI-752; Lendava Administrative Unit: Certificate of Registry with Navigation Licence for Ferry Hotiza, 17 October 1996, Annex SI-761; The last certificate of registry was issued on 13 April 2006; Administrative Unit Lendava: Certificate of Registry with a Navigation Licence for Ferry Hotiza, 13 April 2006, Annex SI-797; Murska Sobota Internal Affairs Administration, Strategy: Protection of the Border With the Republic of Croatia and Activities on Control Points, 6 October 1991, Annex SI-725; Murska Sobota Internal Affairs Administration: Duty Roster of the First Platoon – Second Unit of the Special Police Forces, 10 September 1991, Annex SI-718; Murska Sobota Internal Affairs Administration: Duty Roster of the First Platoon – Second Unit on the Control Points Ferry at Benica-Križovec, Ferry at Hotiza and Ferry at Kot, 11 September 1991, Annex SI-719; Murska Sobota Internal Affairs Administration, Police Inspectorate, Strategy: Protection of the southern Boundary and Description of the Boundary with the Republic of Croatia, 18 September 1991, Annex SI-721; Official Record of the Meeting between Representatives of the Hotiza and Sveti Martin na Muri Local Communities regarding the Navigation and Operation of the Hotiza Ferry on the Mura River, 2 December 1992, Annex SI-736; Decision of Croatian Navigation Safety Inspector regarding Prohibition of Navigation of Ferry Hotiza, 2 May 2005, Annex SI-792; Minutes of the Meeting of the Representatives of the Hotiza Local Community and the Sveti Martin na Muri Municipality, 8 February 2002, Annex SI-778; Decision of Croatian Navigation Safety Inspector regarding Prohibition of Navigation of Ferry Hotiza, 2 May 2005, Annex SI-792; Protest Note of Ministry of Foreign Affairs of Republic of Slovenia sent to Embassy of the Republic of Croatia in Ljubljana regarding the Removal of Slovenian Ferry in Hotiza, 12 May 2005, Annex SI-793.

746 Slovenia's Counter-Memorial, paras 4.94-95; *see* Croatia's Memorial, para. 7.36.

747 Croatia's Reply, Figure 5.10.

748 Letter from the Municipal People's Committee of Lendava to the Municipal People's Committee of Dekanovec, Lendava, 22 May 1956, Annex HR-355.

749 Map of Slovenske Gorice, Prekmurje, Dravsko-ptujsko polje, Haloze, 1955, Annex SI-M-49.

750 Croatia's Counter-Memorial, Figure CM 6.11.

drawn on the Geoportals,[751] as referred to by the Parties at the hearing in June 2014, do not coincide with each other.[752]

407. The Tribunal reviewed the documents provided by the Parties with respect to the administrative limits of their districts and municipalities. It notes that the statutes of the municipality of Lendava (Slovenia) of 1964, 1974 and 1981 list Brezovec-del as part of the territory of that municipality.[753] The long-term plan of Lendava municipality for the period between 1986 and 2000 also includes Brezovec-del.[754] By contrast, Murišće is not mentioned in the 1955 Law of the Territories of District and Municipalities of Croatia.[755] It is also not mentioned in the 1962 Law on Areas of Municipalities and Districts of Croatia[756] nor in the 1983 Statute of the Municipality of Čakovec of Croatia.[757] In fact it seems not to have been mentioned in any Croatian legislative document of that kind.

408. The Tribunal further observes that, in 1997, an Agreement was concluded between Slovenia and Croatia on border traffic and cooperation. Article 59 of that Agreement specifies that its provisions "do not in any way prejudice the determination and demarcation of the State border between the Contracting Parties." However the Agreement provides an indication of the Parties' understanding of the settlements that belonged to their respective territories. In this regard, Article 1 provides: "The border area on land under this Agreement shall comprise: In the Republic of Slovenia the settlements listed in annex A, in the Republic of Croatia the settlements listed in Annex B."[758]

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751 *See also supra* paras 324-325.

752 Transcript, Day 8, p. 117.

753 Statute of Lendava Municipality (extracts), *Official Gazette of the Maribor District*, Year IX, No. 25, 1964, Annex SI-514; Statute of Lendava Municipality (extracts), *Official Publications of Municipal Assemblies: Gornja Radgona, Lendava, Ljutomer and Murska Sobota*, Year VIII, No. 8, 1974, Annex SI-548; Statute of Lendava Municipality (extracts), *Official Publication of Municipal Assemblies: Gornja Radgona, Lendava, Ljutomer and Murska Sobota*, Year XV, No. 37, 1981, Annex SI-593.

754 Long-term Plan of Lendava Municipality for 1986–2000 Period (extracts), *Official publications of Municipal Assemblies: Gornja Radgona, Lendava, Ljutomer and Murska Sobota*, Year XXIII, No. 13, 1987; Long-term Plan of Lendava Municipality for 1986–2000 Period (extracts), *Official publications of Municipal Assemblies: Gornja Radgona, Lendava, Ljutomer and Murska Sobota*, Year XXIII, No. 13, 1987, Annex SI-646.

755 Law on the Territories of Districts and Municipalities in the People's Republic of Croatia, *Official Gazette of the People's Republic of Croatia*, No. 36/1955, 5 August 1955, Annex HR-334.

756 Law on Areas of Municipalities and Districts, *Official Gazette of the People's Republic of Croatia*, No. 39/1962, 4 October 1962, Annex HR-340.

757 Statute of the Municipality of Čakovec, 28 December 1983, Annex HRLA-53.

758 Agreement between the Republic of Slovenia and the Republic of Croatia on Border Traffic and Cooperation, 28 April 1997, Annex SI-295.

409. Annex A includes within the Municipality of Lendava, the settlement of Brezovec-del under number 059003. Annex B, under number 5711, mentions within the Municipality of Sveti Martin na Muri, a settlement called Brezovec (which is south of the Mura River and has no relationship with Brezovec-del). It also mentions the settlement of Jurovec, under number 26859 (without further specification). It does not refer to Murišće.[759]

410. In view of such evidence, the Tribunal is not willing to rely on the Expert Group Report in support of the finding that, in this area, there are cadastral limits and that those limits are aligned. Thus the Tribunal must turn to the *effectivités* alleged by the Parties in support of their respective claim lines.

411. The Parties invoke a great number of *effectivités*. However most of them do not concern Brezovec-del/Murišće, but other areas. This is the case, in particular, for the bridge built by Croatia over the Mura River,[760] for the joined control facility established by agreement of the Parties on the main road from Sveti Martin na Muri to Hotiza[761] and for the dyke maintained by Croatia on the North bank of the Mura River.[762] All of these are clearly located further east or south of the settlement on Croatian territory. Similarly the judgments invoked by Croatia do not relate to land within the area.[763] The Tribunal also notes that many of the *effectivités* invoked by Slovenia relate to Hotiza, a Slovenian village north-east of Brezovec-del. Moreover, many alleged *effectivités* relied on by the Parties are post-1991.

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759 Annex A and B of Agreement between Slovenia and Croatia on Border Traffic and Cooperation (extracts) (1997), Annex SI-763.

760 Minutes of the 11th Meeting of the Sub-Commission for the Coordination of Traffic Links and the Construction of Local Border Crossings for Local Border Traffic, Rijeka, 3 March 2004, Annex HR-92.

761 Agreement between the Republic of Slovenia and the Republic of Croatia on Border Traffic and Cooperation, 28 April 1997, Annex SI-295; Agreement between the Republic of Croatia and the Republic of Slovenia on Using the Joint Facility for Border Control on the Border Crossing for Local Border Traffic, The Minutes of the 10th Session of the Permanent Joint Commission, Vivodina, 23 October 2003, Annex HRLA-67; Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia on the Simple Exercise of Border Control in Road and Railway Traffic, *Official Gazette of the Republic of Croatia (Treaties)*, No. 2/2004, Annex HRLA-68; Exchange of Notes Constituting an Arrangement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia on the Designation of a Zone and an Official Location for Conducting Border Control at the Local Border Crossing of Hotiza-Sveti Martin na Muri on the State Territory of the Republic of Croatia, 25 January 2005, Annex HRLA-72.

762 Letter from Mr. Boris Frlec, Foreign Minister of the Republic of Slovenia, to Dr. Franci Steinman, State Secretary, Ministry of the Environment and Spatial Planning, 11 May 1999, *The Issue of Hotiza: Where Is the Border?*, Delo, 8 September 2006, Annex HR-109.

763 Decision No. D 64/2009-11, District Court in Lendava, Lendava, 24 March 2009, Annex HR-376; Decision on Inheritance of Late Marija Horvat, Public Notary Ruža Hoblaj, Mursko Središće, 14 March 2011, Annex HR-380.

412. Relevant *effectivités* are rare, and this is not astonishing for a small settlement such as Brezovec-del/Murišće. However, it appears that in 1949, 1950 and 1952, inhabitants living in this settlement were registered on the Slovenian electoral registers.[764] In 1990 Brezovec-del was listed as participating in the election of delegates to the Chamber of the Municipality of Lendava.[765] The Slovenian police also acted in the area.[766] Brezovec-del was included by the Slovenian Surveying and Mapping Authority on its official record from 1971 onwards.[767] Its population was included within Slovenia in the 1981 census.[768] The Lendava administrative unit kept a register of home owners from 1980 onwards.[769] Taxes were levied by Slovenia on persons living in the settlement.[770] Residents of Brezovec-del were registered under the recruitment legislation of Slovenia for military identification from 1971 onwards[771] and some were conscripted.[772] The only Croatian document mentioning Murišće is the note from the Yugoslav bureau of statistics of 1980 already referred to.

413. The Tribunal therefore, based on the written and oral submissions of the Parties, determines that the settlement of Brezovec-del/Murišće, partially depicted in Slovenia's Counter Memorial, Figure 4.10, is part of Slovenia and fixes the boundary accordingly. A sketch map of the area follows for ease of reference.

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764 Permanent Electoral Registers and extracts from the Electoral Register for Residents of Brezovec-del from 1949, 1950 and 1952 (extracts), Annex SI-480; Electoral Register for Residents of Brezovec-del (extracts), 3 April 1990, Annex SI-684; Electoral Register for Lendava Municipality including Settlement Brezovec-del (1994), Annex SI-747.

765 Ordinance on the Termination of Constituencies for the Election of Delegates to the Chambers of the Municipal Assembly of Lendava (1990), *Official Gazette of Pomurje*, No. 2/1990, Annex SI-682.

766 Ordinance on the Termination of Constituencies for the Election of Delegates to the Chambers of the Municipal Assembly of Lendava (1990), *Official Gazette of Pomurje*, No. 2/1990, Annex SI-682.

767 Letter sent from Surveying and Mapping Authority of the Republic of Slovenia to Ministry of Foreign Affairs of the Republic of Slovenia regarding Recording of Brezovec-del Settlement in Surveying and Mapping Records, 4 January 2011, Annex SI-814.

768 Census of Population, Socialist Republic of Slovenia, 1981, Annex SI-585; Federal Bureau of Statistics, Census 1981: Population, Households, and Dwellings, Index of local communities in Socialist Republics, Socialist Autonomous Provinces and municipalities, and settlements as parts of local communities (extracts), Belgrade, 1983, Annex SI-917.

769 Extracts from Register of Households for Brezovec-del (1980-2005), Annex SI-578.

770 Hotiza Local People's Committee: Lists of taxable Persons from Brezovec-del from 1948, 1949, 1950 and 1951, Annex SI-476; Gaberje Local People's Committee: List of farm holders who produced wine in 1953 and sales tax calculation, 20 November 1953, Annex SI-486.

771 General People's Resistance Act (extracts) (1971), *Official Gazette of Socialist Republic of Slovenia*, No. 28/1971, Annex SI-538.

772 Registration cards, evidentiary registers and military identification booklets issued to the residents of Brezovec-del by the Lendava Municipality, Annex SI-554.

COURSE OF THE BOUNDARY SOUTH OF BREZOVEC-DEL/MURIŠĆE

Miles: 0.1 0 0.1 0.2 0.3

Kilometers: 0.1 0 0.1 0.2 0.3

Nominal Scale at Latitude 46°32'N - 1:7,900

Map I

Datum: ETRS89

Base aerial image: © 8 December 2016 Esri and its licensors.
This map is for illustrative purposes only.

414. The Tribunal therefore determines that Croatia's request that the Tribunal adjudge and declare that "Slovenia shall not hinder communication between the Croatian municipality of Sveti Martin na Muri, including the area of Murišće" is moot, and no decision by the Tribunal is called for.

(c) Podturen/Pince, Novakovec/Pince, and Ferketinec/Pince

415. Three more areas in the Mura River Region are disputed. They were identified by the Expert Group as area 1.14 (Ferketinec/Pince), area 1.15 (Podturen/Pince), and area 1.16 (Novakovec/Pince). The three areas raise similar questions.

i. The Parties' Positions

416. Croatia submits that, in the Mura River Region in 1956/1957, "the boundary was jointly surveyed, described and mapped in Minutes that were executed by authorised representatives of *both* sides, acting pursuant to the requirements of federal legislation."[773] Croatia adds that it reflected that boundary in its cadastral records and that Slovenia did the same, except for the disputed areas identified by the Joint Expert Group.[774] Croatia concludes that in those areas, the boundaries described in the Minutes were the "authoritative cadastral district boundaries" and "became the international boundary upon independence by operation of *uti possidetis*."[775]

417. Croatia explains that the cadastral system in Yugoslavia was governed by the 1953 federal Ordinance on Land Cadastre.[776] Article 2 required that the cadastre be "permanently maintained".[777] Article 3 required that changes to borders of cadastral districts be implemented in the cadastral documentation.[778] Article 9 provided that the "[b]orders of each cadastral district have to be established and delimited in the field" and that a description of the border must be set out in "minutes".[779] Article 10 provided:

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773 Transcript, Day 2, pp. 10:22-11:1 (emphasis in original).

774 Croatia's Memorial, para. 7.28; Croatia's Counter-Memorial, paras 6.3-4; Croatia's Reply, para. 5.3; Transcript, Day 6, p. 1:18-23.

775 Transcript, Day 2, p. 11:2-4.

776 Ordinance on Land Cadastre, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 43/1953, Annex HRLA-26; Croatia's Memorial, para. 7.8; *see* Croatia's Counter-Memorial, para. 6.6; Transcript, Day 2, p. 3:5-16.

777 Ordinance on Land Cadastre, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 43/1953, Annex HRLA-26; Croatia's Memorial, para. 7.8.

778 *Ibid*.

779 Ordinance on Land Cadastre, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 43/1953, Annex HRLA-26; Croatia's Memorial, para. 7.9; Transcript, Day 2, p. 3:16-19.

> The delimitation of territories of individual cadastral districts is performed by a special commission.
>
> The commission consists of persons from the territory of cadastral districts whose borders are being determined and a representative of the people's committee of the district (city) who must be a geodetic expert.
>
> [. . .][780]

418. Pursuant to this legislation, Croatia explains, joint federally-mandated surveys in the Mura River Region took place.[781] The Croatian and Slovenian Commission members convened to survey the boundary in the field and described their findings in formal Minutes signed by both parties.[782] In Podturen, Novakovec and Ferketinec, Croatia argues that its cadastral district boundary corresponds to the Agreed Minutes and corresponding maps.[783]

419. Croatia disagrees with Slovenia's argument that the 1953 Ordinance was concerned with maintaining the cadastre "for economic and tax purposes, not political ones" such that "changes in the cadastral limits were not understood as changing administrative boundaries."[784] Instead, Croatia contends that, under the law in force on the critical date of 25 June 1991, the cadastral borders of the frontier municipalities formed the republican boundaries.[785]

420. Croatia asserts that the fact that the Minutes on the determination of the boundary in area 1.14[786] were signed by only one Slovenian representative does not affect the binding nature of the agreement,[787] given that the individual who signed the Minutes signed other minutes of delimitation on Slovenia's behalf.[788] Croatia also takes issue with Slovenia's argument that the

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780 Ordinance on Land Cadastre, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 43/1953, Annex HRLA-26; Croatia's Memorial, para. 7.9; Transcript, Day 2, p. 3:20-25.

781 Transcript, Day 2, pp. 3:26; 4:1-5.

782 Croatia's Memorial, para. 7.12; Transcript, Day 2, p. 3:21-25.

783 *See* Minutes on the Determination of the Borders of the Cadastral District of Podturen, Podturen, 18 September 1956, p. 9, Annex HR-17; Minutes on the Determination of the Borders of the Cadastral District of Novakovec, Novakovec, 25 August 1957, p. 6, Annex HR-18; Minutes on the Determination of the Borders of the Cadastral District of Ferketinec, Ferketinec, 28 May 1956, p. 3, Annex HR-16; Croatia's Memorial, paras 7.18, 7.23, 7.27; *see* Croatia's Counter-Memorial, paras 6.7-10.

784 Transcript, Day 6, p. 3:3-14.

785 Transcript, Day 6, p. 3:15-23.

786 Transcript, Day 2, p. 9:16-20 *referring to* Tab 5.9 for the Minutes describing the boundary between the Croatian cadastral district of Ferketinec and the Slovenian cadastral districts of Pince and Petišovci, based on the joint survey of 28 May 1956.

787 Croatia's Reply, paras 5.4-5; Transcript, Day 2, p. 10:6-12.

788 Croatia's Reply, para. 5.5; *see* Minutes on the Determination of the Borders of the Cadastral District Martin na Muri, Martin na Muri, 21 May 1955, Annex HR-333 (signed by only one representative of the Slovenian cadastral districts of Donja Bistrica, Hotiza and Kot); Minutes on the Determination of the Borders of the Cadastral District of Podturen, Podturen, 18 September 1956, Annex HR-17; Minutes on the Determination of the Borders of the Cadastral District of Novakovec, Novakovec, 25 August 1957, Annex HR-18; Transcript, Day 2, p. 10:13-15.

same Minutes are invalid because certain parts were crossed out and re-written with corrected information. Croatia asserts that the clarity of the intended course of the boundary is unaffected, as it is depicted on a map appended to the Minutes.[789] Croatia notes that Slovenia has no reservations as to the authority of the same document with regard to the determination of the boundaries of its cadastral district of Petišovci, which was effected in the same Minutes.[790]

421. Croatia claims that Slovenia's complaint that part of the Minutes of the delimitation for area 1.15[791] are written in handwriting different from most of the text is defeated by the fact that the accompanying map forms an integral part of the Minutes and provides a detailed depiction of the boundary's course.[792]

422. Croatia considers that Slovenia's case is even weaker when it comes to the Minutes of delimitation for area 1.16.[793] Slovenia's objection rests on the fact that question marks were, at some point, written on the copy of the text in Croatia's possession. Croatia submits that this in no way calls into question the final and binding nature of the delimitation.[794]

423. Croatia takes issue with Slovenia's contention that the 1953 Federal Ordinance on Land Cadastre of "could not have allowed for changes or determinations of the republics' boundaries without reference" to proper procedures requiring federal approval.[795] Croatia argues that both Parties participated in the survey, determined the boundary's precise course, and executed the Minutes, jointly affirming their agreement, and as such, there was no dispute and no federal involvement was required.[796]

424. Croatia argues that Slovenia's alleged *effectivités* cannot displace Croatia's title because they only serve to confirm that the owners of the relevant plots lived in Croatia.[797]

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789 Croatia's Reply, para. 5.6; Transcript, Day 2, p. 10:18-19.

790 *Ibid.*

791 Transcript, Day 2, p. 8:15-18 *referring to* Tab 5.8 for Minutes detailing the boundary between the Croatian district of Podturen and the Slovenian cadastral district of Pince, based on the joint survey carried out from 14 May to 3 June 1956.

792 Croatia's Reply, para. 5.7; Transcript, Day 2, p. 9:3-13.

793 Transcript, Day 2, p. 7:9-12 *referring to* Tab 5.7 for Minutes describing the boundary between the Croatian cadastral district of Novakovec and the Slovenian cadastral district of Pince, based on the joint survey of 25 August 1957.

794 Croatia's Reply, para. 5.8; Transcript, Day 2, pp. 7:26; 8:1-9.

795 Transcript, Day 6, p. 2:1-7.

796 Transcript, Day 6, p. 2:16-23.

797 Croatia's Reply, para. 5.9.

425. Slovenia contends that the land survey made under the Federal Ordinance on Land Cadastre of 1953 "could not have allowed for changes or determinations of the Republics' boundaries without reference to [the] proper procedures"[798] established by the Yugoslav and the republics' Constitutions. The 1953 federal Constitutional Act provided that the Federal Assembly was to confirm proposed changes in the republics' boundaries.[799] In Slovenia's view, these constitutional requirements for modification of the boundary were not met.[800]

426. Slovenia notes that the October 1953 Decree on the Land Cadastre recalls that Article 1 of the Decree states that the land cadastre was intended "for technical, economic and statistical purposes, to establish the land register, and as the basis for the taxation of land revenues";[801] however, "changes in the cadastral limits were not understood as changing administrative boundaries."[802] Therefore, according to Slovenia, the border has not been fixed in 1956/1957 by the Commissions, which had no authority to do so.[803]

427. Moreover, the Minutes invoked by Croatia suffer from a number of irregularities. These could not and did not modify the boundary.[804] In relation to the document entitled "Minutes on the Determination of the Borders of the Cadastral District of Ferketinec,"[805] Slovenia points out that only one person is listed on the Slovenian side even though the cadastral municipalities were

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798 Transcript, Day 3, p. 108:14-16.

799 Slovenia's Counter-Memorial, para. 4.27; Transcript, Day 3, p. 109:7-9.

800 Slovenia's Counter-Memorial, paras 4.29-30.

801 Slovenia's Counter-Memorial, para. 4.28; Transcript, Day 3, p. 110:5-7 and 110:12-16; *referring to* Ordinance on Land Cadastre, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 43/1953, Annex HRLA-26.

802 Transcript, Day 6, p. 3:3-14.

803 1946 Constitution, Article 12, Annex SI-85 (providing that: "The People's Assembly of the SFRY determines the boundaries between the People's Republic.") Those boundaries "cannot be altered without its consent." However, the Assembly never fixed the boundaries of the Republics. Moreover, in 1953, a Federal Constitutional Act limited the competence of the Federal Assembly to "the confirmation of the changes of the boundaries between the People's Republics proposed consensually by the People's Republics, and the settlement of disputes concerning their delimitation." Finally, under the 1963 and 1974 Constitutions, "boundaries between the Republics may only be changed on the basis of mutual agreement." Federal consent or confirmation is no longer required.

804 Slovenia's Counter-Memorial, paras 4.67-75; Slovenia's Reply, paras 2.48-51; Transcript, Day 3, pp. 108:3-113:26; Transcript, Day 8, p. 113:7-17.

805 Slovenia's Counter-Memorial, para. 4.67; Minutes on the Determination of the Borders of the Cadastral District of Ferketinec, 28 May 1956, Annex HR-16.

supposed to be represented by *two* persons.[806] Slovenia also points out that there are two different versions of the text, the one which is unsigned and the other crossed out.[807]

428. Turning to the document entitled "Minutes on the Determination of the Borders of the Cadastral District of Podturen,"[808] Slovenia notes several additions inserted into the initial text in a different handwriting. Moreover, the document contains a comment suggesting the need to "correct the minutes according to subsequent survey."[809]

429. Finally, Slovenia points out that, on the document entitled "Minutes on the Determination of the Borders of the Cadastral District of Novakovec," there are large question marks in several places, "with no indication as to what they are questioning."[810]

ii. The Tribunal's Analysis

430. The Tribunal notes that, in the three disputed areas, a cadastral delimitation was made in 1956/1957 under a Federal Ordinance on Land Cadastre of 28 October 1953.[811] This Ordinance specifies in its Article 1 that the "[l]and cadastre is established on the basis of the conducted land survey and the cadastral classification of land." It provides in its Article 3 that the "maintenance of the cadastre involves the implementation, in the cadastral documentation, of the changes that occurred in land possession, the land's form, area, cultures and class, as well as borders of cadastral districts." The Ordinance adds that "[t]he basic cadastral unit is a cadastral district."[812]

431. Article 10 of the 1953 Ordinance provides that "[t]he delimitation of territories of individual districts is performed by a special commission. The Commission consists of [two] persons from the territory of cadastral districts whose borders are [to be] determined and a representative of the people's committee of the district (city) who must be a geodetic expert. The people's committee

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806 Slovenia's Counter-Memorial, para. 4.68, *referring to* Decree on the Land Cadastre, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 43/1953, Article 10, Annex SI-133.

807 Slovenia's Counter-Memorial, para. 4.69; Comparison of the Minutes on the Determination of the Borders of the Cadastral District of Ferketinec, 28 May 1956, Annex SI-496 (highlighting the discrepancies between them).

808 Minutes on the Determination of the Borders of the Cadastral District of Podturen, Podturen, 18 September 1956, Annex HR-17.

809 *See* Slovenia's Counter-Memorial, para. 4.71; Slovenia's Counter-Memorial, Figure 4.8.

810 Slovenia's Counter-Memorial, para. 4.72; Minutes on the Determination of the Borders of the Cadastral District of Novakovec, Novakovec, 25 August 1957, Annex HR-18.

811 Ordinance on Land Cadastre, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 43/1953, Annex HRLA-26.

812 *Ibid.*

of the respective municipality designates the persons from the territory of the cadastral districts."[813]

432. In its Article 11, the 1953 Ordinance provides for the resolution of disputes over cadastral boundary delimitations. It specifies that "if the dispute arises because the border between the two people's Republics is disputed, the dispute shall be resolved by the Federal Executive Council."

433. The Tribunal observes that the 1953 Ordinance gave the commissions, established under its provisions, authority to fix the limits of the cadastral districts not only within a Republic, but also when those limits are "the border between two Republics." In that last case, the Federal Executive Council is only called upon to act if there is a remaining dispute. The Tribunal thus considers that the commissions established under the 1953 Ordinance had authority only to fix the limits of cadastral districts and had no authority to fix the boundary between the Republics. This resulted both from the terms of the 1953 Ordinance and from the fact that, at the time, any modification of such boundary was subject to Federal action under the 1946 Constitution and the 1953 Federal Constitutional Act.

434. This does not mean, however, that the Tribunal may ignore the cadastral limits fixed under the 1953 Ordinance. As already stated (*see* paragraph 348), cadastral limits of peripheral districts of two republics do not constitute the boundary, but they give a *prima facie* indication of that boundary. They cannot be ignored. Accordingly, the Tribunal will now examine whether or not the mixed commissions established in 1956/1957 proceeded to an agreed delimitation of the cadastres in the respective areas. This must be done by considering the three areas, one by one.

435. With respect to Ferketinec/Pince (area 1.14), the Tribunal observes that, according to the Minutes, only one representative from the Slovenian side was present.[814] However, under the 1953 Ordinance, the mixed commission was to be composed of two persons from the territory of each of the cadastral municipalities.[815] This requirement was not met here and, therefore, the Minutes cannot be considered as recording an agreement on new cadastral limits. Those limits remained as they were before.

436. Having reviewed the evidence on the record, the Tribunal notes that the evidence available to it with regard to the course of the cadastral boundary, before the modifications purportedly

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[813] Slovenia's Counter-Memorial, para. 4.68.

[814] Minutes on the Determination of the Borders of the Cadastral District of Ferketinec, 28 May 1956, Annex HR-16. *See also* Map affixed to the Minutes, Figure 7.5.

[815] Slovenia's Counter-Memorial, para. 4.68; Decree on Land Cadastre, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 43/1953, Annex SI-133.

introduced in 1956/1957, is fragmentary. However, the evidence available indicates that the limits depicted in the Slovenian cadastre as of 1991, as they are presented by Croatia in Volume III of its Reply, are congruent with the pre-1956 cadastral limits.[816] The accuracy of the depiction of the lines plotted on these maps representing Croatia's and Slovenia's cadastres has been undisputed in the proceedings. Neither Party suggested the existence or relevance of any cadastral limits other than Croatia's cadastral limits as of 1991 (which the Tribunal understands to reflect the limits after the purported modification in 1956/1957) and Slovenia's cadastral limits as of 1991 (which the Tribunal understands to reflect the pre-existing limits without modification in 1956/1957). Accordingly, the Tribunal determines that the boundary in area 1.14 follows Slovenia's cadastral limits as of 1991 in the manner explained in paragraph 441 below.

437. With respect to Podturen/Pince (area 1.15), the Minutes of the Commission are signed by two persons on both sides and by the land surveyor.[817] Slovenia, however, submits that on page 2 of the Minutes, some additions were inserted in the initial text in different handwriting. The Tribunal does not see any problem in such a presentation. As noted above, Slovenia adds that on the same page, one person made the following addition: "correct the Minutes according to subsequent survey." The Tribunal observes that the signature that is applied after the hand-written comment does not seem to correspond to any of the four signatures at the end of the Minutes. This circumstance, and the uncharacteristically casual placement of the comment across four columns of the Minutes, make it appear possible, if not probable, that the comment was applied after the adoption of the Minutes by an unknown author, most likely a Croatian official. The Tribunal thus considers that this addition does not affect the validity of the Minutes of the Commission and of the cadastral delimitation done on that occasion more generally.

438. With respect to Novakovec/Pince (area 1.16), the Minutes of the Commission are correctly presented and signed.[818] Slovenia, however, observes that markings which could be construed as question marks are present on two of the pages of the Minutes of the Commission. The Tribunal notes that those markings appear in blank passages of pages 4 and 5 of the Minutes and are not easy to identify and to interpret. Moreover, the Tribunal does not consider it established that the markings were applied contemporaneously, at the time that the Minutes were prepared, rather than subsequently to the adoption of the Minutes. In any case, in the Tribunal's opinion, they

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816 Croatia's Reply, Vol. III/1.

817 Minutes on the Determination of the Borders of the Cadastral District of Podturen, 18 September 1956, Annex HR-17, *See also* Map affixed to the Minutes, Figure 7.3.

818 Minutes on the Determination of the Borders of the Cadastral District of Novakovec, 25 August 1957, Annex HR-18, *See also* Map affixed to the Minutes, Figure 7.4.

cannot be considered as invalidating the Minutes. The cadastral limit was agreed by both Parties in those Minutes.

439. The Tribunal concludes that the cadastral limits between the Croatian cadastral districts of Podturen and Novakovec and the neighbouring Slovenian cadastral districts are those fixed by the Parties' representatives in the 1956/1957 jointly signed Minutes.

440. Hence, the Tribunal determines that, in the areas of Podturen/Pince and Novakovec/Pince, the boundary follows the cadastral limits as modified in 1956 and 1957; and in the area of Ferketinec/Pince, the boundary follows the aligned limits of the cadastres of Croatia and Slovenia as they stood before the attempted modifications in 1956.

441. On the basis of the evidence on the record, it appears that the cadastral limits of Ferketinec/Pince, as depicted in the Slovenian cadastre, connect with the cadastral limits of Podturen/Pince, as and to the extent modified in 1956, at a point on the southern bank of the Mura, at the north-western limit of Podturen. As explained in paragraph 436 above, the Tribunal notably bases its analysis on the cadastral maps of Podturen and Ferketinec, submitted by Croatia, onto which Croatia plotted, by way of transparency sheets, the cadastral limits recorded in Slovenia and the cadastral limits recorded in Croatia. The most relevant sheets from these cadastral maps are reproduced in the following figure. The Tribunal's determination of the boundary in the present Award has been emphasised, for greater clarity, in the form of a dashed line.

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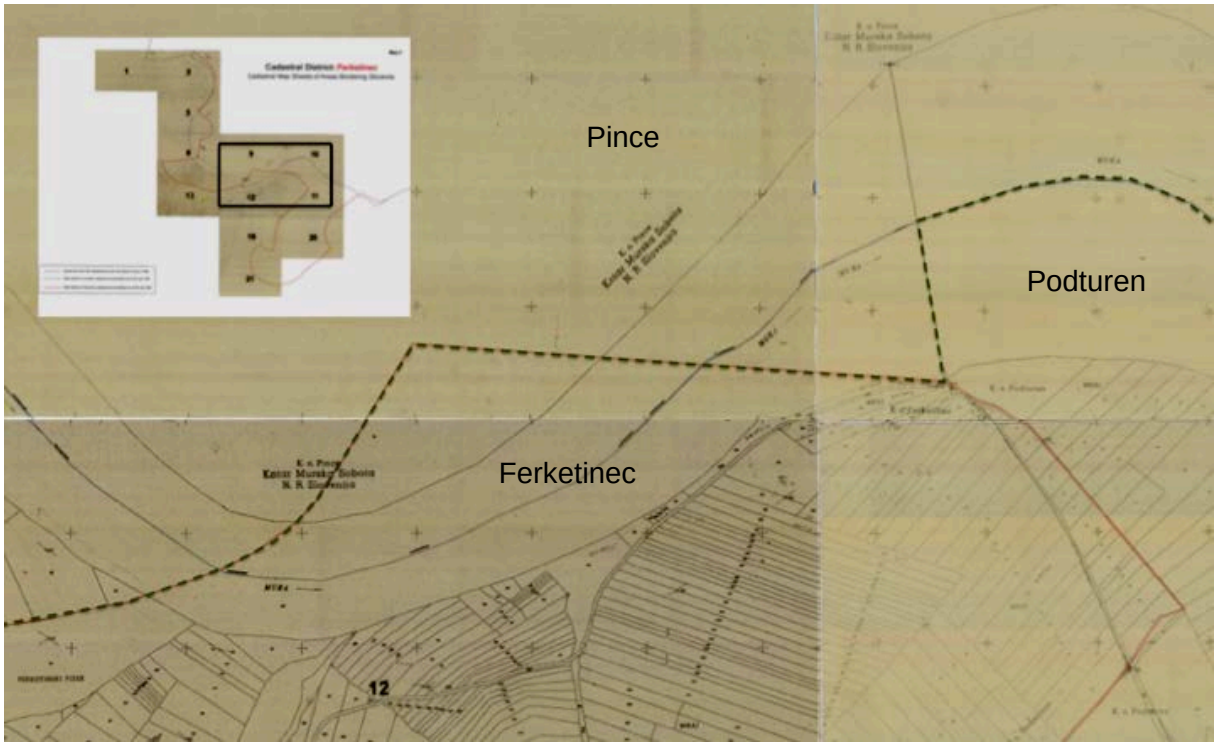

(Assembly of cadastral maps from Croatia's Reply, Volume III/1:
Map 3, Sheets 9, 10, 11, 12; Map 2, Sheets 1, 6)

442. In summary, the Tribunal determines that the land boundary in the area follows the cadastral limits of Podturen/Pince as modified in 1956 up to the point, on the southern bank of the Mura, at which the modified cadastral limit of Podturen joins the cadastral limits of Ferketinec/Pince as depicted in Slovenia's cadastre. The boundary then follows the cadastral limits of Ferketinec/Pince as depicted in Slovenia's cadastre, up to the point at which this line joins the aligned cadastres of Croatia and Slovenia east of Križovec.

(d) Mursko Središće and Peklenica

443. Area 1.11 is located in the cadastral districts of Mursko Središće and Peklenica (Croatia) and Petišovci (Slovenia).[819] In this small disputed area of 3.7 ha, identified by the Expert Group's 1996 Report, the discussion centres on cadastral limits.

819 Croatia's Counter-Memorial, para. 6.15.

i. The Parties' Positions

444. Croatia asserts that the cadastral boundaries overlap in the area of Mursko Središće and Peklenica (area 1.11) as a result of a "cartographic error" that occurred in 1986.[820] It recalls that the Joint Expert Group concluded that the cadastral district boundary between Peklenica and Petišovci should run "according to the new land survey dated 1956."[821] Croatia agrees with the conclusion of the Joint Expert Group based on that survey.[822]

445. Slovenia claims that, as regards disputed area 1.11, the Slovenian cadastre matches the 1956 Minutes endorsed by the Expert Group, and the Croatian cadastre does not. Slovenia agrees with the boundary endorsed in the 1956 survey, which in this region would follow the Mura River.[823] However, Slovenia notes that the maps produced by Croatia do not correspond to this course because the Croatian cadastral maps are old and erroneous. Slovenia alleges that Croatia's maps wrongly depict the 1956 boundary along the Croatian cadastral boundary.[824] Slovenia notes that Croatia recognizes that "its cadastre was at odds with the 1956 survey in this area."[825]

ii. The Tribunal's Analysis

446. In this particular area, the Tribunal notes that the Parties agree on the solution suggested by the Expert Group to remedy the border discrepancies relating to the cadastral districts. The Tribunal shall base itself on that agreement. Accordingly, the Tribunal determines that, in the area of Mursko Središće/Peklenica, the boundary is as recorded in the 1956 Minutes on the Determination of the Borders of the Cadastral District of Peklenica.[826]

2. Central Region

447. The Central Region lies between the Mura River Region in the east and the Istria Region in the west. The Parties disagree as to the definition of the region. According to Croatia, the region extends from the northwest of the Croatian city of Varaždin (south of the village of Trnovec) to

820 Croatia's Counter-Memorial, para. 6.18.

821 Minutes of the 3rd Meeting of the Chairman of the Croatian and Slovenian Parts of the Joint Expert Group, Zagreb, 10 April 1997, Annex HR-305.

822 Croatia's Counter-Memorial, para. 6.19.

823 Slovenia's Reply, para. 2.53.

824 Slovenia's Reply, para. 2.58.

825 Transcript, Day 3, p. 116:1-9.

826 Minutes on the Determination of the Borders of the Cadastral District of Peklenica, 18 August 1956, Annex HR-169.

Gorski Kotar.[827] According to Slovenia, the region starts at the point near Gibina where the boundary leaves the Mura River, and where the Mura River sector ends, in the east. The boundary then continues to the west to run through the hilly region of the Slovenske gorice; it follows the Drava River upstream and continues to cross the Haloze hills, until it meets the Sotla River. The boundary then follows the Sotla River, and continues downstream along the Sava River and then along the Bregana River. It then crosses the Gorjanci Mountains, until it reaches the Kamenica River. It continues to run on to the latter river, the Kolpa River and the Čabranca River, and finally crosses the Slovenian karst or *Kras* up to the point at the foot of Mount Škodovnik in Croatia and Beli vrh in Slovenia. At this point, the land boundary reaches the former border between Yugoslavia and the Julian March which was partly integrated into the FPRY after 1947.[828]

448. Within the Habsburg monarchy, the boundary line separated, on the one hand, the Crown lands of Carniola and Styria, and, on the other, Hungary and Croatia-Slavonia.[829] As the boundary line at the time served to demarcate the two halves of the Dual Monarchy,[830] it was very well documented.[831]

449. The establishment of the Kingdom of Serbs, Croats and Slovenes in 1918, with its *oblasti* administrative system, generally did not modify the boundary line.[832] The southern boundary formed by the Ljubljana and Maribor *oblasti* continued to reflect, with limited exceptions, the former boundary between Carniola and Styria, on the one hand, and Croatia-Slavonia, on the other.[833] The introduction of the *banovine* system did not alter the boundary line.[834]

450. According to Slovenia, the extent of the Central Region has not been determined on a geographical basis but on a legal one.[835] The boundary between Slovenia and Croatia in the Central Region was not delimited anew or altered significantly after the implementation of the 1947 Peace Treaty with Italy and the London Memorandum. It therefore excludes all territories which in 1946 were not yet part of the FPRY but were part of the occupied zones of the Julian

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827 Croatia's Memorial, para. 6.1.

828 Slovenia's Memorial, paras 6.03, 6.46; Transcript, Day 3, pp. 123:22-26, 124:1-12.

829 Slovenia's Memorial, para. 6.50; *see* Croatia's Memorial, para. 6.12.

830 Croatia's Memorial, para. 6.12; Slovenia's Memorial, para. 6.50.

831 Croatia's Memorial, para. 6.13; Slovenia's Memorial, paras 6.51-55.

832 *See* Slovenia's Memorial, para. 6.58.

833 Slovenia's Memorial, para. 6.58.

834 Slovenia's Memorial, para. 6.59.

835 Transcript, Day 3, p. 124:13-15.

March.[836] The boundary line generally did not change until the independence of both Parties in 1991.[837]

451. Slovenia divides the region into eight segments and addresses the course of the boundary for each segment in turn.[838] Slovenia claims that the boundary in the region "follows mainly geographical features" and in particular the Drava, Sotla, Sava, Bregana, Kamenica, Kolpa and Čabranka Rivers.[839]

452. Slovenia submits:

> The latest relevant legal act concerning the boundary was the 1945 AVNOJ decision, as was recognized in 1990 shortly before the critical date. This decision referred back to the *banovine* and their legal establishment in the Kingdom of Yugoslavia. These legal acts, in turn, determine the boundaries of the relevant *Dravska banovina* with reference to the existing boundaries of then existing districts. These district boundaries were fixed through the delimitation and demarcation of the boundary between the Austrian and the Hungarian parts of the Austro-Hungarian Empire, i.e., between Carniola and Styria, in Cisleithania, and Croatia-Slavonia and Hungary, in Transleithania, which can be traced back much further in history. Except where the historical title had been modified, it continued to constitute the relevant *jus* for the application of the *uti possidetis juris* principle, on the critical date.[840]

453. Slovenia argues that Croatia is incorrect in asserting that it "re-established itself in much of the same territory that had formed the autonomous Kingdom of Croatia, including its historic regions of Slavonia and Dalmatia, within Austria-Hungary,"[841] and that Croatia's reliance on the 1947 Constitution of Croatia is misplaced.[842] While the historical Austro-Hungarian boundaries are relevant, the modifications made during the Yugoslav kingdoms are as well.[843] The Kingdom of Serbs, Croats and Slovenes is not "redundant" and the changes implemented during those times still apply today. Croatia's claim confirms that point.[844] In particular, Slovenia points out the following modifications:

- the municipalities of Razkrižje and Štrigova, integrated into Dravska banovina in 1937;
- the Žumberak and Marindol areas, which formed part of the former Military Frontier, where no boundary was determined under the Austro-Hungarian Empire because of

836 Slovenia's Memorial, para. 6.61; Croatia's Memorial, paras 6.20-21; Transcript, Day 3, p. 124:16-21.

837 Slovenia's Memorial, para. 6.62.

838 *See* Slovenia's Memorial, para. 6.68.

839 Slovenia's Memorial, para. 6.47; *see* Slovenia's Reply, para. 2.73.

840 Slovenia's Memorial, para. 6.65; *see also* Slovenia's Counter-Memorial, paras 5.02-04. *See* Transcript, Day 3, pp. 124:21-125:2; Transcript, Day 3, pp. 125:21-126:6; Transcript, Day 3, pp.129:6-9.

841 Croatia's Memorial, para. 3.42; Slovenia's Counter-Memorial, para. 5.05.

842 Slovenia's Counter-Memorial, para. 5.05.

843 *Ibid*.

844 Transcript, Day 3, p. 13:17.

continuing disputes and mutual claims of Carniola and Croatia, and where a boundary only crystalized after 1922;

– the area in the vicinity of Draga (Kras), which was integrated into Savska banovina in 1931. Before 1918, the Draga area was part of the Duchy of Carniola.[845]

454. In all other areas of the Central Region, Slovenia contends, the course of the border was "only slightly modified and corrected after 1945, so as to re-establish historical boundaries and to take account of the needs and aspirations of the local population."[846] Modifications in the following areas are relevant:

– the Razkrižje area, where the boundary was modified as a result of the incorporation of the municipality of Štrigova and parts of the municipality of Razkrižje into Croatia […]

– in the western part of the Gorjanci/Žumberak area, where only the settlement of Drage with its surroundings remained in Slovenia, while the remainder of the municipality of Radatoviči was included in Croatia. […]

– the Marindol area, which was also part of the former Military Frontier, and remained part of *Savska banovina*. The whole of Marindol and its surroundings on the left bank of the Kolpa River were re-integrated into Slovenia. […]

– the area in the vicinity of Draga (Kras), where the former boundary between *banovine* was modified in 1945. […][847]

455. Slovenia underlines that the course of the boundary in the region cannot be determined "simply by referring to the cadastres" of either Party.[848] Slovenia adds that Croatia's argument is inconsistent: while Croatia asserts that the relevant boundary is the 1918 boundary of the Kingdom of Croatia-Slavonia, its claim does not correspond to the historical boundary, nor do its own cadastral records.[849] According to Slovenia, Croatia has never proposed any explanation for the continuous relevance of the historic boundary between Carniola, Styria, Croatia-Slavonia and Hungary.[850] In its written pleadings, it has simply inferred a common understanding from the alleged "alignment of the majority of the cadastral boundary".[851] Slovenia argues that according to Croatia and its misguided position on the exclusive relevance of the cadastre, it is not the historic records of the delimitation and demarcation of the Austro-Hungarian boundary which count, but the cadastral district "which is more *faithful* to the proper historic source of title."[852]

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845 Slovenia's Counter-Memorial, para. 5.05 (footnotes omitted); *see* Slovenia's Memorial, paras 6.71, 6.115-21, 6.137.

846 Slovenia's Counter-Memorial, para. 5.06.

847 Slovenia's Counter-Memorial, para. 5.06.

848 Slovenia's Counter-Memorial, paras 5.09-10.

849 Slovenia's Counter-Memorial, para. 5.09.

850 Transcript, Day 3, p. 126:9-11.

851 Transcript, Day 3, p. 126:11-14.

852 Transcript, Day 3, p. 127:1-7.

456. Slovenia has not submitted its cadastral records. However, Slovenia notes that the records that it has submitted contain detailed descriptions of the course of the border and are, "for all purposes, as good as title."[853] In this regard, Slovenia points to evidence regarding the historic boundary between the Austro-Hungarian provinces from the late 19th and the 20th century.[854] That boundary continued to be relevant through a complete chain of legal instruments.[855] The boundary largely survived the Kingdom of Serbs, Croats, and Slovenes through the established districts and the *oblasti*.[856] The Kingdom of Yugoslavia used the same districts to describe the *Dravska* and *Savska banovine*, except in the Mura River Region, where no such historic boundary existed.[857] The historic boundary continued to be relevant as the *banovine* boundary, and became the boundary of Slovenia and Croatia in accordance with the AVNOJ decision.[858] Slovenia underlines that if the cadastres correspond, this is because they were correctly maintained and updated with regard to the republic boundary, which in turn still reflected the historic, legally relevant boundary between Carniola, Styria, Hungary, and Croatia-Slavonia.[859] This process of continuous updating and maintenance of the cadastres was not implemented consistently on the entire land boundary which created overlaps and even gaps in the records.[860] As far as the "dry" part of the boundary is concerned, Slovenia underlines that the boundary was "materialized on the ground" by boundary stones, sometimes still present.[861] As far as the "wet" part of the boundary is concerned, Slovenia reiterates that the rivers "in their actual course" reflect the border, even when the cadastral records describe a common cadastral limit that does not correspond to the river.[862] Slovenia refers to freshwater fishing, water management, hunting, and police activities as evidence of the fact that the rivers are considered to be the boundary.[863] According to Slovenia, this is further confirmed by the criteria adopted by the chairpersons of the 1998 Mixed Diplomatic Commission.[864]

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853 Slovenia's Counter-Memorial, para. 5.11; *see Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 554 at p. 564, para. 18; Transcript, Day 3, p. 127:9-12.

854 Transcript, Day 3, p. 127:15-19.

855 Transcript, Day 3, p. 127:20-21.

856 Transcript, Day 3, p. 127:21-23.

857 Transcript, Day 3, pp. 127:23-25, 128:1.

858 Transcript, Day 3, p. 128:2-5.

859 Transcript, Day 3, p. 128:6-12.

860 Transcript, Day 3, p. 128:12-16.

861 Slovenia's Counter-Memorial, para. 5.12.

862 Slovenia's Counter-Memorial, para. 5.13.

863 *See* Slovenia's Counter-Memorial, para. 5.14.

864 Slovenia's Counter-Memorial, para. 5.15; *see* Criteria for the Determination of the Border Line, 14 May 1997, Annex SI-764.

457. As opposed to Slovenia, which divides the region into eight segments and describes the entire course of the boundary in the region,[865] Croatia identifies nine[866] significant disputed areas in the Central Region on the basis of the cadastral district boundaries.[867] Croatia discusses separately a tenth area, the Sveta Gera area, where it claims that, although the cadastral district boundaries were aligned, Slovenian armed forces continued to occupy a military facility.[868]

458. Croatia asserts that the alignment of the cadastral district boundaries for nearly the entirety of the boundary is "not a coincidence".[869] Croatia points to "a common understanding" between the Parties, since their establishment as republics within Yugoslavia, that their boundary followed "the historic border that had been delimited with precision in the 19th century" to separate the Kingdom of Croatia from the Austrian Crown Lands of Carniola and Styria.[870] Croatia adds that the boundary did not change until both States achieved independence on the critical date.[871] On that date, the boundary in the Central Region followed cadastral district boundaries.[872] Croatia argues that the land boundary in the Central Region is established by cadastral records dating back to the Austro-Hungarian period.[873] As with the Mura River Region, the boundary did not follow rivers, as Slovenia claims, except where cadastral boundaries happened to coincide with rivers.[874] This explained why Slovenia, during the work of the Expert Group, agreed that the boundary was formed by the outer limits of cadastral districts, and why the joint experts determined that 95% of the boundary in the Central Region was agreed.[875] With respect to areas 9.3 and 9.4, these were located in both the Croatian cadastral district of Prezid and the Slovenian cadastral districts of Snežnik and Leskova Dolina.[876] The Parties agree that Croatia's claim

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865 Slovenia's Memorial, para. 6.68.

866 Based on its definition of the regions, Croatia identifies ten disputed areas where the divergence is greater than 50 m. Based on the definition of the regions adopted by the Tribunal, two of these areas (areas 9.3 and 9.4) are located in the Istria region. Additionally, the Tribunal treats as part of the Central Region one area that Croatia treats as part of the Mura River region (area 2.1).

867 Croatia's Memorial, para. 6.5; Croatia's Counter-Memorial, paras 5.4-5.

868 Croatia's Memorial, para. 6.23.

869 Croatia's Counter-Memorial, para. 5.3; Croatia's Memorial, para. 6.21.

870 Croatia's Memorial, para. 6.2; *see* Croatia's Counter-Memorial, para. 5.3; Croatia's Reply, paras 4.1-2.

871 Croatia's Memorial, para. 6.4.

872 Transcript, Day 2, p. 11:15-16.

873 Transcript, Day 1, pp. 79:5-81:21, *citing* Slovenia's Counter-Memorial, paras 3.111, 3.112; Slovenia's Memorial, paras 5.63, 5.64, 5.65, 5.66. Transcript, Day 5, pp. 158:23-159:8, *citing* Transcript, Day 3, p. 126:7-8.

874 Transcript, Day 2, p. 11:17-19.

875 Transcript, Day 2, p. 11:19-24.

876 Transcript, Day 2, p. 12:7-10.

matches the historic boundary between Croatia and Carniola, which was established in 1860, as shown in the 1881 map by the Military Geographic Institute in Vienna.[877]

459. Croatia terms Slovenia's approach "revisionist", "novel", and "inherently contradictory".[878] According to Croatia, Slovenia accepts that the boundary runs along the historic border constantly recognized since the Habsburg Empire but still asserts "the contrary (and unsupportable) proposition" that the boundary conforms to the 1931 division.[879] Additionally, "[t]o make this theory serve its purposes," Slovenia assumes that the 1931 division ran along rivers; this is Slovenia's "(incorrect) riverine boundary theory."[880] Croatia adds that when there is no river in the vicinity of the border, Slovenia "simply departs from what had been at independence mutually accepted borders."[881] Croatia calls Slovenia's riverine boundary theory "rather remarkable" and notes that never before did Slovenia "declare, state, propose, suggest or even whisper that its border with Croatia was composed of rivers."[882]

460. Croatia contends that Slovenia's claims that "rivers were considered to be the boundary between both Republics and ultimately the limit of their respective regulatory powers" is "disproven even by the *mélange* of laws, decrees, regulations and management activities that Slovenia relies upon for that assertion."[883]

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877 Transcript, Day 2, p. 12:10-14.

878 Croatia's Counter-Memorial, para. 5.7.

879 Croatia's Counter-Memorial, para. 5.7; *see* Slovenia's Memorial, paras 6.63, 5.18.

880 Croatia's Counter-Memorial, paras 5.7-8; *see* Croatia's Reply, para. 4.3.

881 Croatia's Counter-Memorial, para. 5.8.

882 Croatia's Reply, para. 4.4.

883 Croatia's Reply, para. 4.41; *see* Croatia's Reply, paras 4.42-49 (discussing Slovenian Decree on the Determination of the Hunting and Breeding Units in Slovenia, *Official Gazette of the Socialist Republic of Slovenia*, No. 34/1983, Annex SI-614; Agreement on the Allocation of Hunting Grounds for Management Purposes, concluded between the Assembly of the Ormož Municipality and the Ormož Hunting Club, 24 February 1981, Annex SI-587; Agreement on the Common Fishing Regime on the Borderline Watercourses, October 1965, Annex SI-515; Minutes of the Meeting held in Bregana in relation with regulation problems of the Bregana Stream, 16 March 1974, Annex SI-547; Resolution on the Determination of the Areas for the Breeding or Keeping of Ordinary Deer, Wild Boar and Bear, *Official Gazette of the Socialist Republic of Croatia*, No. 4/1977, Annex SI-555; Evidence of the Slovenian Fishing Organizations' Supervision on Drava from 1963 to 1986, Annex SI-640; Police Station Črnomelj: Safety and Security Assessment of the Kolpa Region in the Municipality Of Črnomelj, 7 December 1990 and Internal Affairs Administration Ljubljana okolica, Police Inspection: Assessment of the Security Situation along the Border with the Republic of Croatia, 10 December 1990, Annex SI-691; Police Station Ormož: Aide Memoire for Patrol Work in the Border Area with the Republic of Croatia from Središče ob Dravi up to Ormož, and in the Town Ormož, 4 April 1991 and Police station Ormož: Report on Minor Offence, 3 December 1985, Annex SI-710).

461. Croatia asserts that Slovenia's "new" claims fail because the principle of *uti possidetis* precludes Slovenia from raising them.[884] Further, Croatia argues that the 1931 division is "irrelevant to the present delimitation."[885] Croatia underlines that Slovenia also claims that the banovine boundary was "substantially identical" to the old historic border[886]: Slovenia "thus turns full circle"[887] but eventually "got it right":[888] The old historic border, "carefully demarcated" in the 19th and 20th centuries, formed the boundary on the critical date.[889]

462. Croatia claims that in the Central Region Slovenia "redraws" 106 km of agreed boundary, seeking to appropriate 1,373 ha of Croatian territory, thus shortening the boundary by 51 km.[890] Croatia observes that Slovenia divides the Central Region into eight segments. This, however, according to Croatia, is "just another way of making the same groundless argument on which Slovenia's case is based."[891]

(a) Slovenske gorice

463. The Slovenske gorice is a "hilly region south of the Mura River."[892] The general course of the boundary in this area is described by Slovenia as follows:

> From the point in the vicinity of Gibina where the land boundary leaves the Mura River, the land boundary follows the eastern and southern boundaries of Slovenia's municipalities reflected in the records of the cadastral municipalities of Gibina, Šafarsko, Razkrižje, Veščica and Globoka, and encompassing ten houses south of Razkrižje, until it reaches the Presika Stream. It then follows the former State boundary between Austria and Hungary, reflected in [the] south-eastern boundary of the municipality of Ljutomer and the eastern and southern boundaries of the municipalities of Ormož and Središče ob Dravi, up to the point where it meets the Drava River to the south-east of Središče ob Dravi.[893]

i. Razkrižje

464. In the area of Razkrižje, a dispute arose in 1945 as to whether all or part of the Razkrižje and Štrigova municipalities should belong to Slovenia or Croatia.[894] Multiple bilateral initiatives to

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884 Croatia's Counter-Memorial, para. 5.9.

885 Croatia's Counter-Memorial, para. 5.10.

886 Croatia's Counter-Memorial, para. 5.11; Slovenia's Memorial, para. 6.61.

887 Croatia's Counter-Memorial, para. 5.11.

888 Croatia's Counter-Memorial, para. 5.12.

889 *Ibid*.

890 Croatia's Counter-Memorial, para. 5.58.

891 Croatia's Counter-Memorial, para. 5.60.

892 Slovenia's Memorial, para. 6.69.

893 Slovenia's Memorial, para. 6.80 (footnote omitted).

894 Slovenia's Memorial, para. 6.72, Transcript, Day 3, pp. 131:26-132:2.

solve the dispute failed.[895] In June 1946, the Federal Control Commission of the FPRY took the following decision concerning the boundary to be drawn:

> a/ The areas of the local people's committees Razkrižje and Robadje that anyway mainly belong to the former Razkrižje Municipality that was separated from Štrigova shall fall to the People's Republic of Slovenia, while the remaining parts of the former Štrigova Municipality shall fall to the People's Republic of Croatia. The exact border line shall be drawn by a joint commission of county people's committees of Varaždin and Maribor; and since there are villages whose individual hamlets gravitate more to one or the other side, the matter needs to be examined on the spot and the exact data of which house numbers will be on which side must be accurately entered into the proposal.
>
> b/ As soon as at its next session, the Assembly of the Federal People's Republic of Yugoslavia shall pass a Law on the Delimitation between the People's Republic of Slovenia and the People's Republic of Croatia, because only one other dispute exists in the area of Črnomelj and Karlovac districts on which the comrades from Croatia and Slovenia have already reached an agreement.
>
> c/ Until this Law on Permanent Delimitation has been passed, the provisional delimitation shall immediately be notified to the localities concerned and is to be implemented along with the explanation that a definitive solution will be reached at the session of the Federal Assembly.[896]

465. Following the Federal Control Commission's statement, a proposal was adopted by the local authorities and transmitted to the federal authorities, but never endorsed by them.[897]

The Parties' Positions

466. Slovenia claims that, unlike the rest of the boundary in the Central Region, this part of the boundary was only established in the immediate aftermath of World War II and therefore does not correspond to the former boundary of the *Dravska banovina*.[898] Slovenia contends that the 1946 decision of the Yugoslav Federal Control Commission "still constitutes the most authoritative statement fixing the relevant elements to be taken into account for delimitation in this area,"[899] and asks the Tribunal to fix the boundary on the basis of the administrative boundaries "interpreted in the light of the 1946 decision of the Federal Control Commission."

467. According to Slovenia:

> The land boundary follows mainly the boundaries of the cadastral municipalities in the area as they were in 1991. The boundaries of the respective cadastral municipalities are not

895 *See* Slovenia's Memorial, paras 6.72-73.

896 Federal Control Commission, Report regarding the delimitation between the People's Republic of Slovenia and the People's Republic of Croatia in the area of Štrigova Municipality, June 1946, Annex SI-92; Slovenia's Memorial, para. 6.74; Transcript, Day 3, p. 132:8-16.

897 Slovenia's Memorial, para. 6.75.

898 Slovenia's Memorial, para. 6.70.

899 Slovenia's Memorial, para. 6.77.

> disputed between the Parties. The only discrepancy that was established during the comparison of the cadastral records in 1996 concerned overlapping plots in the records of the Globoka cadastral municipality in Slovenia and the Robadje cadastral municipality in Croatia. This discrepancy only arose as a result of a new survey of the area unilaterally carried out by Croatia in 1955 in violation of the legal provisions in force at that time. It follows that only the Slovenian cadastre should be used.[900]

468. Croatia submits that the decision invoked by Slovenia was never agreed upon. It recalls that the cadastral limits were aligned in 1991 and adds that "on the critical date Slovenia's laws did not include this area in Slovenian territory."[901] The boundary must thus follow the aligned cadastral limits, according to Croatia.

469. Croatia underlines that the only discrepancy identified in the 1996 Report is area 2.1.[902] In contrast, Slovenia now asserts four "new" claims in its Memorial.[903] The first of these four new areas is located in the Croatia cadastral district of Štrigova,[904] where Slovenia "attempts to reopen a long-settled dispute" over whether all or part of certain municipalities belonged to Slovenia or Croatia."[905] As for the three other "new" claims, Croatia dismisses them as lacking any evidentiary support.[906]

The Tribunal's Analysis

470. The Tribunal notes that, in the Razkrižje area, the cadastral limits are aligned. It is not disputed that the cadastral limits represent the limits of the relevant administrative districts established under the Acts enacted by Slovenia and Croatia in 1946 and 1947, respectively.[907]

471. Slovenia, however, submits that "[s]everal hamlets and houses in this area, although formally listed in the Croatian cadastral records, maintained closer ties to Slovenia than Croatia," and that at the time of independence, "several families requested to be re-included into Slovenia."[908] Slovenia emphasises that in 1946, the Federal Control Commission contemplated a delimitation

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900 Slovenia's Memorial, para. 6.78 (footnote omitted); *see* Slovenia's Reply, para. 2.76.

901 Croatia's Counter-Memorial, para. 5.81.

902 Croatia's Counter-Memorial, para. 5.78; *see* Slovenia's Memorial, para. 6.78.

903 Croatia's Counter-Memorial, para. 5.77.

904 Croatia's Counter-Memorial, para. 5.79; *see* Croatia's Memorial, Figure 5.22.

905 Croatia's Counter-Memorial, para. 5.79.

906 *See* Croatia's Counter-Memorial, paras 5.83-84; *see* Croatia's Memorial, Figure 5.23.

907 Act on the Administrative Division of the People's Republic of Slovenia, 14 September 1946, Annex SI-96; and Act on the Administrative and Territorial Division of the People's Republic of Croatia (1947), Annex SI-106.

908 Slovenia's Memorial, para. 6.76.

taking into account the fact that some "hamlets gravitate more to one or the other side."[909] Slovenia requests the Tribunal to take those elements into consideration.

472. The Tribunal observes that the decisions contemplated in 1946 by the Federal Control Commission[910] were never implemented.[911] Moreover, the Tribunal has been asked to proceed to the land delimitation on the basis of *uti possidetis*. It, therefore, cannot base its decision on other elements such as the wishes and the allegiance of the population.[912]

473. The Tribunal accordingly determines that the boundary shall follow the aligned cadastral limits in the area.

ii. Robadje/Globoka

474. The Expert Group noticed a discrepancy between the records of the Globoka cadastral municipality (Slovenia) and the records of the Robadje cadastral municipality (Croatia), which it identified as area 2.1.[913]

The Parties' Positions

475. Slovenia submits that this discrepancy arose as a result of a new survey of the area unilaterally carried out by Croatia in 1955, and argues that the Slovenian cadastral limits should be used.[914] Slovenia criticizes the 1955 Minutes on which Croatia relies. First, it notes that the Minutes were signed neither by Croatian nor Slovenian authorities. Second, it asserts that the Minutes were prepared without any involvement of the Slovenian authorities. Third, even if the Minutes embodied an actual agreement, *quod non*, that agreement would not be valid under the then

909 Slovenia's Memorial, para. 6.77.

910 Federal Control Commission, Report regarding the delimitation between the People's Republic of Slovenia and the People's Republic of Croatia in the area of Štrigova Municipality, June 1946, Annex SI-92.

911 Letter to the Presidium of the Government of the People's Republic of Slovenia, Department for the Establishment of the People's Authority from the Secretariat of the Maribor County People's Committee, 31 July 1946, Annex SI-94; and Letter to the [Federal] Control Commission at the Presidency of the Federal Government of the Federal People's Republic of Yugoslavia, 26 August 1946, Annex SI-95.

912 *See supra*, para. 339.

913 Mixed Slovenian-Croatian Commission for the Demarcation, Maintenance and Restoration of the State Border, Joint Report of the Mixed Slovenian-Croatian Expert Group, Section 2, 11 January 1996, Annex SI-294.

914 Slovenia's Memorial, para. 6.78.

constitutional order. Finally, Croatian authorities recognized in 1971 that they had no records of the determination and could not establish whether it had been carried out properly.[915]

476. Croatia asserts that the boundary was established by a survey conducted in 1955, described in great detail in attached Minutes.[916] Croatia submits that the Tribunal must rely on the 1955 survey.[917] Croatia objects to Slovenia's claim on the basis that Slovenia's argument is not supported by any evidence.[918] Croatia believes that area 2.1 is more appropriately treated as part of the Mura River Region, as it lies east of the former tripoint where the borders of the Kingdom of Croatia, the Austrian Duchy of Styria and the Kingdom of Hungary intersected.[919]

The Tribunal's Analysis

477. The Tribunal notes that the 1955 survey produced by Croatia[920] only bears the signature of the geometer who conducted it. No other person is mentioned in the survey. It appears that, contrary to the provisions of the 1953 Federal Ordinance on Land Cadastre,[921] no representative of the interested municipalities participated in the survey. In view of this lack of participation, the Tribunal considers that the 1955 survey cannot be taken into account. As a result, the cadastral limits remain as they were before the survey. The aligned cadastral limits of 1858 mentioned in the Expert Group Report must be retained.

478. The Tribunal therefore determines that the boundary follows the limit of the Slovenian cadastre.

iii. Santavec River

479. In addition, Slovenia presented to the Tribunal certain claims in the vicinity of the Santavec River, in respect of areas that had not been identified as disputed by the Expert Group.[922] The claims in this area relate to two areas of 2.8 ha and 11.2 ha.

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915 Slovenia's Reply, para. 2.75.

916 Croatia's Counter-Memorial, para. 6.14; Minutes on the Determination of the Borders of the Cadastral District of Robadje, 21 June 1955, Annex HR-159.

917 Croatia's Counter-Memorial, para. 6.14.

918 *Ibid*.

919 Croatia's Counter-Memorial, para. 6.13.

920 Minutes on the Determination of the Borders of the Cadastral District of Robadje, 21 June 1955, Annex HR-159.

921 Ordinance on Land Cadastre, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 43/1953, Annex HRLA-26.

922 Croatia's Counter-Memorial, Figure 5.23. Slovenia's claim line is available at Slovenia's Memorial, Vol 2, Course of the Land Boundary Maps.

480. Slovenia advances two bases for its claim. First, Slovenia states that the "dry part of the boundary . . . was demarcated on the ground by boundary stones, which are still in existence, in particular in the Slovenske gorice area (last demarcated in 1754) (Figure 3.8(a))."[923] An extract of Slovenia's claim line based on boundary stones in the region, as set out in its Counter-Memorial at Figure 3.8(a) is reproduced below.

(Slovenia's Counter-Memorial, Figure 3.8(a).
Black squares represent boundary stones placed in the region.)

481. Second, Slovenia argues that, generally, "the boundary runs along natural features, *i.e.*, creeks, and the cadastre has to be interpreted accordingly."[924]

482. The Tribunal notes that the cadastres in the area are aligned, which constitutes a *prima facie* indication of the location of the boundary. On the other hand, the Tribunal does not consider that the contention that natural features generally determine the course of the boundary to be of any probative value. The Tribunal might be prepared to give more weight to the presence of historic boundary stones, as indicated on Figure 3.8 (a) of Slovenia's Counter-Memorial. However, upon review of that map, the Tribunal finds that no boundary stone was placed in the specific area under consideration here. In the absence of any specific evidence in support of Slovenia's claims

923 Slovenia's Counter-Memorial, para. 3.113.

924 Slovenia's Reply, para. 2.7, *referring to* Josephine Survey, Inner Austrian Provinces, Descriptions, Sections 169, 198 and 13 (extracts) (1763-1787), Annex SI-825.

in the Santavec River area, the Tribunal therefore determines that the boundary follows the aligned limits of the cadastres of Croatia and Slovenia.

iv. Zelena River

483. Similarly, Slovenia has presented claims in vicinity of the Zelena River, which go beyond the aligned cadastral limits. According to Croatia, these claims concern an area of approximately 10.7 ha.[925]

484. As in respect of the areas along the Santavec River, Slovenia states that "the boundary runs along natural features, *i.e.*, creeks, and the cadastre has to be interpreted accordingly."[926] More specifically, Slovenia states that creeks, including the Zelena, constituted the boundary between Styria and Hungary, as already described in the Josephine Survey.[927]

485. As indicated earlier, the Tribunal does not attribute any probative value to the contention that natural features generally determine the course of the boundary in the region. On the other hand, the cadastres in the area are aligned, which constitutes a *prima facie* indication of the location of the boundary. The Tribunal therefore determines that the boundary shall follow the aligned limits of the cadastres of Croatia and Slovenia.

v. The Remaining Part of the Slovenske gorice

486. The remaining part of the Slovenske gorice is undisputed between the Parties,[928] and the boundary is fixed accordingly.

(b) Drava River

487. The Drava flows in a general easterly direction through Italy, Austria, Slovenia, Croatia and Hungary until it joins the Danube. In the area, the Drava River has numerous tributaries and forms several meanders.[929]

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925 Croatia's Counter-Memorial, Figure 5.23.

926 Slovenia's Reply, para. 2.78. This is in response to Croatia's suggestion that there is no evidence justifying Slovenia's departure from the agreed boundary in this region (Croatia's Counter-Memorial, paras 5.83-84).

927 Slovenia's Reply, para. 2.78, relying on Josephine Survey, Inner Austrian Provinces, Descriptions, Sections 169, 198 and 13 (extracts), (1763-1787), Annex SI-825.

928 Slovenia's Memorial, para. 6.79.

929 Slovenia's Memorial, para. 6.81.

i. The Parties' Positions

488. Both Parties agree that, in this region, the boundary is the historic boundary between Styria and Croatia which had been delimited before 1918. The Parties, however, disagree on the precise boundary demarcation in the Drava region.

489. Croatia submits that the boundary follows the aligned limits of the cadastral districts of the Parties. Croatia notes that Slovenia makes new territorial claims, amounting to 976.1 ha, even though the 1996 Report identified no cadastral discrepancies in the area.[930] Croatia asserts that Slovenia's claim that the Drava River is the boundary not only is contrary to *uti possidetis*, but also relies on a "flawed factual premise".[931] Slovenia relies on maps and surveys from the Josephine Survey,[932] even though it recognizes that the Franciscan cadastres replaced the earlier Josephines ones[933] and that the Josephine maps "are not up to the current standards of geodetic surveys."[934] The Josephine materials are "long-superseded"[935] and contradicted by later maps.[936] Croatia also criticizes Slovenia's reliance on a 1932 Yugoslav Almanac and alleged *effectivités*.[937]

490. Slovenia contends that the boundary runs along the middle of the present main channel of the Drava River. It submits that the Drava River constituted the natural boundary in the region,[938] until the end of the Austro-Hungarian Empire and the establishment of the Yugoslav kingdoms.[939] Slovenia asserts that it was plain since the Josephine Survey that the Drava constituted the boundary between Styria and Croatia.[940] Slovenia relies on 18th and 19th century maps,[941] the verbal descriptions accompanying these maps,[942] the description contained in the Josephine

930 Croatia's Counter-Memorial, paras 5.85-86.

931 Croatia's Counter-Memorial, para. 5.87.

932 *See* Slovenia's Memorial, para. 6.82.

933 Slovenia's Memorial, para. 5.61.

934 Slovenia's Memorial, para. 6.52; *see* Croatia's Counter-Memorial, para. 5.87.

935 Croatia's Counter-Memorial, para. 5.89.

936 Croatia's Counter-Memorial, para. 5.88.

937 *See* Croatia's Counter-Memorial, para. 5.92 n.108.

938 Slovenia's Reply, para. 2.79.

939 Transcript, Day 3, p. 136:10-12.

940 Slovenia's Memorial, para. 6.82 (footnote omitted); *see* Slovenia's Reply, para. 2.82.

941 *See* Joseph II Land Survey, Croatia, Section 3, (1763-1787), Annex SI-M-7; Joseph II Land Survey, Inner Austrian provinces, Section 197 (1763-1787), Annex SI-M-2; Joseph II Land Survey, Croatia (1763-1787), Annex SI-M-6; Map of the boundary between Styria and Croatia (1811), Annex SI-M-11; Komitat Varaždin in Croatia (1810), Annex SI-M-10; Slovenia's Memorial, para. 6.82; Transcript, Day 3, p. 136:3.

942 Transcript, Day 3, p. 136:4-5.

Survey of the Croatia village of Dubrava,[943] and the 1932 Yugoslav Almanac,[944] which demonstrate that the boundary existed and that it ran along the Drava River. According to Slovenia, this is the relevant evidence, not the line on a cadastral map depicting the Drava where it no longer flows.[945] Slovenia also adduces as *effectivités* certain Slovenian fishing regulations[946] and the construction of a hydroelectric power plant.[947]

491. Slovenia criticizes Croatia for "manipulat[ing]" an 1882 map by colouring it in blue, when the original map includes no original colour,[948] on the basis of its own "quite partial and subjective understanding of what the Drava River actually was."[949] Slovenia adds that upon adding a more coherent and complete colouring, it becomes apparent that the boundary did not run just on land, but within the numerous meanders, meadows, and arms of the Drava River, indeed on the Drava River itself. This is why the Austro-Hungarian authorities referred to this part of the Styria-Croatia-Slavonia boundary as the "wet boundary".[950] It also faults Croatia for relying on a 1904

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943 Mirko Valentić, Ivana Horbec and Ivana Jukić (eds), *Hrvatska na tajnim zemljovidima 18. i 19. Stoljeća* [Secret Maps of Croatia from the 18th and 19th century]*: Varaždinska županija* [Varaždin County], Vol. 7, Hrvatski institut za povijest, Zagreb p. 125 (2005) (emphasis added), Annex SI-3; Slovenia's Memorial, para. 6.83; Transcript, Day 3, p. 136:4.

944 *Almanac of the Kingdom of Yugoslavia, General State Administration (Banovine, Districts, Municipalities and Towns)*, Editorial Board of the Almanac of the Kingdom of Yugoslavia, Zagreb, 1932, p. 33, Annex SI-67; Slovenia's Memorial, para. 6.84; Transcript, Day 3, p. 137:9-12.

945 Transcript, Day 3, p. 136:7-9.

946 Decree Establishing Fishing Areas and Fishing Environs (1959), *Official Gazette of the People's Republic of Slovenia*, No. 17/1959 (Article 1 (c), Lower Drava River Fishing Area), Annex SI-156; Decision No. 324/3-80 of the Ormož Municipal Assembly, 13 June 1982, Annex SI-207; Slovenia's Memorial, para. 6.85; Transcript, Day 3, p. 137:18-19 *citing* 1965 Agreement on the Common Fishing Regime on the Borderline Watercourses entered into by Slovenia and Croatia "in the boundary quarters of the two republics at the rivers . . . Mura, Drava, Sotla, Bregana and Kolpa."

947 Slovenia's Reply, para. 2.83; Decision No. 324/A-196/74 concerning the water management consent for Srednja Drava 2 Hydroelectric Power Plant – drainage channel, 24 February 1975, Annex SI-897; Socialist Republic of Slovenia, Republic Secretariat for Industry, Decision No. 351/B-27/75-IND/SE permitting the construction of the dam in Markovci, power house in Formin as well as the drainage and water supply channels at "Srednja Drava II" Hydroelectric Power Plant, 28 March 1975, Annex SI-898; Socialist Republic of Slovenia, Republic Secretariat for Industry, Decision No. 351/B-176/75-IND/SE permitting the construction of the grout curtain on the drainage channel at Srednja Drava 2 Hydroelectric Power Plant, 20 August 1975, Annex SI-899; Socialist Republic of Slovenia, Republic Secretariat for Industry, Supplementary Decision No. 351/B-27/75-IND/ŠK Building Permit for the dam in Markovci, a power house in Formin as well as the drainage and water supply channels at "Srednja Drava II" Hydroelectric Power Plant, 23 December 1975, Annex SI-900; Socialist Republic of Slovenia, Republic Committee For Industry And Building & Construction, Ljubljana, Decision No. 351-06/86-8 permitting the operation of the Srednja Drava 2 Hydroelectric Power Plant – Formin, 23 September 1987, Annex SI-948; *see* Minutes of the '*ad hoc*' meeting of the Slovenian – Croatian Sub-Commission for the Drava and the Mura – the Drava Part, Ptuj, 27 March 2013, Annex SI-997.

948 Transcript, Day 3, p. 136:12-22 *citing* Croatia's Counter-Memorial, Figure 5.25 and Slovenia's Reply, Figure 2.21.

949 Slovenia's Reply, para. 2.80. *Cf.* Slovenia's Reply, Figure 2.20; Slovenia's Reply, Figure 2.21.

950 Transcript, Day 3, pp. 136:22-137:7.

Protocol which, as Slovenia emphasises, concerns the "wet boundary".[951] In any event, the relevant documents confirm that the cadastral records were not pertinent to the establishment of the boundary in the area.[952]

ii. The Tribunal's Analysis

492. The Tribunal observes, first, that in this region the limits of the cadastral districts are aligned. In principle, these cadastral limits represent the boundary. Slovenia, nonetheless, submits that this is in contradiction with the Josephine Survey dating back to the 18th century, and with the subsequent practice of both Parties.

493. The Tribunal notes that on 23 November 1900, a mixed Commission met for the "determination and revision" of the boundary between the Kingdom of Croatia and the Duchy of Styria.[953] With respect to the so-called "wet boundary" of the border, the mixed Commission observed that the existing boundary, as approved by the Imperial authorities, "is depicted in greater detail in the authorised maps dated 16 August 1830 and 14 October 1838, from the tri-point near Polstrau [Središće] to the boundary point No. 77 near Sauritsch (Zavrč)."[954] On that ground, the mixed Commission entrusted the performance of the demarcation in the Drava region to a technical Expert Group.

494. In light of the work performed by the Expert Group, a Protocol was signed by the competent authorities on 26 November 1904 "on the permanent marking of the Styrian-Croatian-Slavonian boundary from the tripoint at Središte to Zavrč."[955] The Protocol describes the precise location of all border stones, ancient and new. Maps showing the boundary are annexed to the Protocol. Triangulation was performed in 1912 to establish the astronomic coordinates of all the turning points of the border.[956]

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951 Slovenia's Reply, para. 2.81.

952 Slovenia's Reply, para. 2.84.

953 Minutes taken on 15 November 1900 and in the subsequent days on the results of the Determination and Revision of the boundary between the Kingdom of Croatia and the Duchy of Styria, 23 November 1900, Annex SI-841.

954 Minutes taken on 15 November 1900 and in the subsequent days on the results of the Determination and Revision of the boundary between the Kingdom of Croatia and the Duchy of Styria, 23 November 1900, para. I, Annex SI-84.

955 Protocol on the Permanent Marking of the Styrian-Croatian–Slavonian Boundary from the Tripoint at Središte to Zavrč, 26 November 1904, p. 1, Annex HR-136.

956 Minutes taken in Polstrau [Središče ob Dravi] and Friedau [Ormož] between the Representatives of Royal Hungarian Triangulation Office, Imperial and Royal Austrian Triangulation and Calculation Bureau, Land Registry of the Royal Croatian-Slavonian-Dalmatian Provincial Government and Imperial and Royal Governorship in Graz, 13 and14 May 1912, Annex SI-849; and Minutes taken in Friedau [Ormož] between

495. Croatia contends that the aligned limits of the cadastres represent the boundary thus fixed. Slovenia does not adduce any convincing evidence to the contrary. Therefore, the Tribunal determines that the boundary follows the aligned limits of the cadastres of Croatia and Slovenia.

496. The title having thus been established, the Tribunal does not need to discuss the *effectivités* invoked by Slovenia relating to fishing regulation and the construction of the artificial channel of the Formin hydroelectric power plant.

(c) Haloze-Macelj

497. Disputed area 4.1 is located in the region of Haloze in Slovenia and the region of Macelj in Croatia. The area is 0.5 ha in size. It is not recorded in the cadastre of either of the relevant border municipalities, Jesenje in Croatia or Žetale in Slovenia. In addition to area 4.1, Slovenia points out that there are three other cadastral discrepancies amounting to less than 50 m of the boundary.[957]

i. The Parties' Positions

498. Croatia initially proposed that the problem of the so-called gap between the Parties' cadastres in area 4.1 should be resolved between the Parties themselves.[958] Accordingly, Croatia did not provide any further documentary or cartographic evidence as to where the boundary in this area should lie. However, at the hearing, Croatia invited the Tribunal to determine the course of the land boundary in its entirety—a task that should include attributing areas that are not recorded in either Parties' cadastre "to one party or the other in accordance with the applicable law." [959]

499. As explained above, Slovenia submits that, in the Haloze-Macelj region between the Drava and the Sotla, the land boundary follows the "historically established State boundary between Styria and Croatia demarcated in 1907-1914."[960] Slovenia asserts that this demarcation was accepted by

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the Representatives of the Royal Hungarian Triangulation Office, Imperial and Royal Austrian Triangulation and Calculation Office, Land Registry of the Royal Croatian-Slavonian-Dalmatian Provincial Government and Imperial and Royal Governorship in Styria, 3-6 June 1912, Annex SI-850.

957 Slovenia's Memorial, paras 6.90-92; Slovenia's Reply, paras 2.86-87.

958 Croatia's Counter-Memorial, para. 5.57.

959 Transcript, Day 5, p. 186:24-25.

960 Slovenia's Memorial, para. 6.93.

the respective authorities[961] and is reflected in Slovenia's cadastral records.[962] Slovenia submits maps depicting the results of that demarcation as evidence, and argues that the Slovenian cadastral map is aligned with the early 20th century demarcation.[963]

500. Slovenia notes that Croatia simply asserts that the Parties agree on the boundary except for disputed area 4.1.[964] It asserts that only the historic title for the land boundary can resolve the issue of the gap constituted by that disputed area.[965] While Croatian records appear to attribute the small discrepancy that exists between Croatian and Slovenian cadastral records in area 4.1 to a possible historical change in the course of the riverbed, Slovenia questions that explanation. Slovenia points to maps from 1913 and 1914 to demonstrate that the demarcation did not follow the former riverbed.[966]

501. Slovenia specifically addresses the bordering cadastral municipalities Formin and Zavrč (Slovenia) and Dubrava Križovljanska (Croatia).[967] Slovenia claims that it was established that the latest official cadastral maps from Slovenia (1964) and Croatia (1911) of all these cadastral municipalities established a single boundary in the area, matching the demarcation line established in the last Austro-Hungarian survey.[968]

ii. The Tribunal's Analysis

502. Disputed area 4.1 represents territory in respect of which the Parties' cadastral limits do not coincide. It follows that the Tribunal cannot infer any agreement between the Parties at the critical date as to the location of the boundary of the Republics. The Tribunal shall thus proceed to a decision based on the limited evidence that it has before it.

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961 Slovenia's Memorial, para. 6.88; Note to the Imperial-Royal Governorship in Graz from the Royal-Imperial Ministry of the Interior (Vienna), 8 January 1915, Annex SI-47; Letter to the Imperial-Royal Ministry of the Interior (Vienna) from the Royal Croatian-Slavonian-Dalmatian Provincial Government (Department for the Interior), 1 March 1915, Annex SI-48.

962 Slovenia's Memorial, para. 6.93.

963 Slovenia's Memorial, para. 6.92; *See* Map No. 18 of the Maps concerning the II. Part of the Boundary between Styria and Croatia-Slavonia from Sauritsch-Dubrava up to the source of the Sotla River, 1913, Annex SI-M-21; Boundary between Croatia and Styria, Map No. 15 and Detail ad 14, Annex SI-M-22.

964 Slovenia's Reply, para. 2.85.

965 Transcript, Day 3, p. 139:12-16.

966 Slovenia's Memorial, para. 6.92.

967 Slovenia's Memorial, para. 6.91.

968 Slovenia's Memorial, para. 6.91; *see* Mixed Slovenian-Croatian Commission for the Demarcation, Maintenance and Restoration of the State Border, Joint Report of the Mixed Slovenian-Croatian Expert Group, Krapina, 25 October 1995, Section 4, Case 2, Annex SI-289.

503. Having reviewed the historical maps that the Parties have submitted to it, the Tribunal finds that the maps resulting from the 1912-1913 survey are detailed, and their accuracy (and authenticity) has not been challenged by Croatia. The boundary drawn on these maps was approved by the Royal-Imperial Ministry of the Interior and the Royal Croatian-Slavonian-Dalmatian Provincial Government in 1915.[969] According to Slovenia's uncontested statement, no later survey has been conducted in the area.[970]

504. The 1914 maps in particular clearly place the area of what is now described as area 4.1 within the cadastral municipality of Schiltern (now Žetale).[971] No documentary or cartographic evidence postdating the 1913/1914 maps has been proffered to the Tribunal in support of a different boundary line.

505. Accordingly, the Tribunal finds that the 1914 maps reflect the boundary in area 4.1 as it still stood in 1991, and as it is set out in Slovenia's cadastre. The Tribunal determines that the boundary shall be fixed accordingly. The same set of maps resulting from the 1912/1913 delimitation shall also be used to resolve the remaining three discrepancies of less than 50 m in the Haloze-Macelj region.

506. The Tribunal moreover notes that this reasoning is consistent with the one applied in disputed areas 5.1 and 5.2 (*see* paragraphs 520-522 of the present Award).

(d) Sotla River

507. The Sotla/Sutla River has its source in the southern Macelj. It is approximately 90 km long and flows generally from north to south.[972]

508. In this sector, the 1996 Expert Report identified two disputed areas: the area around Laduč/Loče and Velika Dolina, which it identified as area 5.1, and the Gornji Čemehovec/Stara Vas, which it identified as disputed area 5.2.

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969 Letter to the Royal-Imperial Ministry of the Interior (Vienna) from the Royal Croatian-Slavonian-Dalmatian Provincial Government (Department for the Interior), 1 March 1915, Annex SI-48.

970 Slovenia's Memorial, para. 6.88.

971 Detailed maps concerning the II. Part of the Boundary between Styria and Croatia-Slavonia from Sauritsch-Dubrava up to the source of the Sotla River, 14 July 1914, Map No. 15 and Detail ad 14, Annex SI-M-22.

972 Slovenia's Memorial, para. 6.94.

i. The Parties' Positions

509. As noted above, Croatia contends with respect to the Sotla River sector generally that the boundary is the historic Austro-Hungarian era boundary, whose course was based on a cadastral survey carried out in 1862.[973] The course of that boundary is, it says, the line indicated by the border markers that had delimited the Kingdom of Croatia and Slavonia and the Duchy of Styria, which the Joint Expert Group said corresponded with the cadastral boundary of Laduč.[974] Croatia notes that in 1912-1913 official surveyors from the Kingdom of Croatia and the Duchy of Styria had demarcated the boundary, matching Croatia's cadastral limits. Moreover, the surveyors' Protocol dated 13 July 1912 stated that, in places where the boundary and the river had once coincided, the boundary should follow the cadastral limits, even if the river had changed course.[975] Croatia says that this boundary line also corresponds to Croatia's *effectivités*, demonstrated in the exercise of jurisdiction by a court in Zagreb over matters relating to land in the area.[976]

510. In response to Slovenia's claim that the boundary is the middle of the Sotla River, Croatia says that "[t]he river might have been regarded as a boundary in the middle ages, or even as late as the Josephine period; but beginning at least as far back as the Franciscan period, these boundaries were fixed and remained fixed, and no longer followed the changing rivers."[977] As explained above, Croatia also says that Slovenia's claims that the boundary follows the middle of the river do not conform with Slovenia's own practice during the twentieth century, when Slovenian maps showed the boundary departing from the course of the river and following the boundaries of districts making up the *banovine* of Croatia and Slovenia.[978]

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973 Croatia's Counter-Memorial , paras 5.50, 5.52.

974 Minutes on Field Works in the Area of Unaligned Borders of Cadastral Districts, Border Sector V, Case 1 (Laduč/Loče), Joint Expert Group (Čatež ob Savi, 25 September 1997), p. 7, Annex HR-306.

975 Protocol on the Determination of Technical Procedures for the Establishment of the Third Part of the Croatian-Styrian Boundary Alongside the Sutla River, Zagreb, 13 July 1912, Annex HR-137. The Tribunal notes that this Protocol says that "the border points [will be] provisionally marked with strong poles," but understands this phrase, in the context in which it occurs, to refer to provisional markers, rather than to a provisional boundary.

976 Croatia's Counter-Memorial, para. 5.55. *Cf.* Decision of the Municipal Court in Zagreb on Plot 4126/3, Zagreb, 8 May 1978, Annex HR-222; Decision of the Department for Cadastre, Zaprešić on Plot 4126/3, Zaprešić, 26 October 1978, Annex HR-223; Decision of the Municipal Court in Zagreb on Inheritance of Plot 4125/4 , Zagreb, 29 December 1988, Annex HR-258.

977 Transcript, Day 5, pp. 183:24-184:2.

978 Croatia's Reply, paras 2.44-49.

511. Slovenia contends that the boundary follows the middle of the Sotla River[979] in Croatia's Laduč cadastral district. As a consequence, a further 164 ha not included within Slovenia's cadastral boundaries belong to Slovenia.[980]

512. Slovenia relies upon the Josephine land surveys,[981] and maps and cadastral records from the period 1811-1825,[982] and the description in the 1932 Almanac of the Kingdom of Yugoslavia of the boundary as running "along the Sotla River."[983] This is confirmed, according to Slovenia, by Slovenian authorities,[984] and the *effectivités* in the area.[985] Slovenia notes that the cadastral limits "were never comprehensively adapted to the new situation on the ground."[986] Consequently, while the course of the river departed from the limits in places, the river remained the boundary. It observes that in the 1960s Croatia had acted unilaterally to align its cadastre with the course of

979 Slovenia's Memorial, paras 6.95-97. Transcript, Day 3, pp. 140-43.

980 Slovenia's Reply, para. 2.89, *referring to* Croatia's Counter-Memorial, para. 5.50.

981 Joseph II Land Survey, Inner Austrian provinces, sec. 197 (1763-1787), Annex SI-M-2.

982 Slovenia's Memorial, paras 6.95-101; Annexes SI-M-2; *see* Mirko Valentić, Ivana Horbec and Ivana Jukić (eds), *Hrvatska na tajnim zemljovidima 18. i 19. Stoljeća* [Secret Maps of Croatia from the 18th and 19th century]*: Varaždinska županija* [Varaždin County], Vol. 7, Hrvatski institut za povijest, Zagreb, 2005, p. 307, Annex SI-3; Map of the boundary between Styria and Croatia (1811), Annex SI-M-11; Cadastral maps of the cadastral municipalities along the Sotla River (1824, 1825, 1828), Annex SI-12.

983 Slovenia's Memorial, paras 6.95-100. Transcript, Day 3, p. 140:1-5. *Almanac of the Kingdom of Yugoslavia, General State Administration (Banovine, Districts, Municipalities and Towns)*, Editorial Board of the Almanac of the Kingdom of Yugoslavia, Zagreb, 1932, p. 33, Annex SI-67.

984 Slovenia's Memorial, para. 6.99; Surveying and Mapping Authority of the Socialist Republic of Slovenia, Information on Problems Caused by the Undefined Boundary with the Socialist Republic of Croatia, No. 45-d-25/25-70, 29 March 1972, Annex SI-181; *see* Letter to the Surveying and Mapping Authority of Socialist Republic of Slovenia from the Šmarje Surveying and Mapping Authority, 16 June 1971, Annex SI-180; Letter to the Secretariat for Justice and General Administration of the Socialist Republic of Croatia, to the Secretariat for Justice, Organisation of Administration and the Budget of the Socialist Republic of Slovenia, 17 May 1978, Annex SI-197.

985 Slovenia's Memorial, para. 6.100; *See* Decree on a General Flood Protection Plan for 1954, *Official Gazette of the People's Republic of Croatia*, No. 4/54 (item II), Annex SI-136; *See also Official Gazette of the People's Republic of Croatia*, Nos. 7/55, 4/56, 1/57, 9/58, 4/59, 2/60, 2/61, 2/62 (item II); *Official Gazette of the Socialist Republic of Croatia*, Nos. 1/63, 3/64, 1/65 (item II), No. 55/83 (item X). *See also Official Gazette of the Socialist Republic of Croatia*, No. 54/1984 (item IX), Annex SI-209; Article I (1), Decree Defining the Boundaries of River Basin Districts in the Socialist Republic of Slovenia, *Official Gazette of the Socialist Republic of Slovenia*, No. 41/1966, Annex SI-171; Article 1 (3), Decree Defining the Boundaries of River Basin Districts in the Socialist Republic of Slovenia, *Official Gazette of the Socialist Republic of Slovenia*, No. 6/75, Annex SI-189; Article 1 (g), Decree Establishing Fishing Areas, *Official Gazette of the People's Republic of Slovenia*, No. 17/59, Annex SI-156; Article 6, Freshwater Fisheries Act, *Official Gazette of the People's Republic of Slovenia*, No. 22/1958, Annex SI-155; Article 18, Freshwater Fisheries Act, *Official Gazette of the Socialist Republic of Slovenia*, No. 25/1976, Annex SI-192. *See* Agreement between the Assembly of the Brežice Municipality and the Brežice Fishing Club on the granting of the Brežice fishing environ to further management, 17 March 1982, Annex SI-206; Agreement between the Assembly of the Šmarje pri Jelšah Municipality and the "Sotla" Podčetrtek Fishing Club on the granting of the Sotla fishing environ to the management, 3 July 1981, Annex SI-204.

986 Slovenia's Memorial, para. 6.97.

the Sotla River.[987] Slovenia criticizes Croatia's reliance on the 1912 Protocol and explains that no final delimitation had been affected then, but only preparatory steps had been undertaken.[988]

513. Turning specifically to area 5.1, Croatia argues that its cadastral district boundary is based on a cadastral survey carried out in 1862, as opposed to Slovenia's claim being based on "several different maps prepared at different times and for a variety of purposes."[989] Moreover, a 1997 field survey conducted by the Joint Expert Group determined that Croatia's cadastral boundary accurately reflected the historic boundary on the critical date.[990] Croatia contends that the Joint Experts determined that the "bilaterally determined border" between the Kingdom of Croatia and Styria should "continue to be considered a collated cadastral border", and that the border of Croatia's Laduč cadastral district "corresponds" to this boundary.[991] In contrast, Croatia argues that the Joint Expert Group noted "major deviations" from that historic boundary in Slovenia's Loče cadastral district.[992] In short, Croatia asserts that the cadastral district boundaries are correct because they follow the historic delimitation between Croatia and Styria.[993] The exercise of jurisdiction by a Croatian court over the area further confirms Croatia's title, as *effectivité*.[994]

514. With respect to area 5.1, Slovenia responds that the 1997 Minutes do not support Croatia's claim but indicate that the boundary should be delimited on the basis of documentation for the border between Croatia and Styria, an area on which the Expert Group had no evidence or knowledge.[995]

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987 Slovenia's Reply, para. 2.94.

988 Slovenia's Reply, para. 2.95; Protocol on the Determination of Technical Procedures for the Establishment of the Third Part of the Croatian-Styrian Boundary Alongside the Sutla River (Zagreb, 13 July 1912), Annex HR-137; *cf.* Minutes taken in Agram [Zagreb] between the Representatives of the Royal Hungarian Triangulation Office, Imperial and Royal Austrian Triangulation and Calculation Office, Land Registry of the Royal Croatian-Slavonian-Dalmatian Provincial Government and Imperial and Royal Governorship in Graz, 13 July 1912, Annex SI-851.

989 Croatia's Counter-Memorial, para. 5.52; *see* Slovenia's Memorial, paras 6.95-96.

990 Croatia's Counter-Memorial, paras 5.53-54; *see* Minutes on Field Works in the Area of Unaligned Borders of Cadastral Districts, Border Sector V, Case 1 (Laduč/Loče), Joint Expert Group (Čatež ob Savi, 25 September 1997), p. 6, Annex HR-306; Transcript, Day 2, p. 25:16-20.

991 Transcript, Day 2, pp. 25:21-26:3.

992 Transcript, Day 2, p. 26:3-6.

993 Transcript, Day 2, p. 26:17-19.

994 Croatia's Counter-Memorial, para. 5.55; Decision of the Municipal Court in Zagreb on Plot 4126/3, Zagreb, 8 May 1978, Annex HR-222. On the basis of Decision of the Municipal Court in Zagreb on Plot 4126/3, the Department for Cadastre and Geodetic-Technical Documentation Zaprešić, as part of the Institute for Cadastre and Geodetic Affairs Zagreb, adopted a decision on 26 October 1978 by virtue of which the data in cadastral records were changed accordingly, *see* Decision of the Department for Cadastre, Zaprešić on Plot 4126/3, Zaprešić, 26 October 1978, Annex HR-223. *See also* Decision of the Municipal Court in Zagreb on Inheritance of Plot 4125/4, Zagreb, 29 December 1988, Annex HR-258 (The Court decided that Ana Španjol, the late Vlado Španjol's spouse, would inherit plot 4125/4.); Decision of the Municipal Court in Zagreb on Inheritance of Part of Plot 4125/5, Zagreb, 25 November 1988, Annex HR-256.

995 Slovenia's Reply, para. 2.90.

Further, Slovenia submits that the exercise of jurisdiction by a Croatian court does not constitute appropriate evidence, as the exercise of jurisdiction in inheritance disputes is based on the residence of the deceased at the time of death, not the location of the real property concerned.[996] Slovenia adds that other evidence relied on by Croatia is equally unpersuasive: in particular, Slovenia suggests that the decision of the Croatian cadastral authorities to modify the ownership data of a given cadastral plot can at best show that Croatian authorities held these cadastral records.[997]

515. In relation to area 5.2, Croatia's claim is based on a 1965 cadastral survey.[998] Croatia asserts that Slovenia's claim is inconsistent with its cadastral district boundary claim in relation to this area.[999] Slovenia responds that Croatia modified its cadastre unilaterally and without any coordination with the Slovene authorities in order to adapt it to the new course of the river and the Republic's boundary. This unilateral change is at the origin of disputed area 5.2.[1000] According to Slovenia, Croatia unilaterally altered its cadastre in the 1960s, without this modifying the perception of the Sotla as the boundary.[1001] Slovenia contends that most of the cadastral maps submitted by Croatia depict the boundary in the middle of the Sotla River.[1002]

ii. The Tribunal's Analysis

516. As has been explained,[1003] the Tribunal has decided that where the cadastral limits of Croatia and Slovenia coincide, the line of the aligned cadastral limits constitutes a *prima facie* indication of the boundary between the two States. The Tribunal also applies that approach here.

517. The Tribunal notes that the aligned cadastral boundary ceased in certain places to coincide with the middle of the river. It was, of course, open to the authorities to amend the cadastral boundaries from time to time. The Tribunal considers that in circumstances where they did not do so, very clear evidence would be necessary to justify the redrawing of the boundary now. It would have to be shown that the authorities were agreed that the cadastral boundaries that remained aligned

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996 Slovenia's Reply, para. 2.91.

997 Slovenia's Reply, para. 2.92.

998 Croatia's Counter-Memorial, para. 5.56; Minutes on Collating Unaligned Borders of Cadastral Districts, Border Sector V, Case 2 (Gornji Čemehovec/Stara Vas) Joint Expert Group, Klanjec, 13 September 1995, p.1, Annex HR-295.

999 Croatia's Counter-Memorial, para. 5.56.

1000 Transcript, Day 3, p. 141:6-15.

1001 Transcript, Day 2, p.140:19-23.

1002 Slovenia's Reply, paras 2.93-94; Transcript, Day 3, p. 140:5-21.

1003 *See supra*, para. 345.

should not be counted as the boundary between Croatia and Slovenia, and that some other agreed line should count as the boundary.

518. The Tribunal has not found any such evidence. The Tribunal regards the references in the 1932 Almanac to the boundary running "along the Sotla River"[1004] as insufficiently precise and peremptory to indicate that the boundary was understood to follow the middle of the Sotla River wherever that might be from time to time, and regardless of its coincidence with the cadastral limits. That might have been the case if there had been evidence of an agreement between the Parties that the boundary shall run along the mid point of the main channel of the Sotla River and shall continue to do so regardless of any changes in the course of the river. But there is no such evidence.

519. Similarly, Slovenia's various regulatory measures concerning fishing and river regulation do not appear to the Tribunal to contain convincing evidence of acceptance that the Slovenia-Croatia boundary follows the mid-line of the river, regardless of where the aligned cadastral limits lie.[1005] Accordingly, the Tribunal confirms the boundary in those parts where the cadastral limits coincide. In this sector, it therefore only remains for the Tribunal to determine the boundary in areas 5.1 and 5.2.

520. In area 5.1, the disagreement is between Croatia's contention that the boundary follows its cadastral limits, and Slovenia's contention that it follows the middle of the Sotla River. The Tribunal considers that there is no compelling evidence in respect of this area that the Parties had agreed at any stage to disconnect the boundary from the cadastral limits.

1004 *See* Slovenia's Memorial, paras 6.99-100.

1005 *See e.g.*, Decree on a General Flood Protection Plan for 1954, *Official Gazette of the People's Republic of Croatia*, No. 4/54 (item II), Annex SI-136; Freshwater Fisheries Act, Article 6, *Official Gazette of the People's Republic of Slovenia*, No. 22/1958, Annex SI-155; Decree Establishing Fishing Areas, Article 1 (g), *Official Gazette of the People's Republic of Slovenia*, No. 17/59, Annex SI-156; Decree Defining the Boundaries of River Basin Districts in the Socialist Republic of Slovenia, Article I (1), *Official Gazette of the Socialist Republic of Slovenia*, No. 41/1966, Annex SI-171; Decree Defining the Boundaries of River Basin Districts in the Socialist Republic of Slovenia, Article 1 (3), *Official Gazette of the Socialist Republic of Slovenia*, No. 6/75, Annex SI-189; Freshwater Fisheries Act, Article 18, *Official Gazette of the Socialist Republic of Slovenia*, No. 25/1976, Annex SI-192; Krško District People's Committee's Decision on Establishing Hunting Grounds and Determining the Borders of the Hunting Grounds in the Krško District, 13 October 1954, Annex SI-491; Water Management Administration of the People's Republic of Croatia: Sutla river valley – Economic explanation in relation to the regulation of the Sutla River and the construction of the railway line from Savski Marof to Kumrovec (1955); Documentation regarding the "Imensko Polje" Amelioration Project (1955 and 1959), Annex SI-492.

521. As for the precise location of those cadastral limits, Slovenia submitted a cadastral map dated 1825,[1006] while Croatia submitted its own cadastral records based on an 1862 survey, [1007] whose accuracy had allegedly been confirmed by field measurements, conducted in 1912-1913 by official surveyors."[1008] In these circumstances, the Tribunal considers that preference is to be given to the line based on the 1862 survey. The Tribunal accordingly determines that, in disputed area 5.1, the boundary follows the limits of the Croatian cadastral district of Laduč.

522. Also in area 5.2, Slovenia contends that the boundary should follow the middle of the river. It refers to the record of a meeting of the Mixed Expert Group in 1996, [1009] which noted a discrepancy between the Croatian and Slovenian cadastral boundaries but observed that "[a]t the time of the survey, both boundaries run on the middle of channel of the Sotla River."[1010] Croatia's cadastral limit follows the course of the Sotla River in this location. The Tribunal finds that there is in fact no disagreement between the Parties concerning the boundary in area 5.2. The Tribunal therefore determines that the boundary depicted in Croatia's cadastral register stands as the agreed boundary.

(e) Sava and Bregana Rivers

523. The Sava crosses Slovenia in a general south-easterly direction.[1011] The Bregana is a small stream rising on the Croatian side of the Gorjanci (Žumberak, in Croatian), a range of mountains in the frontier areas between Croatia and Slovenia. It flows through the valleys of the Gorjanci before it meets the Sava.[1012]

1006 Cadastral maps of the cadastral municipalities along the Sotla River (1824, 1825, 1828), Annex SI-12. The Tribunal notes that this map does not align with the Slovenian cadastral limits depicted in Croatia's Reply, Vol. III/3, Map 49-7.

1007 Croatia's Counter-Memorial, para. 5.52; Croatia's Reply, Vol. III/3.

1008 Croatia's Counter-Memorial, para. 5.96-98, *citing* Protocol on the Determination of Technical Procedures for the Establishment of the Third Part of the Croatian-Styrian Boundary Alongside the Sutla River (Zagreb, 13 July 1912), Annex HR-137.

1009 Slovenia's Counter-Memorial, para. 2.94.

1010 Minutes on Field Works in the Area of Unaligned Borders of Cadastral Districts, Border Sector V, Case 1 (Laduč/Loče), Joint Expert Group, Čatež ob Savi, 25 September 1997, Annex HR-306.

1011 Slovenia's Memorial, para. 6.103.

1012 Slovenia's Memorial, para. 6.104.

i. Area 6.1

524. In the sector of the Sava and Bregana Rivers, the Expert Group identified a disputed area 6.1 in which the cadastral limits of the Parties are not aligned. Area 6.1 is located in the Croatian cadastral district of Laduč and the Slovenian cadastral district of Velika Dolina.

The Parties' Positions

525. According to Croatia, the boundary in that area follows the right bank of the Sava River, while, according to Slovenia, it follows the middle of the river. [1013] The disputed area extends over 1 km of the boundary and encompasses 27.3 ha.

526. Croatia submits that its claim accurately reflects the boundary that delimited Croatia and Austria at the time of the Austro-Hungarian Empire. In support of that submission, it produces a 1940 reproduction of an official 1862 cadastral map. It also contends that the relevant cadastral plots are either managed or owned by Croatian public entities.[1014]

527. Slovenia contests the interpretation given by Croatia of the 1862 map and stresses that the situation depicted on that map is contradicted by Croatia's own maps, provided both on its geoportal and in the present case. It submits that the 1862 map no longer corresponds to the situation. Slovenia notes that the 1862 map as reproduced in 1940 described the boundary not between Carniola and Croatia but between the *banovine*, and simply depicts the riverbed of the Sava as it was at the time of the survey. Slovenia further points out that the line on the map is contradicted by the cadastral evidence available on the Geoportal.[1015] Furthermore, Slovenia contends that the 1940 reproduction is contradicted by Croatia's own topographical maps provided in Volume III of its Counter-Memorial.[1016]

528. Slovenia contests both in fact and in law the arguments based by Croatia on the management or ownership of the relevant plots. Slovenia argues that Croatia relies on "outdated cadastral maps" and that Croatia's records do not correspond to the territorial situation on the ground.[1017] In response to Croatia's argument that land plots in the disputed area are owned by Croatian State

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1013 *See* Croatia's Counter-Memorial, para. 5.47; *see* Slovenia's Memorial, para. 6.113; Transcript, Day 2, p. 24:3-5.

1014 Croatia's Counter-Memorial, para. 5.49; List of Plots for the Cadastral District of Laduč, Book I, Plots 1-2750, Zagreb, 20 May 1966, Annex HR-191.

1015 *See* Slovenia's Reply, para. 2.97.

1016 Slovenia's Reply, para. 2.98.

1017 Transcript, Day 3, pp. 144:20-145:13.

entities, Slovenia asserts that this does not constitute sufficient proof of title and that the evidence submitted by Croatia is unreliable.[1018]

The Tribunal's Analysis

529. The Tribunal observes that in the present case, the cadastral records established in Carniola in 1824 indicate that the boundary is in the middle of the major arm of the Sava.[1019] By contrast, the Croatian cadastral map of 1862 places the boundary on the right bank. A joint commission met in 1864 and proposed that the State border be fixed in the middle of the river.[1020] In the beginning of the 20th century, a regulation of the Sava river was contemplated, and a new joint commission was established in 1909 "for the demarcation of . . . the state border between Cisleithania and Transleithania."[1021] Except in the vicinity of the junction of the Sava and the Bregana, it proposed "the axis (the middle) of the newly regulated Sava River—analogously to the decisions of the commission of 27 July 1864—as the future state border." [1022] However, the Imperial Administration in Vienna noted in 1910 that "the regulated course of the Sava River in this area has not been finally determined yet" and proposed that a new Commission be convened to take into account "the present situation".[1023] The Hungarian authorities expressed the view that it was "unnecessary to send a second commission to check the calculations" of the first one, but reluctantly agreed to do so.[1024] No further decision was taken.

530. The Tribunal notes, however, that the 1909 Joint Commission explained that "the newly established border line [which it proposed] will coincide with the already existing and undisputed line."[1025] Moreover, in 1910, the Minister of Interior of Hungary expressed the view that the proposal made by the joint commission:

> to take the centre of the Sava river, which is to be regulated, as the border line, is advantageous for both interested countries in all respects, since, regardless of the changes in the project of the regulation of the Sava concerning this section, the future, regulated riverbed, due to the structure of the terrain, still remains in the present, unregulated, very

1018 Slovenia's Reply, para. 2.99.

1019 Sheet Nos. VII and X of the cadastral municipality of Velika Dolina (1824), Annex SI-13.

1020 Protocol of the Joint Commission, 21 September 1909, p. 4, Annex SI-37.

1021 Protocol of the Joint Commission, 21 September 1909, p. 1, Annex SI-37.

1022 Protocol of the Joint Commission, 21 September 1909, p. 4, Annex SI-37.

1023 Letter to the Imperial-Royal Provincial Government in Laibach [Ljubljana] from the Imperial-Royal Ministry of the Interior, 17 October 1910, p. 1, Annex SI-41.

1024 Letter to the Imperial-Royal Provincial Government in Laibach [Ljubljana] from the Imperial-Royal Ministry of the Interior, 6 June 1911, p. 2, Annex SI-42.

1025 Protocol of the Joint Commission, 21 September 1909, p. 4, Annex SI-37.

> wide Sava river bed, which has always been regarded as the state border, and therefore cannot be changed to any major disadvantage for the territory of Carniola.[1026]

531. The Tribunal considers this statement of the 1909 Joint Commission and this recognition by Hungary to be decisive as far as area 6.1 is concerned. In that area, the Tribunal therefore determines that the boundary is as indicated by the 1909 Joint Commission, following the middle of the Sava River.

ii. Junction of the Sava and Bregana Rivers

The Parties' Positions

532. Slovenia contends that, even outside area 6.1, the boundary between the two countries in that sector runs "from the mouth of the Sotla in the middle of the Sava River up to the mouth of the Bregana, and continue[s] on the latter river upstream up to the settlement of Gabrovica".[1027] By contrast, Croatia submits that, outside area 6.1, the boundary follows the aligned limits of the Parties' cadastral districts. At certain points, these differ from the course of the rivers. The dispute essentially concerns two areas in the vicinity of the junction of the Bregana with the Sava.

533. Slovenia claims that the maps of the Josephine Survey clearly mark the Bregana and Sava Rivers and the boundary running along both rivers.[1028] Slovenia also relies on various 19th century and early 20th century sources.[1029] Slovenia explains that this is not necessarily reflected in the

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1026 Quoted in Letter to the Imperial-Royal Provincial Government in Laibach [Ljubljana] from the Imperial-Royal Ministry of the Interior, 6 June 1911, p. 2, Annex SI-42.

1027 Slovenia's Memorial, para. 6.113.

1028 Slovenia's Memorial, para. 6.105; Joseph II Land Survey, Inner Austrian provinces, Section 235 (1763-1787), Annex SI-M-4.

1029 *See* Slovenia's Memorial, paras 6.106-10; Letter to the Government of Carniola from the Imperial-Royal Governorship of Styria, 2 August 1910, Annex SI-40; *See* cadastral municipality of Velika dolina, Sheet Nos. Vll and X (1824) (sheet No. 7), Annex SI-13; *See* Protocol of the Joint Commission, 21 September 1909, Annex SI-37; Letter of the Imperial-Royal District Administration of Neustadt [Novo mesto] to the Imperial-Royal Provincial Government, 20 August 1838, Annex SI-16; cadastral municipality of Bregana, Sheet Nos. I, II, Ill, N, V (1824), Annex SI-14; Cadastral municipality of Koritno, Sheet Nos. VI, VII (1824), Annex SI-15; Protocol of the Joint Commission, 21 September 1909, Annex SI-38; Appendix II (Actual situation of the Works) to the Letter to the Imperial-Royal Provincial Government in Laibach [Ljubljana] from the Imperial-Royal Ministry of the Interior, 17 October 1910, Annex SI-41; Letter to the Imperial-Royal Provincial Government in Laibach [Ljubljana] from the Ministry of the Interior, 9 April 1910, Annex SI-39; Letter to the Imperial-Royal Provincial Government in Laibach [Ljubljana] from the Imperial-Royal Ministry for the Interior, 17 October 1910, Annex SI-41; Letter to the Imperial-Royal Provincial Government in Laibach [Ljubljana] from the Imperial-Royal Ministry of the Interior, 6 June 1911, Annex SI-42; Letter to the Imperial-Royal Provincial Government of Carniola in Laibach [Ljubljana] from the Royal Croatian-Slavonian-Dalmatian Provincial Government, 16 March 1912, Annex SI-44; Letter to the Imperial-Royal Provincial Government in Laibach [Ljubljana] from the Imperial-Royal Ministry of the Interior, 6 June 1911, Annex SI-42; Slovenia faults Croatia for relying on an 1861 unilateral survey. Slovenia's Reply, para. 2.101.

cadastral records because the survey and demarcation of the boundary on the ground could only be done once the regulated course of the Sava had been definitely fixed.[1030] Slovenia suggests that, even though the exact demarcation had never been finalized, the middle of the river was accepted as the boundary.[1031] Slovenia asserts that the boundary was reflected in the 1932 Almanac[1032] and remained largely identical, despite several modifications until 1945. During the early years of Slovenia and Croatia, some further territorial changes were implemented and reflected in the legislation of the Republics.[1033]

534. Croatia notes that Slovenia ignores the 1996 Report and makes new claims, seeking to transfer 39.3 ha from Croatia.[1034] Croatia argues that the new claims are not only contrary to the principle *uti possidetis* and to Slovenia's own law, but also lack any factual basis.[1035] Croatia criticizes Slovenia's reliance on "a never-implemented proposal from 1909,"[1036] and says that Slovenia's reliance on documents from a 1824 survey is also misplaced, as a subsequent 1861 survey superseded the 1824 one.[1037] Finally, Slovenia's new claims fail because of Croatia's *effectivités*.[1038]

The Tribunal's Analysis

535. The Tribunal first observes that, in the segment considered here, the limits of the cadastral districts are aligned. These aligned limits constitute a *prima facie* indication of the boundary.

536. Slovenia, however, submits that this could not be so because "[t]his part of the land boundary has always been determined with reference to the Sava and the Bregana Rivers."[1039] Nevertheless, most of the documents submitted to the Tribunal do not provide precise information concerning

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1030 Slovenia's Memorial, para. 6.111; *See* Letter to the Imperial-Royal Provincial Government in Laibach [Ljubljana] from the Imperial-Royal Ministry for the Interior, 6 March 1913, Annex SI-46; Letters to the Imperial-Royal Provincial Government of Carniola in Laibach [Ljubljana] from the Royal Croatian-Slavonian-Dalmatian Provincial Government of 24 May 1916 and 13 December 1917, Annexes SI-49 and SI-50.

1031 Slovenia's Reply, para. 2.100.

1032 Slovenia's Memorial, para. 6.112; *Almanac of the Kingdom of Yugoslavia, General State Administration (Banovine, Districts, Municipalities and Towns),* Editorial Board of the Almanac of the Kingdom of Yugoslavia, Zagreb, 1932, p. 33, Annex SI-67.

1033 Transcript, Day 3, p. 143:2-11.

1034 Croatia's Counter-Memorial, para. 5.101.

1035 Croatia's Counter-Memorial, para. 5.102.

1036 Croatia's Counter-Memorial, para. 5.102.

1037 Croatia's Counter-Memorial, para. 5.103; Transcript, Day 2, p. 24:16-18.

1038 Croatia's Counter-Memorial, para. 5.104.

1039 Slovenia's Memorial, para. 6.105.

the area of the junction of the Bregana with the Sava.[1040] The only document that provides such information is the 1824 cadastral map. However, on this outdated map the Sava River is situated east of its present bed and the map gives to Carniola zones which are not claimed today by Slovenia.[1041] In contrast, Croatia provides an 1861 cadastral map of Podvrh,[1042] an 1882 map created by the Military Geographic Institute of Vienna,[1043] and a 1985 map created by the Slovenian Geodetic Institute,[1044] which reproduce a border similar to the aligned cadastral limits near the junction.

537. The Tribunal further notes that, in 1909, the joint commission did consider separately the question of the delimitation of the boundary at the junction of the Sava and the Bregana and proposed a specific delimitation in that area the course of which would have been similar to the present aligned cadastral lines.

538. The Tribunal thus concludes that Slovenia cannot point to any agreed decision fixing the boundary in the Sava River in the vicinity of its junction with the Bregana. Accordingly, the aligned cadastral lines must be retained.

539. With respect to the Bregana itself, Slovenia refers to an 1824 survey of the cadastral districts of Velika Dolina, Bregana and Koritno[1045] for the premise that the river was considered to be the border. For its part, Croatia contends that this survey was superseded in 1861 by a survey of the cadastral district of Podvrh, on which the existing cadastres were based.[1046]

540. Slovenia has not provided evidence of any title relating to the area in question—from the mouth of the Sotla in the middle of the Sava River up to the mouth of the Bregana, and continuing on

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1040 Sheet Nos. I, II, III, IV and V of the cadastral municipality of Bregana (1824), Annex SI-14; Sheet Nos. VI and VII of the cadastral municipality of Koritno (1824), Annex SI-15; Letter of the Imperial-Royal District Administration of Neustadt [Novo mesto] to the Imperial-Royal Provincial Government, 20 August 1838, Annex SI-16; *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 93/1945, Annex SI-84; Letter sent from Imperial and Royal Ministry of Public Works to Imperial and Royal Provincial Government in Ljubljana regarding the Determination of the provincial boundary between Carniola and Croatia from Jessenitz [Jesenice] to Bregana, 21 May 1911, Annex SI-847; Gazetteer of the Drava banovina places (1937), Annex SI-853.

1041 Sheet Nos. VII and X of the cadastral municipality of Velika Dolina (1824), Annex SI-13.

1042 Croatia's Counter-Memorial, para. 5.103, Figure CM 5.33.

1043 Croatia's Counter-Memorial, para. 5.103, Figure 5.34.

1044 Croatia's Counter-Memorial, para. 5.103, Figure 5.35.

1045 Protocol of the Joint Commission, 21 September 1909, Annex SI-37; Sheet Nos. VII and X of the cadastral municipality of Velika Dolina (1824), Annex SI-13.

1046 Croatia's Counter-Memorial, para. 5.103, Figure 5.33.

the latter river upstream up to the settlement of Gabrovica—and the Tribunal accordingly determines that the boundary follows aligned limits of the cadastres of Croatia and Slovenia.

541. The Tribunal adds that Croatian *effectivités* support this conclusion. It notes in particular that in the vicinity of the junction of the two rivers, Croatia during the mid-1980s expropriated more than 60 plots of land in the disputed zone, north of the Bregana, and awarded permits for the construction of an important well field which supplies water to the Croatian cities of Samobor and Zagreb.

(f) Gorjanci/Žumberak

542. In the Gorjanci/Žumberak area, Croatia submits, the land boundary must follow Croatia's own cadastral limits, which, it argues, conform with the historic Austro-Hungarian boundary.

543. Slovenia recalls that this particular area was part of the Military Frontier at the time of the Austro-Hungarian Empire. The Military Frontier was dissolved in 1881 and it was then placed under Croatian civil administration on a provisional basis.[1047] However, the boundary in the areas of Žumberak and Marindol had not yet been fixed in 1918. According to Slovenia, the situation became clear only after World War II, when Marindol was attached to Slovenia and Žumberak to Croatia, with the exception of some areas which are presently disputed.

544. The Tribunal notes that the history of the Military Frontier is complex. The Military Frontier was established in the sixteenth century as a buffer zone against Ottoman incursions. It neither formed part of Carniola nor Croatia, and was directly administered from Vienna.[1048]

545. An Imperial Law of 8 June 1871 authorised "the transfer of part of the Military Frontier from the military administration to the civil administration" of Hungary. The district of Sichelburg (Žumberak) and the Municipality of Mariental (Marindol) were provisionally exempted from the transfer.[1049] It was specified that "during the regulation of the border which had to be carried out at the same time, the entitlement of the Duchy of Carniola to these parts of the territory is duly to

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1047 Slovenia's Counter-Memorial, para. 5.33.

1048 Slovenia's Memorial, para. 6.115; Slovenia's Counter-Memorial, paras 5.30-31 *referring to* Joseph II Land Survey, Inner Austrian provinces, 1763-1787, Annex SI-M-1; Joseph II Land Survey, Croatia, 1763-1787, Annex SI-M-6.

1049 Law Authorizing the Ministry of the Kingdoms and Territories Represented in the Council of the *Reich* to Conclude an Agreement with the Hungarian Ministry Concerning the Contribution to the Common Affairs in Relation to the Transfer of Part of the Military Frontier from the Military Administration to the Civil Administration, 8 June 1871, *Reichsgesetzblatt*, No. 149/1871, Annex SI-27.

be taken into consideration, and that the regulation of the border will be submitted to the approval of the Imperial authorities."[1050]

546. An Imperial and Royal Decree of 15 July 1881 formalised the transfer of the Military Frontier to the Kingdom of Croatia and Slavonia. However, the Decree specified that "the frontier issues regarding the Žumberak District and the Marindol town municipality" had not yet been solved. The decree further stipulated that "the provincializing of these areas stay[ed] in abeyance" until the constitutional regulation of the issue but "in order to avoid any disturbance in the administration of these areas," that administration was temporarily transferred to the Ban of Croatia, Slavonia and Dalmatia.[1051]

547. A first survey was carried out in the disputed areas in 1883. No agreement could be reached.[1052] In 1908, a more general survey was contemplated for the settlement of the disputed boundaries between the Duchy of Carniola and the Kingdom of Croatia and Slavonia. The survey, however, showed that "[t]he disputed areas at Sichelburg [Žumberak] and Mariental [Marindol] have been left out of consideration at present, separate negotiations were launched as regarding these areas with the Royal Hungarian Prime Minister, which have not yet been concluded."[1053] The negotiations remained unresolved in 1918.

548. The Tribunal therefore concludes that, in 1918, the land boundary was not yet fixed in these two then disputed areas. Contrary to what is alleged by Croatia, the Tribunal notes that there was no "historic Austro-Hungarian boundary" in these areas.

549. Between the two World Wars, the borders of Slovenia and Croatia were modified several times,[1054] first in favour of Croatia, and later in favour of Slovenia. As a result, "the border

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1050 *Ibid.*

1051 Imperial and Royal Decree concerning the Unification of the Croatian-Slavonian Frontier Province with the Kingdom of Croatia and Slavonia, and thereby with the Countries of My Hungarian Crown, 15 July 1881, *Official Gazette for the Croatian-Slavonian Vojna Krajina*, Article 26, Annex SI-31.

1052 Minutes taken for the field Notes of the Austro-Hungarian Sub-commission after the Survey that was carried out in the Marienthal [Marindol] municipality and the Sichelburg [Žumberak] District, 15 August 1883, Annex SI-445.

1053 Note to Provincial Council of Carniola from the Imperial-Royal Provincial Government of Carniola, 13 August 1908, Annex SI-34.

1054 Decree on the Division of the State into Provinces (*Oblasti*), *Official Gazette of the Kingdom of Serbs, Croats and Slovenes (Regional Administration for Slovenia)*, No. 49/122, Annex SI-57; Decree of the Provincial Government for Croatia and Slavonia, Internal Affairs Department in Liquidation, of 22 August 1924, No. 26/481, Proclaiming the Establishment of a New Administrative Municipality in Radatovići, Jastrebarsko District, Zagreb Oblast (1924), *Official Gazette of the Kingdom of Serbs-Croats and Slovenes (Regional Administration for Croatia-Slavonia)*, No. 197/1924, Annex SI-58; Act on the Name and Division of the Kingdom to Administrative Territories (1929), *Official Gazette of the Kingdom of Yugoslavia (Dravska banovina*), No. 100/1929, Annex SI-61; Act on the Establishment of the New Metlika

between Slovenia and Croatia stabilized under the relevant legislation concerning the territorial organisation of the Kingdom of Yugoslavia" and large parts of the boundary in the area are now "undisputed between the Parties [as] is reflected in their matching cadastral boundaries."[1055]

550. After 1945, it is not disputed that Marindol was attached to Slovenia,[1056] and most of the Žumberak area was attached to Croatia. Slovenia however submits that "some part of the former cadastral municipality of Sekulići in the Radatoviči municipality remained attached to Slovenia. These are the areas where the boundary is still disputed."[1057]

551. The Tribunal shall now consider each disputed area successively, moving from south to north. Namely: the Brezovica pri Metliki area; the settlement of Drage; and the Trdinov vrh/Sveta Gera area.

i. Brezovica pri Metliki

552. A first disputed area is located near a village called Brezovica pri Metliki. In this village, the Expert Group identified area 7.1, which covers 2.4 ha of land and which remains disputed between the Parties.[1058]

District with the seat in Metlika, 1931, *Official Gazette of the Kingdom of Yugoslavia (Dravska banovina*), No. 36/1931, Annex SI-63; Act Amending the Act on the Name and Division of the Kingdom to Administrative Territories, 23 August 1931, *Official Gazette of the Kingdom of Yugoslavia (Dravska banovina*), No. 53/1931, Annex SI-64; Constitution of the Kingdom of Jugoslavia (1931), *Official Gazette of the Kingdom of Yugoslavia (Dravska banovina*), No. 53/1931, Annex SI-65; Decree Amending and Supplementing the Decree of the Merger of Municipalities in the Dravska Banovina, 1934, *Official Gazette of the Kingdom of Yugoslavia (Dravska banovina*), No. 29/1934, Annex SI-68.

1055 Slovenia's Memorial, para. 6.121.

1056 Article 6 of the 1945 Act on the Administrative division of the Federal Slovenia listed the settlement of Marindol as part of the district of Črnomelj. A 1952 Slovenian Act confirmed that the cadastral municipality of Marindol was part of Slovenia. By contrast, the Croatian legislation adopted in 1947, 1949, and 1950 included Marindol as part of the district of Karlovac. However, Marindol was no longer listed as part of this district in Croatia after 1952. Slovenia's Memorial, para. 6.139; Act on the Administrative Division of the Federal Slovenia, *Official Gazette of the Slovenian People's Liberation Council and the People's Government of Slovenia*, No. 33/1945, Annex SI-80; Act on the Administrative and Territorial Division of the People's Republic of Croatia, *Official Gazette of the People's Republic of Croatia*, No. 60/1947, Annex SI-106; Act on the Administrative and Territorial Division of the People's Republic of Croatia, *Official Gazette of the People's Republic of Croatia*, No. 29/1949, Annex SI-117; Act on the Administrative and Territorial Division of the People's Republic of Croatia, *Official Gazette of the People's Republic of Croatia*, No. 27/1950, Annex SI-119; Act dividing the People's Republics of Slovenia into Towns, Districts and Municipalities (1952), *Official Gazette of the People's Republic of Slovenia*, No. 11/1952, Annex SI-12.

1057 Transcript, Day 3, p. 148:10-13.

1058 Minutes on Collating Unaligned Borders of Cadastral Districts, Border Sector VII, Case 1 (Sekulići-Bušinja Vas), Joint Expert Group, Ozalj, 14 March 1996, Annex HR-301.

553. Slovenia requests the Tribunal to include within its territory not only area 7.1, but also "the entire settlement of Brezovica pri Metliki."[1059]

554. According to Croatia, this very same village is composed of two parts: a Slovenian part bearing that name and a Croatian part called Brezovica Žumberačka.[1060] Slovenia submits that Brezovica is a single settlement, which is connected with and receives its supplies from Slovenia.[1061]

The Parties' Positions

555. Croatia submits that, in this disputed area, the cadastral limits of the two countries coincide and that the common line corresponds to the historic Austro-Hungarian boundary. To that end, Croatia invokes an official survey carried out in 1898,[1062] and adds that this common line leaves area 7.1 on the Croatian side of the boundary.

556. Slovenia argues that the cadastral boundary, creating numerous enclaves and exclaves, is "the direct heritage of the Austro-Hungarian Military Frontier and the unresolved issues of its exact boundaries."[1063]

557. Slovenia stresses however that the whole area gravitates to Metlika in Slovenia.[1064] It contends that, taking into account the complexity of the situation, the only "practical solution" for the local population is to place the entire settlement of Brezovica pri Metliki (including area 7.1) under Slovenian sovereignty.[1065]

558. Croatia opposes Slovenia's claim to the entire settlement of Brezovica Žumberačka, an area of an additional 132 ha beyond the 2.4 ha that the Expert Group characterized as disputed.[1066] Croatia calls that claim "baseless".[1067]

559. Both Parties claim that their respective position is supported by *effectivités*.

1059 Slovenia's Memorial, para. 6.127.

1060 Croatia's Reply, para. 4.33.

1061 Transcript, Day 3, p. 150:2-8.

1062 Croatia's Counter-Memorial, para. 5.44.

1063 Slovenia's Memorial, para. 6.127.

1064 Slovenia's Memorial, para. 6.127; *see also* Slovenia's Counter-Memorial, para. 5.39; Slovenia's Reply, para. 2.103.

1065 Slovenia's Memorial, para. 6.127.

1066 Croatia's Counter-Memorial, para. 5.43.

1067 Croatia's Counter-Memorial, para. 5.43; *see* Croatia's Reply, paras 4.31-32.

The Tribunal's Analysis

560. The Tribunal first recalls that in this disputed area, there was no historic Austro-Hungarian boundary.[1068] The Tribunal also observes that the cadastral limits coincide (except for area 7.1) and that they correspond to the administrative limits of the Croatian and Slovenian districts. The Tribunal considers that the common line must be regarded as representing the boundary. As noted above, the Tribunal considers that in a situation of matching cadastres, it may be presumed that the outer limits of the Parties' cadastres represent the boundaries of the Republics—a presumption which can be overridden by convincing evidence of title to the contrary, but not by the mere presence of *effectivités*. Accordingly, the Tribunal does not have to consider the *effectivités* invoked by the Parties.

561. Nonetheless, the Tribunal would add that it has carefully examined the alleged *effectivités*. It is established that Slovenia played a major role in providing public utilities in the area, in particular with respect to roads,[1069] telephone services,[1070] and water and energy supply.[1071] Both police forces were active in this disputed area.[1072] Censuses were conducted by Croatia but they did not

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1068 *See supra*, para. 548.

1069 Report on Inspection and State of Repairs of Roads on the territory of the Assembly of Metlika Municipality concerning their regular maintenance (1974) and Contract concluded between the Assembly of the Metlika Municipality Roads Fund, therefore, the Assembly of the Metlika Municipality and the Transport and Construction Company TGP Metlika (1974), Annex SI-550; Documentation of the Metlika Municipality regarding the works for the Brezovica-Radovica Road (1978), Annex SI-567; Decision of the Executive Council of the Assembly of the Buje Municipality, 22 November 1983, Annex SI-615; Ordinance on the Designation and Safety of Local Roads in the Area of the Municipality of Metlika (1992), *Official Gazette of the Republic of Slovenia*, No. 6/1992, Annex SI-730.

1070 Project Documentation No. 371/83-S and No. P-371/83 for Local Telephone Cable Network of Suhor Terminal Telephone Exchange, January and February 1984, Annex SI-617; Municipality of Metlika: Decision regarding the Use of Land for Construction of the Local Telephone Cable Network of the Local Automatic Telephone Exchange Suhor, 16 April 1987, Annex SI-645; Municipality of Metlika: Construction Permit for the Construction of the local Telephone Network of the Local Automatic Telephone Exchange Suhor, 11 February 1988, Annex SI-658; Documentation regarding the Construction of Telephone Network in Brezovica pri Metliki from 1987 to 1988, Annex SI-689.

1071 Project Documentation regarding Reconstruction of Water Pipeline Kuljaji-Glavica-Hrast, June 1987, Annex SI-647; Public Utility Company Metlika Infrastructure of the Metlika Municipality and fixes assets Register, 2011, Annex SI-813; Construction and Transport Company Metlika, Water Consumption Statements for the Settlement Brezovica pri Metliki from 1947 to 1997, Annex SI-680.

1072 For Croatia, *see* Criminal Application Filed by the Police Station Ozalj to the Municipal Public Prosecutor Karlovac, Karlovac, 16 April 1988, Annex HR-368; Letter from the Municipal Public Prosecutor Karlovac to the Police Station Ozalj, Karlovac, 28 April 1988, Annex HR-369; Correspondence between the Triglav Insurance Company from Novo Mesto (Slovenia), and the Municipal Secretariat for Internal Affairs Ozalj (Croatia), Novo Mesto, Ozalj, 21-22 September 1988, Annex HR-370. For Slovenia, *see* Police Station Metlika: Official Notice of Policeman regarding the Jurisdiction in the Area of Settlements Drage and Brezovica pri Metliki, 18 September 2012, Annex SI-817; Police Station Metlika: Official Notice of Policeman regarding the Jurisdiction in the Area of Settlements Drage and Brezovica pri Metliki, 19 September 2012, Annex SI-818.

cover the whole population.[1073] Building permits were given by the Slovenian authorities,[1074] Croatia exercised law enforcement in the area,[1075] and land transactions were registered in the Croatian land registry.[1076] If the Tribunal were to rely upon the *effectivités*, the unavoidable conclusion would be that neither Party had exclusive jurisdiction in the Brezovica pri Metliki area. The Tribunal, however, would not have been able to draw any more precise conclusion from the materials provided by the Parties.

562. The situation is different with respect to area 7.1, where, as noted above, the cadastral limits do not coincide.[1077] No tacit agreement between the Parties as to the course of the land boundary can therefore be inferred in this area. Croatia's cadastral limits are consistent with historical Franciscan maps of the Military Frontier, while Slovenia's cadastral limits correspond to historical maps of Carniola.[1078] Both historical maps are of high quality and can be superimposed on the Parties' respective cadastral limits with precision. Slovenia's claim in the present arbitration is also based on considerations of practicality.

563. Between the historical maps that the Parties have adduced, neither is, in the view of the Tribunal, to be preferred *per se* as the more authoritative one. In the present area, the historical surveys forming the basis for cartographic materials were, significantly, accompanied by a specific acknowledgment that the frontier in the Žumberak area has not been fixed.

1073 Federal Bureau of Statistics, Census Tally Sheet for the Settlement of Brezovica Žumberačka in the Municipality of Ozalj, 3 April 1971, Annex HR-347; Federal Bureau of Statistics, Census Tally Sheet for the Settlement of Brezovica Žumberačka in the Municipality of Ozalj, 10 April 1981, Annex HR-357; Republican Bureau of Statistics, Census Tally Sheet for the Settlement of Brezovica Žumberačka in the Municipality of Ozalj, 12 April 1991, Annex HR-374.

1074 Metlika Municipality, Spatial Planning Department: Building Permit No. 351-155/82, 11 October 1984, Annex SI-622.

1075 Ministry of Foreign Affairs of the Republic of Slovenia, Note No. ZMP-8/08- Declaration to the Protocol on the Integrated Coastal Zone Management of Mediterranean Coastal Zones, 21 January 2008, Annex SI-368; Croatia 2007 Accession Partnership, annexed to Council Decision (20081119/EC), 42/55, 12 February 2008, Annex SI-369; Decision Amending the Decision on the Extension of the Jurisdiction of the Republic of Croatia in the Adriatic Sea (2008), *Official Gazette of the Republic of Croatia*, No.31/2008, Annex SI-370.

1076 Decision of the Administration for Cadastre and Geodetic Affairs on the Amendment of Cadastral Records Reflecting Change in Ownership of Plot No. 5979 (Karlovac, 19 February 1973), Annex HR-218; Decision of the Municipal Administration for Cadastre and Geodetic Affairs on the Amendment of Cadastral Records Reflecting Reparcelling of Plot No. 5971, Ozalj, 12 December 1988, Annex HR-257; Decision of the Municipal Administration for Cadastre and Geodetic Affairs on the Amendment of Cadastral Records Reflecting Change in Ownership of Plot No. 5960, Ozalj, 17 November 1990, Annex HR-277.

1077 Croatia's Counter-Memorial, Figure CM 5.12.

1078 Brezovica and Kamenica, Land cadastre limits of the Franciscan survey of 19th century (comparison), Annex SI-M-66.

564. In the absence of evidence of title, the Tribunal must consider the *effectivités* relied upon by the Parties. As noted earlier, most examples of exercise of administrative powers by one of the States concerned[1079] cannot be related specifically to the narrow area in dispute, area 7.1. The evidentiary record presented by the Parties in respect of the effective exercise of administrative authority in this area is very thin, but the Tribunal must make its decision on the basis of the best available evidence. Area 7.1 appears to consist of a tree-covered area that stretches along the border. The Tribunal recalls Slovenia's argument that the various plots in and around Brezovica pri Metiliki were "consistently perceived as forming a natural, geographical, economic, and social unit,"[1080] with close ties to the village of Metlika, as the name "Brezovica pri Metiliki" already indicates. Croatia has not disputed such perceived unity, nor has it advanced any contrary argument suggesting that area 7.1 would form a "natural, geographical, economic, and social unit" with any Croatian settlement. The Tribunal determines that, in these circumstances, area 7.1 forms part of the territory of Slovenia, and the boundary runs along Slovenia's cadastral limits.

565. The Tribunal recognizes that the delimitation thus made on the basis of the cadastral limits is one of great complexity. The cadastral boundary creates numerous meanders and even enclaves.[1081] It cuts the road of the Brezovica pri Metliki settlement several times. This is not without precedent,[1082] but may well lead to practical problems. While remaining aware of these difficulties, the Tribunal, in respect of the land boundary, is strictly bound to decide in accordance with international law, and not on the basis of (its understanding of) what may be practical or convenient. It will therefore be up to the Parties either to agree on an adjustment or to find other ways to resolve those problems in a spirit of friendly cooperation.

1079 Croatia has submitted evidence of *effectivités* over area 7.1 in the form of the administration of cadastral records for specific cadastral plots. Croatia's Counter-Memorial, para. 5.46, *referring to* Decision of the Municipal Administration for Cadastre and Geodetic Affairs on the Amendment of Cadastral Records Reflecting Change in Ownership of Plot No. 5960, Ozalj, 17 November 1990, p.1, Annex HR-277; Decision of the Municipal Administration for Cadastre and Geodetic Affairs on the Amendment of Cadastral Records Reflecting Reparcelling of Plot No. 5960, Ozalj, 4 November 1991, p.1, Annex HR-278; Decision of the Municipal Administration for Cadastre and Geodetic Affairs on the Amendment of Cadastral Records Reflecting Reparcelling of Plot No. 5971, Ozalj, 12 December 1988, p.1, Annex HR-257; Decision of the Administration for Cadastre and Geodetic Affairs on the Amendment of Cadastral Records Reflecting Change in Ownership of Plot No. 5979, Karlovac, 19 February 1973, p.1, Annex HR-218.

1080 Slovenia's Counter-Memorial, para. 5.39.

1081 Slovenia's Memorial, para. 6.127.

1082 *Cf.* Baarle-Hertog and Baarle-Nassau in *Sovereignty over certain Frontier Land (Belgium/Netherlands)*, Judgment of 20 June 1959: I.C.J. Reports 1959, p. 209.

ii. Settlement of Drage (Sekulići/Sekuliči)

566. The second disputed area in the former Military Frontier has been identified by the Expert Group as area 6.3. In this disputed area, the cadastral district boundaries of the Parties overlap. The overlapping area covers 337.8 ha. It is heavily forested except for the village of Drage.[1083]

The Parties' Positions

567. Croatia submits that this disputed area "which was surveyed in the 19th century, was part of the Kingdom of Croatia,"[1084] and contends that it remained within Croatia. Its position is that "Croatia's cadastral district boundary in this area conforms to the historic Austro-Hungarian boundary."[1085]

568. Croatia relies on cartographic[1086] and documentary[1087] evidence from the late 19th and early 20th century.

569. Slovenia challenges the notion of a historic "Austro-Hungarian boundary" in the area.[1088] It claims that the boundary in the area was disputed well before and after the dissolution of the Military Frontier in 1881.[1089] The boundary only "crystalized" within the Kingdom of Serbs, Croats and Slovenes, and later the Kingdom of Yugoslavia, and was, in some parts, modified after World War II.[1090]

570. In any event, Slovenia submits that in 1948 the disputed area was incorporated into the Slovenian cadastral district of Črnomelj and remained part of Slovenia thereafter. It notes that the settlement of Drage was not listed in the Slovenian territorial legislation before 1948, but was listed in the 1948 legislation and in all subsequent years.[1091] It adds that "the corresponding Croatian

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1083 Croatia's Memorial, para. 6.35.

1084 Croatia's Memorial, para. 6.36.

1085 Croatia's Memorial, para. 6.35.

1086 Croatia's Memorial, para. 6.36 and Figure 6.13; *see* Croatia's Reply, para. 4.14.

1087 Croatia's Memorial, para. 6.37; Royal Croatian-Slavonian-Dalmatian State Government, Political and Judicial Division and Repertory of Residence of the Kingdoms of Croatia and Slavonia, Zagreb, 1903, pp. 32-33, Annex HR-1; Royal Croatian-Slavonian-Dalmatian State Government, Political and Judicial Division and Repertory of Residence of the Kingdoms of Croatia and Slavonia, Zagreb, 1913, p. 40, Annex HR-2; Transcript, Day 2, pp. 19:18-21:9.

1088 Slovenia's Counter-Memorial, para. 5.28.

1089 *Ibid*.

1090 *Ibid*.

1091 Act on the Administrative Division of the People's Republic of Slovenia, *Official Gazette of the People's Republic of Slovenia*, No. 9/1948, Annex SI-113; Act on the Procedure for Establishing, Merging or Shifting Municipal Boundaries and Municipal Boundaries, *Official Gazette of the Socialist Republic of*

legislation did not include the Drage settlement after 1952."[1092] The cadastral records of Drage were transferred from Croatia to Slovenia in 1953.[1093] Slovenia thus concludes that "its boundary with Croatia on the critical date followed the eastern boundary of the municipality of Metlika and includes the settlement of Drage with its surroundings."[1094]

571. Croatia, however, contends that "[c]ontrary to Slovenia's assertion, Croatia never ceded the disputed area 6.3 to Slovenia."[1095] That area remained within Croatia. In this regard, Croatia points out that Slovenia does not seem to have submitted any evidence to the Joint Expert Group to substantiate its claim of cession of the disputed area.[1096]

572. In support of their submissions, both Parties invoke *effectivités* relating to the village of Drage and the neighbouring forest.

The Tribunal's Analysis

573. The Tribunal first recalls that in this area, the boundary was not fixed at the time of the Austro-Hungarian Empire.

574. The Tribunal notes that the settlement of Drage permanently appeared on Slovenian cadastres from 1948 onwards.[1097] The settlement was not mentioned on any of the Croatian cadastres provided to the Tribunal.[1098] The Tribunal further observes that "[a]bout 1950 . . . a part of the

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Slovenia, No. 28/1980, Annex SI-203; *see also* Slovenia's Memorial, para. 6.123; Slovenia's Counter-Memorial, paras 5.48-50.

1092 Slovenia's Memorial, para. 6.123.

1093 Letter to the Surveying and Mapping Administration of the People's Republic of Croatia from the Surveying, Mapping and Cadastral Administration of the People's Republic of Slovenia, 31 January 1953 and Letter to the Surveying, Mapping and Cadastral Administration of the People's Republic of Slovenia from the Surveying and Mapping Administration of the People's Republic of Croatia, 4 February 1953, Annex SI-128; *see also* Slovenia's Memorial, para. 6.123; Slovenia's Counter-Memorial, paras 5.52-53.

1094 Slovenia's Counter-Memorial, para. 5.54.

1095 Croatia's Counter-Memorial, para. 5.30.

1096 Croatia's Memorial, para. 6.38; Transcript, Day 2, pp. 21:10-22:9.

1097 Act on the Administrative Division of the People's Republic of Slovenia, 1948, *Official Gazette of the People's Republic of Slovenia*, No. 9/1948, p. 47, Annex SI-113; Act dividing the People's Republic of Slovenia into Towns, Districts and Municipalities, 1952, *Official Gazette of the People's Republic of Slovenia*, No. 11/1952, p. 43, Annex SI-120; Act on the Procedure for Establishing, Merging or Shifting Municipal Boundaries and Municipal Boundaries, 1980, *Official Gazette of the Socialist Republic of Slovenia*, No. 28/1980, para. 37, Annex SI-203.

1098 Act on the Administrative and Territorial Division of the People's Republic of Croatia, 1947, *Official Gazette of the People's Republic of Croatia*, No. 60/1947, para. 28, Annex SI-106; Act on the Division of the People's Republic of Croatia into Districts, Towns and Municipalities, 1952, *Official Gazette of the People's Republic of Croatia*, No. 16/1952, para. 28, Annex SI-121; Act on the Territories of the Municipalities and Districts in the People's Republic of Croatia, 1962, *Official Gazette of the People's Republic of Croatia*, p. 176, Annex SI-160; Act on the Territories of the Countries, Towns and

cadastral municipality of Sekulići (a wider area of the Drage settlement) was deleted from the cadastral register of the cadastral municipality Sekulići in the Ozalj [c]adastral [o]ffice" in Croatia.[1099] A new "cadastral municipality Sekulići was started" and was still kept and maintained in 1996 "in the Črnomelj cadastre" in Slovenia.[1100] The corresponding cadastral records were then transferred from Croatia to Slovenia in 1953,[1101] and in 1966, the Ozalj cadastral office informed the Slovenian forestry administration of Novo Mesto that the register for that area had been handed over to Črnomelj and that it no longer had competence in that area.[1102] On the basis of those documents, the Tribunal considers *prima facie* that the limit of the Sekulići/Sekuliči Slovenian district represents the boundary.

575. The Tribunal further observes that, in several matters, Slovenia acted in the disputed area *à titre de souverain* without provoking any protest in Croatia. The Slovenian local authorities delivered building permits.[1103] The police station in Metliki (Slovenia) exercised its powers in Drage without interference from the Croatian security bodies.[1104] The Novo Mesto basic Court held a

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Municipalities in the Republic of Croatia, 1992, *Official Gazette of the Republic of Croatia*, No. 90/1992, Annex SI-268.

1099 Minutes of the meeting held on 13 March 1996 and dealing with the comparison of uncoordinated boundaries between cadastral municipalities, drawn up on the premises of the Karlovac Office for Cadastral and Geodetic Affairs (Ozalj Branch), Mixed Slovenian-Croatian Commission for the Demarcation, Maintenance and Restoration of the State Border, *State Border Republic of Slovenia – Republic of Croatia, Comparison of Data on the Borders of the Cadastral Municipalities in the Areas of Larger Discrepancies, Comparison of data Performed in the Years 1995/1996*, Sector 6, Case 3, p. 3, Annex SI-760.

1100 Minutes of the meeting held on 13 March 1996 and dealing with the comparison of uncoordinated boundaries between cadastral municipalities, drawn up on the premises of the Karlovac Office for Cadastral and Geodetic Affairs (Ozalj Branch), Mixed Slovenian-Croatian Commission for the Demarcation, Maintenance and Restoration of the State Border, *State Border Republic of Slovenia – Republic of Croatia, Comparison of Data on the Borders of the Cadastral Municipalities in the Areas of Larger Discrepancies, Comparison of data Performed in the Years 1995/1996*, Sector 6, Case 3, p. 3, Annex SI-760.

1101 Letter to the Surveying and Mapping Administration of the People's Republic of Croatia from the Surveying, Mapping and Cadastral Administration of the People's Republic of Slovenia, 31 January 1953, and Letter to the Surveying, Mapping and Cadastral Administration of the People's Republic of Slovenia from the Surveying and Mapping Administration of the People's Republic of Slovenia from the Surveying and Mapping Administration of the People's Republic of Croatia, 4 February 1953, Annex SI-128.

1102 Letter from the Cadastral Bureau of the Municipal Assembly Ozalj in the Socialist Republic of Croatia to the Department of Forestry Planning of the Forestry Administration of Novo Mesto, 23 September 1996, Annex SI-518.

1103 Assembly of the Metlika Municipality: Building permit for the Construction of a 20 kV branch transmission line and a standard transformer substation, located in the Drage village, 8 November 1973, Annex SI-546; Assembly of the Metlika Municipality: Building Permit issued for Resident from Drage, 4 September 1978, Annex SI-648; Municipality of Metlika: Construction Permit No. 351-53/87 for the Construction of the forest Road Vahta-Kapa, 25 December 1987, Annex SI-655.

1104 Police Station Metlika: Official Notice of Policeman regarding the Jurisdiction in the Area of Settlements Drage and Brezovica pri Metliki, 18 September 2012, Annex SI-817; Police Station Metlika: Official Notice of Policeman regarding the Jurisdiction in the Area of Settlements Drage and Brezovica pri Metliki, 19 September 2012, Annex SI-818; Police Station Metlika: Official Notice of Policeman regarding the Jurisdiction in the Area of Settlements Drage and Brezovica pri Metliki, 19 September 2012, Annex SI-819.

public hearing in Drage in 1979.[1105] The population, households and dwelling of Drage were listed as part of Slovenia on the occasion of the 1981 federal census.[1106] The inhabitants seem to have been registered in the Slovenian electoral list as early as 1947,[1107] and they participated in the plebiscite of 22 December 1990 as part of Slovenia.[1108]

576. Croatia does not deny those facts but submits a number of documents attesting that the land registry for the area remained in Ozalj.[1109] Consequently, the Croatian local courts handed down decisions relating to the land ownership in the disputed area which were then transcribed on the land register. However, the Tribunal observes that even though the land registry was maintained in Croatia in spite of the change in the limits of the districts, it does not imply that sovereignty remained Croatian.

577. In support of its submission, Croatia also contends that "[a]pproximately 60% of the disputed lands and forests in disputed area 6.3 are publicly-owned by the government of Croatia."[1110] Slovenia, on the other hand, submits that it owns around 30% of the same forest. In both cases, the local Forest Offices held a right of use and those two Offices collaborated in order to manage

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1105 Convocation of Court Expert-Interpreter to a Public Hearing on Site in Drage, 3 October 1979, Annex SI-573; Novo Mesto Basic Court, Črnomelj Unit, Convocation of Parties to a Public Hearing on Site in Drage, 11 October 1979, Annex SI-574; Novo Mesto Basic Court, Črnomelj Unit, Protocol of Settlement, 18 October 1979, Annex SI-575.

1106 Federal Bureau of Statistics, Census 1981: Population, Households, and Dwellings, Index of local communities in Socialist Republics, Socialist Autonomous Provinces and municipalities, and settlements as parts of local communities (Belgrade, 1983), Annex SI-917.

1107 Letter by the Radatovići People's Committee (Croatia) to the Suhor People's Committee (Slovenia), 27 March 1947, Annex SI-468.

1108 Municipality of Metlika: Record on the Work of the Electoral Committee, Polling Station No. 30 for Settlement Drage, 22 December 1990, Annex SI-695.

1109 Reply from the Municipal Court in Karlovac to the Forest Management Authority in Novo Mesto, 29 October 1968, Annex HRLA-93; Decision of the Municipal Court in Ozalj, 3 February 1987, Annex HRLA-98; Application by the Forest Management Authority in Novo Mesto to the Land Registry in Karlovac, 30 July 1968, Annex HR-198; Judgment on Gaining Ownership by Usucaption over Plot No. 5645 in Drage, Municipal Court in Ozalj, Ozalj, 11 March 1981, Annex HR-356; Decision on Registering Title to Property in Drage to the Benefit of Vladimir Vilfan, Municipal Court in Ozalj, Ozalj, 15 September 1987, Annex HR-365; Contract of Gift Between Zora Badovinac and Janko Petković Regarding Land in Drage, Ozalj, December 1987, Annex HR-366. *See also* Municipal Court in Črnomelj, Resolution on inheritance, 8 September 1971, Annex SI-539; Letter of Municipality Ozalj, Cadastre and Land Survey Administration to Assembly of the Novo Mesto Municipality, Cadastre Office, 29 September 1971, Annex SI-540; Letter of Municipality Ozalj, Cadastre and Land Survey Administration to Assembly of the Novo Mesto Municipality, Cadastre Office, 29 September 1971, Annex SI-541; Decision of Municipal Court in Ozalj, 20 April 1982, Annex SI-599; Decision of the Municipal Court in Ozalj, 18 April 1986, Annex SI-636; Land Register Excerpt for Land Registry Entry No. 133 from the Ozalj Land Register Department of the Karlovac Municipal Court, 16 July 2013, Annex SI-823; Land Register Excerpt for Land Registry Entry No. 175 from the Ozalj Land Register Department of the Karlovac Municipal Court, 16 July 2013, Annex SI-824.

1110 Croatia's Counter-Memorial, para. 5.35; Property Register No. 2 for the Cadastral District of Sekulići, 1 January 1898, Annex HR-135.

the area.[1111] However, whatever may have been the exact situation in this respect, ownership and management of property must be distinguished from sovereignty. A State may own and manage property such as a forest on foreign soil.[1112] This argument of Croatia cannot be upheld.

578. In conclusion, the Tribunal notes that, for more than 40 years, this disputed area was part of the Sekulići/Sekuliči Slovenian cadastral district, without Drage being mentioned in Croatian cadastral districts. It also observes that Slovenia acted *à titre de souverain* in the area and in a number of fields without objection from Croatia. Therefore, the Tribunal determines that the boundary is the eastern limit of Slovenia's Sekulići/Sekuliči cadastral district.

iii. Trdinov Vrh/Sveta Gera

579. The third area in the former Military Frontier region is a small area of land that appears to owe its significance to a television tower, a military facility constructed by the Yugoslav Army, and a trigonometric reference point used by Slovenia to calculate the positioning of boundaries and infrastructure.[1113]

The Parties' Positions

580. Croatia contends that in Sveta Gera, "the Croatian and Slovenian cadastral district boundaries are fully aligned"[1114] along the historic Austro-Hungarian boundary. Croatia requests the Tribunal to fix the boundary accordingly.

581. Slovenia submits that the Croatian claim "is based solely on cadastral evidence, the purpose of which . . . was not to establish . . . a republic boundary."[1115]

582. Croatia adds that the area is unlawfully occupied by Slovenian military forces,[1116] and requests the Tribunal to decide that "no Slovenian personnel, whether military, civilian, police or security,

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1111 Letter from the Cadastral Bureau of the Municipal Assembly Ozalj in the Socialist Republic of Croatia to the Department of Forestry Planning of the Forestry Administration of Novo Mesto, 17 December 1966, Annex SI-520; Minutes of the 12th Ordinary Meeting of Quadrilateral Commission for the Protection of the Adriatic Sea Waters and Coastal Areas of 27-28 October 2011, Portoroz, section 2.2, 28 October 2011, Annex SI-427.

1112 For example, the *Mundat* Forest is the property of the French *Office national des forêts* on German territory; *see* Jacques Myard, "L'accord du 10 mai 1984 sur le Mundat", *Annuaire Français de Droit International*, 31, pp. 884-892 (1985).

1113 Slovenia's Memorial, Figure 6.23; Croatia's Reply, Figure R 4.1.

1114 Croatia's Memorial, para. 6.39.

1115 Slovenia's Counter-Memorial, para. 5.56.

1116 Croatia's Counter-Memorial, paras 5.65-75; Croatia's Reply, para. 4.23.

shall be entitled to remain at the facility located at Sveta Gera in the Croatian municipality of Ozalj."[1117]

583. As noted above, Slovenia requests the Tribunal to declare that the submission of Croatia relating to the presence of Slovenian personnel in that area "is not within the task of the Arbitral Tribunal set out in the Arbitration Agreement"[1118] and must be rejected for this reason.

584. In any event, Slovenia stresses that "the cadastral records do not entirely reflect the concrete situation on the ground."[1119] It notes that before 1991, the forces of the Yugoslav Army were constantly supplied from Novo mesto (Slovenia) through the only access road to the top of Trdinov Vrh.[1120] Slovenia states that, in 1991, the Yugoslav Army "handed over the facility" to Slovenian forces.[1121] Slovenia underlines that Croatia did not object at that time.[1122] Slovenia points out that "[t]he access road to the television tower and the trigonometric reference point on Trdinov vrh were built and maintained by Slovenia."[1123]

585. Croatia calls Slovenia's statement that "the cadastral records do not entirely reflect the concrete situation"[1124] a "euphemistic way of recognizing that its military forces are unlawfully occupying Croatian territory."[1125] It recalls that "the alteration of existing frontiers or boundaries by force is not capable of producing any legal effect."[1126] Croatia also notes that, after the Yugoslav forces had agreed to withdraw in 1991, Slovenian military units entered the outpost and have not left

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1117 Transcript, Day 6, p. 41:4-8.

1118 Transcript, Day 8, p. 179:8-12.

1119 Slovenia's Memorial, para. 6.125.

1120 *Ibid.*; Transcript, Day 3, pp. 148:26-149:3.

1121 Slovenia's Memorial, para. 6.125; *see* Slovenia's Counter-Memorial, paras 5.59-60; Transcript, p. 148:18-20.

1122 Slovenia's Memorial, para. 6.125; Letter of Janez Janša, former Slovenian Minister of Defence, *Delo* [Work], 24 April 1999, Annex SI-304.

1123 Slovenia's Memorial, para. 6.126; *see also* Slovenia's Counter-Memorial, para. 5.58.

1124 Slovenia's Memorial, para. 6.125.

1125 Croatia's Counter-Memorial, para. 5.63.

1126 Croatia's Counter-Memorial, para. 5.66; Conference on Yugoslavia Arbitration Commission [Badinter Commission], 31 ILM 1488 (1992), p. 1500, Annex HRLA-61 ("According to the 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 of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations . . . and in the Helsinki final act.").

ever since.[1127] Croatia refers to notes of diplomatic meetings and diplomatic correspondence to show that it has protested the presence of Slovenian military forces in the area.[1128]

The Tribunal's Analysis

586. The Tribunal first recalls that, in this disputed area, there was no historic Austro-Hungarian boundary. It also observes that the cadastral limits coincide, and that they correspond to the administrative limits of the Croatian and Slovenian districts.[1129] No contrary evidence of title has been submitted to the Tribunal. The Tribunal thus determines that the aligned cadastral limits are the boundary. Accordingly, it does not have to consider the *effectivités* invoked by Slovenia.[1130]

587. The common line thus retained leaves the television tower on the Slovenian side, and the military facility constructed by the Yugoslav Army together with the trigonometric reference point on the Croatian side of the border.[1131]

588. However, Slovenia recalls that the military facility was handed over by the Yugoslav Army to the Slovenian Territorial Defence in October 1991,[1132] and submits that, at the time, Croatia had raised no objection. Slovenia therefore contends that "very shortly after the critical date, the

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1127 Croatia's Memorial, para. 6.40.

1128 Croatia's Memorial, paras 6.41-43; Note on the Working Meeting of the Foreign Ministers of the Republic of Croatia and the Republic of Slovenia, Ministry of Foreign Affairs of the Republic of Croatia, Zagreb, 20 January 1998, p. 4, Annex HR-83; *Note verbale* No. 838/07 from the Ministry of Foreign Affairs and European Integration of the Republic of Croatia to the Embassy of the Republic of Slovenia, Zagreb, 7 February 2007, Annex HR-110; *Note verbale* No. 1107/09 from the Ministry of Foreign Affairs and European Integration of the Republic of Croatia to the Embassy of the Republic of Slovenia, Zagreb, 11 March 2009, Annex HR-121; Transcript, Day 2, pp. 27:11-28:7, *citing note verbale* No. 521-0304-92/301 from the Ministry of Foreign Affairs of the Republic of Croatia to the Ministry of Foreign Affairs of the Republic of Slovenia, Zagreb, 27 September 1992, Annex HR-287; *Note verbale* No. 1107/09 from the Ministry of Foreign Affairs and European Integration of the Republic of Croatia to the Embassy of the Republic of Slovenia, Zagreb, 11 March 2009, Annex HR-121.

1129 Joint Croatian-Slovenian Expert Group for Collating Unaligned Borders of the Cadastral Districts, *State Border, Republic of Croatia – Republic of Slovenia: Joint Report on the Results of the Collation of the Records of Cadastral District Borders in Areas of Greater Discrepancies*, 20 December 1996, Annex HR-80.

1130 Surveying and Mapping Authority of Republic of Croatia, Request for data on triangulation Station for Gorjanci, 14 December 1951, and answer from Surveying and Mapping Authority of the People's Republic of Slovenia, 21 December 1951, Annex SI-479; Surveying and Mapping Authority of the Socialist Republic of Slovenia: Geodetic point data for trigonometric point Gorjanci 375, 1959, Annex SI-503; Position and stabilisation of the 375 Gorjanci point, 1963, Annex SI-510; Republic Surveying and Mapping Authority Ljubljana: Letter regarding the Decision on the Protection of Survey Markers and Horizontal Lines of Sight at Geodetic Network Points, 20 February 1984, Annex SI-619.

1131 Slovenia's Memorial, Figure 6.23; Croatia's Reply, Figure R 4.1.

1132 Minutes of the Handover of the Facility at Trdinov vrh between Yugoslav Army and Slovenian Territorial Defense, 23 October 1991, Annex SI-728.

authorities of both Slovenia and Croatia considered that these military facilities were part of Slovenia."[1133]

589. The Tribunal observes that the only document produced in this respect by Slovenia is a letter from the former Minister of Defence of Slovenia to the newspaper Delo, dated 24 April 1999, stating that "[t]he day the territorial defence took over the facility from the Yugoslav National Army, I personally placed a call to the Croatian defence minister [who] . . . did not raise the slightest objection . . .."[1134] The Tribunal is unable to draw, from such a document, the conclusion that, on the occasion of the transfer of the military facility to the Slovenian authorities in October 1991, Croatia recognized Slovenian sovereignty in the area.

590. Croatia has sought a declaration that "no Slovenian personnel, whether military, civilian, police or security, shall be entitled to remain at the facility located at Sveta Gera in the Croatian municipality of Ozalj."[1135] The Tribunal has determined that the area south of the boundary line is part of Croatian territory, but the Tribunal has no jurisdiction to make a declaration as to the presence of military personnel in that area.

(g) Kamenica, Kupa/Kolpa and Čabranka Rivers

591. For approximately 144 km, the boundary between Croatia and Slovenia broadly follows the Kamenica, Kupa/Kolpa, and Čabranka Rivers.

592. In most parts, the location of the boundary is agreed between the Parties.

593. In particular, it is not in dispute that Marindol, an enclave which had been transferred provisionally to the Kingdom of Croatia as part of the former Military Frontier in 1881, was re-integrated into Slovenia after World War II, and at the critical date was considered by both Parties to form part of Slovenia.[1136]

1133 Slovenia's Memorial, para. 6.125.

1134 Letter of Janez Janša, former Slovenian minister of defence, *Delo* [Work], 24 April 1999, Annex SI-304.

1135 *See supra,* paras 207 and 208.

1136 *See supra,* para. 550; *see also* Slovenia's Memorial, para. 6.139; Slovenia's Counter-Memorial, para. 5.16; Croatia's Counter-Memorial, Vol. III, Map 19.

i. Kamenica River

594. The Kamenica is a small river which flows in a generally southerly direction from the former Žumberak area in Croatia to the Kupa/Kolpa River. The Kamenica River reaches the boundary between Slovenia and Croatia to the east of a settlement that is also called Kamenica.[1137]

The Parties' Positions

595. According to Slovenia, the Kamenica River was established as the boundary between Croatia and Carniola during the Josephine Survey. Slovenia contends that the maps as well as the textual descriptions of the Josephine Survey indicate that the boundary between Croatia and Carniola lies along the Kamenica River.[1138]

596. According to Slovenia, the 1908-1909 demarcation rejected an alteration that had been made by Croatia in 1861 and confirmed that the Kamenica River constituted the provincial boundary.[1139]

597. A change made in 1929 by the Law establishing the *banovine*[1140] was reversed by the 1931 amendments of the territorial division of the Kingdom of Yugoslavia, which moved the southern boundary of the *Dravska banovina* to the Kamenica River.[1141] In Slovenia's view, the cadastres in the present area are in a "chaotic state", and "the cadastral boundaries in these two settlements [Brezovica pri Metliki and Kamenica] . . . did not match at the critical date or even at the time of Franciscan survey."[1142]

1137 Slovenia's Memorial, para. 6.130.

1138 Slovenia's Memorial, para. 6.133; Joseph II Land Survey, Inner Austrian provinces, Sections 231, 236, 237, 238, 239, 246, 247, and 250, 1763-1787, Annex SI-M-5; *see* Vincenc Rajšp and Majda Ficko (eds.), *Slovenija na vojaškem zemljevidu 1763–1787* [Josephine Landesaufnahme 1763-1787 for the territory of the Republic of Slovenia], Vol. 1, pp. 65, 66, 144 (1995), Annex SI-2. According to Slovenia, the area of Marindol was an exception because it "constituted an exclave of the Military Frontier." Slovenia's Memorial, para. 6.133.

1139 Slovenia's Memorial, para. 6.134; Results of the Comparison of Boundaries with Respect to the Provincial Boundary between Camiola and Croatia from the Sava up to the Boundary with Camiola and the Littoral with Enclosures, October 1908, Annex SI-35; Protocol taken at the Meeting of the Joint Commission for the Demarcation of the Provincial Boundary between Croatia and Carniola or, to put it otherwise, the State border between Cisleithania and Transleithania, held on 17 and 18 September 1909 and the following days in Jesenice (Jesenitz) and Samobor, Continuation on 23 September 1909, 24 September 1909, Annex SI-38.

1140 Slovenia's Memorial, para. 6.135, Figure 6.26(a); Act on the Name and Division of the Kingdom to Administrative Territories (1929), *Official Gazette of the Kingdom of Yugoslavia (Dravska banovina)*, No. 100/1929, Annex SI-61.

1141 Slovenia's Memorial, para. 6.136.

1142 Slovenia's Counter-Memorial, para. 5.38.

598. Croatia submits that the Parties' cadastral boundaries with respect to the Kamenica River were aligned at the critical date, as evidenced by the Expert Report.

599. Croatia objects to Slovenia's reliance on administrative borders established in 1931, given that the laws and regulations of the Kingdom of Yugoslavia were annulled in 1946.[1143]

600. Croatia's claim in this area is depicted at Maps 22 and 23 of Volume III of its Counter-Memorial. On Map 22, the boundary appears to follow the course of the Kamenica River. On Map 23, the boundary further coincides with the course of the Kamenica River, beginning at a point to the north east of the settlement called Kamenica. The maps annexed to Croatia's Reply, as corrected, depict the boundary following the Kamenica River from south of the Kamenica settlement until the Kamenica River reaches the Kupa River,[1144] and depict the Kamenica settlement on the Croatian side in the cadastral district of Brašljevica.[1145]

601. The only significant difference in the Parties' respective claims is to the west of the Kamenica settlement, as illustrated on a map submitted by Slovenia.[1146] Accordingly, the Tribunal shall focus on this difference only.

The Tribunal's Analysis

602. The Tribunal's point of departure is the question of whether or not the cadastres in respect of this part of the boundary are aligned. Since the Tribunal was not provided with complete cadastral records, it must determine that question on the basis of the evidence put before it. As Croatia observes, the Expert Group did not consider the area west of Kamenica to be a disputed area, thus regarding the cadastres as coinciding.[1147] Slovenia, however, alleged that the cadastral boundaries in the Kamenica settlement "did not match at the critical date or even at the time of the Franciscan survey."[1148] To illustrate the alleged non-alignment of the boundary at the critical date, Slovenia refers to maps attached to correspondence of 1971 from the local Surveying and Mapping

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1143 Croatia's Reply, para. 4.50.

1144 Croatia's Reply, Vol. III/4, Maps 60-61.

1145 Croatia's Reply, Vol. III/4, Map 59/3.

1146 Brezovica and Kamenica, Land cadastre limits of the Franciscan survey of 19th century (comparison), Annex SI-M-66.

1147 Croatia's Counter-Memorial, para. 5.114.

1148 Slovenia's Counter-Memorial, para. 5.38.

Authority.[1149] To show the alleged non-alignment in the 19th century, Slovenia adduces maps produced between 1824 and 1856 (and a further undated 19th century map).[1150]

603. Having reviewed the various 19th century maps submitted by Slovenia, the Tribunal agrees that these maps show a degree of variation in the shape of the boundary that is depicted on them. That said, considering that these maps do not show the area west of Kamenica on a large scale, the Tribunal hesitates to deduce from this evidence that the Parties' cadastres were historically non-aligned. The 1971 map, on the other hand, constitutes significant evidence that the Parties' cadastres in the area do not coincide. The map contains hand-drawn highlighting to the north of the village of Vidošiči, approximately where the village of Kamenica must be located, to indicate an "unaligned boundary".

604. To shed further light on the situation, the Tribunal has consulted the Geoportals of both Parties, on which, notably, Croatia had relied repeatedly during the hearing. The cadastral limits on the Parties' Geoportals are *not* aligned. In view of such conflicting evidence, the Tribunal is not willing to rely on the Expert Report in support of a finding that the cadastres are aligned, and the Tribunal cannot proceed from a presumption that the cadastral limits designate the boundary between the Parties. Instead, the Tribunal turns to the evidence submitted by the Parties in support of their respective claim line.

605. Croatia has not provided any documentation other than the Expert Report in support of its position. Slovenia has adduced a variety of cartographic materials and other evidence.

606. A number of maps submitted by Slovenia are on such a small scale that it is impossible to draw any firm conclusions as to the location of the boundary near Kamenica, given the small size of the disputed area.[1151] However, if a choice had to be made on the basis of these materials, it would be in Croatia's favour. The boundary line on the maps which the Tribunal has reviewed proceeds in a northerly direction from the Kamenica River before it bends lightly eastwards. None of the maps evidence that the boundary line shows the kind of westerly inflection that is characteristic of Slovenia's claim lines.

1149 Maps attached to the letter of Črnomelj Surveying and Mapping Authority to the Surveying and Mapping Authority of the Socialist Republic of Slovenia, 6 May 1971, Annex SI-M-56.

1150 *See infra, notes* 1151-1152.

1151 Joseph II Land Survey, Inner Austrian provinces (1763-1787), Annex SI-M-1; Joseph II, Land Survey, Inner Austrian provinces, Sections 231, 236, 237, 238, 239, 246, 247, and 250, 1762-1787, Annex SI-M-5; Duchy of Carniola, 1832, Annex SI-M-14; Map of Carniola (1855), Annex SI-M-39. The Tribunal has also reviewed other maps provided by Slovenia, which do not allow for conclusions to be made regarding the shape of the boundary.

607. Among the maps submitted, a map from the Josephine period stands out as the most precise evidence of the location of the boundary west of Kamenica.[1152] The maps, according to Slovenia, show the "land cadastre limits of the Franciscan survey." When this Franciscan map is superimposed on the Parties' respective claim maps, it is apparent that the territorial limits on this map correspond with a high degree of precision to Croatia's claims, which are based on its current cadastral limits.

608. The Tribunal therefore concludes that the evidence, on balance, supports Croatia's claim. The Tribunal determines that the boundary is as shown in Map 23 of Volume III of Croatia's Counter-Memorial and in Map 59 of Volume III of Croatia's Reply.

ii. Kupa/Kolpa River

609. The Kupa/Kolpa River flows in a general easterly direction from Croatia's Gorski Kotar to the Sava River.

The Parties' Positions

610. Croatia's original claim with respect to the relevant territory is depicted in Volume III of its Counter-Memorial at Maps 13 to 22. In all these maps, the boundary coincides with the Slovenian bank of the Kupa River, with the exception of a few small areas.[1153]

611. Slovenia has consistently taken the view that the boundary runs along the middle of the Kolpa River. Slovenia contends that the cadastral boundaries are aligned with the middle of the Kolpa River.[1154]

612. In the corrected maps annexed to its Reply, Croatia's claim depicts the boundary running along the middle of the Kupa River.[1155]

1152 Brezovica and Kamenica, Land cadastre limits of the Franciscan survey of 19th century (comparison), p. 5, Annex SI-M-66.

1153 *See* Map 16 in the vicinity of Kavrani; Map 15 in the vicinity of Goršeti and of Planica; Map 14 in the vicinity of Gusti Laz; and Map 13 in the vicinity of Hrvatsko. On Map 13, the departure of the boundary from the river bank appears to show that the boundary cuts across a road on the Slovenian side.

1154 Transcript, Day 3, p. 87:24.

1155 Croatia's Reply, Vol. III/4, Maps 61/2-76; Croatia's Reply, Vol. III/5, Maps 77-83, 84/1, 84/3-6, and 85-88. Map 84/2 depicts the boundary running through the centre of the channel to the Slovenian side of an island in the middle of the Kupa River.

The Tribunal's Analysis

613. The Tribunal, therefore, observes that not only are the Parties' cadastral limits identical with respect to this part of the boundary, but so are their claims in the present proceedings. The boundary in this area is no longer in dispute.

614. Accordingly, the Tribunal determines that the boundary is as concurrently depicted on the Parties' claim maps. The Tribunal also notes that it need not address the Parties' arguments any further, especially in respect of *effectivités* in this particular area.

iii. Čabranka River

615. The Čabranka River is a tributary of the Kupa/Kolpa River. It runs south from its principal source near the Croatian settlement of Čabar to Osilnica, where it joins the Kupa/Kolpa.

The Parties' Positions

616. Slovenia explains that, similar to the Kamenica and Kolpa Rivers, the Čabranka River was established as the boundary between Croatia and Carniola during the Josephine Survey and confirmed in 1908-1909.[1156] In 1930, the municipalities of Draga, Trava and Osilnica were detached from the Kočevje district and integrated into the Čabar district.[1157] In 1931, the Čabar district was excluded from the *Dravska banovina* to form part of the *Savska banovina*.[1158] In 1945, the former river boundary between Croatia and Carniola was established as the boundary between Croatia and Slovenia.[1159]

617. Croatia's claim in respect of this area is depicted in Maps 12 and 13, annexed to its Counter-Memorial and in Maps 89 to 91, annexed to its Reply. Croatia disputes part of Slovenia's claim and argues that, on 25 July 1991, this part of the boundary was undisputed between the Parties as reflected in their matching cadastral boundaries. Croatia relies on the historic boundary between

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1156 Slovenia's Memorial, paras 6.133-34.

1157 Slovenia's Memorial, para. 6.137.

1158 Slovenia's Memorial, para. 6.137, Figure 6.26(b); Act Amending the Act on the Name and Division of the Kingdom to Administrative Territories, 28 August 1931, *Official Gazette of the Kingdom of Yugoslavia (Dravska banovina)*, No. 53/1931, Annex SI-64.

1159 Slovenia's Memorial, para. 6.140; Figure 6.28. The Act on the Administrative Division of the Federal Slovenia (1945), *Official Gazette of the Slovenian People's Liberation Council and the People's Government of Slovenia*, No. 33/1945, Annex SI-80, included the municipalities of Draga, Trava, and Osilnica as part of the Kočevje district, while Croatia's corresponding legislation did not include those settlements after 1947 in the Delnice or Rijeka districts.

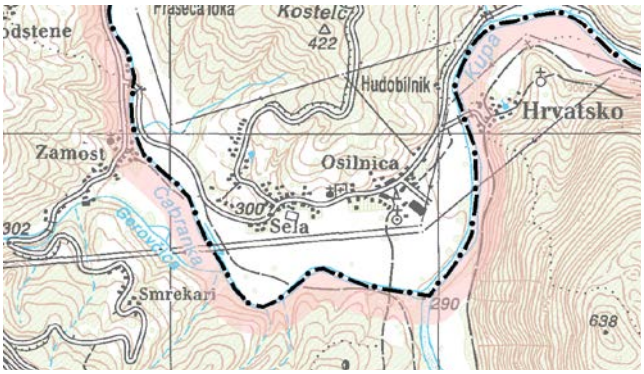
the Kingdom of Croatia and Austria, as depicted on a map produced by the Military Geographic Institute in 1882.[1160]

The Tribunal's Analysis

618. The Tribunal notes that the Parties' positions differ only with respect to two areas: an area of 6.7 ha immediately to the south-west of the settlement of Osilnica; and a smaller area to the east of the settlement of Plešce. The Parties' cadastral district limits in both areas are aligned. Slovenia however asserts title going beyond the aligned cadastral limits to the extent that they do not coincide with the course of the Čabranka River.

619. In respect of the area south of Osilnica, the discrepancy is readily apparent upon a juxtaposition of the Parties' claims, as illustrated in their Memorials:

(Croatia's Counter-Memorial, Map 13)



(Slovenia's Memorial, Map 33)

620. Given that the cadastral limits in the area of Osilnica are aligned, the Tribunal applies a working presumption that these aligned cadastral limits—which correspond to Croatia's claim—represent the boundary. In view of Slovenia's claim in the present arbitration, however, the Tribunal will examine whether there is evidence of legal title, in Slovenia's favour, to the small area south-west of the settlement of Osilnica up to the Čabranka River. Slovenia asserts that Osilnica was one of the settlements named in the internal legislation organising the Parties' respective territories after 1945 and was not included in Croatian legislation after 1947. While the Tribunal has reviewed this evidence, it notes that the latter supports Slovenia's general claim to title only in respect of the settlement of Osilnica, which however is not in dispute between the Parties. The evidence of title presented by Slovenia does not support Slovenia's claim that it has legal title over the specific

1160 Kamenica, Kolpa and Čabranka Map at scale of 1:75,000 produced by the Military Geographic Institute, Vienna, Zone 23, Col. XI, presented at Croatia's Counter-Memorial, Figure CM 5.44.

area in question. Accordingly, the Tribunal decides that the agreed cadastral limits represent the boundary in the area of Osilnica.

621. In view of this conclusion, there is no need, strictly speaking, for the Tribunal to consider the *effectivités* argued by Slovenia. The Tribunal recalls that evidence of *effectivités* is only relevant to the extent that no legal title can be established or that such legal title is unclear.[1161] However, for the sake of completeness, the Tribunal would add that the evidence put forward by Slovenia in this regard, notably in relation to water management activities,[1162] hunting,[1163] and police inspections,[1164] if considered relevant, would not alter the Tribunal's conclusion. The 1990 police inspection report adduced by Slovenia mentions "cases of cross-border ownership, mainly around Osilnica"[1165] and notes the existence of a concrete bridge between Osilnica with Hrvatsko.[1166] That bridge however is, according to the maps presented by the Parties,[1167] located to the east of the confluence of the Čabranka River with the Kupa/Kolpa River, at a point where the boundary is not in dispute. The Tribunal therefore concludes that Slovenia's evidence of *effectivités* does not support Slovenia's claim in respect of the area south of the settlement of Osilnica up to the Čabranka River.

622. Similar considerations apply in the second area claimed by Slovenia, in the vicinity of Plešce. The aligned cadastral limits of both States constitute a *prima facie* indication of the boundary in the area.[1168] Slovenia has presented no evidence of legal title in support of its claim that the boundary runs on the river, rather than on the aligned cadastral limits (which roughly follow the Čabranka River but do not fully coincide with its course).

1161 *See supra*, para. 340.

1162 Documentation and Maps from Water Management Company Hidrotehnik concerning the Exercise of the Water Communities' Supervision Powers and the Performance of Regulation Works on Kolpa and Čabranka from December 1987 and January 1991, Annex SI-698.

1163 Agreement on Management of Hunting Grounds, concluded between Municipal Assembly of Kočevje Municipality and Osilnica Hunting Club, 12 January 1967, and Agreement on the Allocation of the Hunting Grounds for Management, concluded between Executive Council of the Assembly of the Socialist Republic of Slovenia and Posestvo Snežnik, Snežnik Breeding and Hunting Grounds, 6 July 1982, Annex SI-604; Documentation and Maps from Water Management Company Hidrotehnik concerning the Exercise of the Water Communities' Supervision Powers and the Performance of Regulation Works on Kolpa and Čabranka from December 1987 and January 1991, Annex SI-698.

1164 Police Station Črnomelj: Safety and Security Assessment of the Kolpa Region in the Municipality Of Črnomelj, 7 December 1990, and Internal Affairs Administration Ljubljana okolica, Police Inspection: Assessment of the Security Situation along the Border with the Republic of Croatia, 10 December 1990, Annex SI-691.

1165 *Ibid.*

1166 *Ibid.*

1167 Slovenia's Memorial, Vol. 2, Map 33; Croatia's Counter-Memorial, Vol. 3, Map 13.

1168 Croatia's Reply, Vol. III/5, Map 90.

623. As noted earlier, evidence of *effectivités* is only relevant to the extent that no legal title can be established or that such legal title is unclear. However, even if *effectivités* were to be considered, the probative value of Slovenia's evidence of *effectivités* is very limited. The above-mentioned police inspection report states, in respect of Plešce, that "the border follows the middle of the Čabranka River, while the road runs on its Croatian side."[1169] The report records the understanding of the course of the boundary by a police officer on an isolated occasion; it can hardly be said to amount to proof of the effective exercise of territorial jurisdiction in the area. Hence, even if evidence of *effectivités* were relevant, the Tribunal would have to conclude, in assessing the force of such evidence, that the evidence suggesting that the aligned cadastral limits represent the border is more convincing.

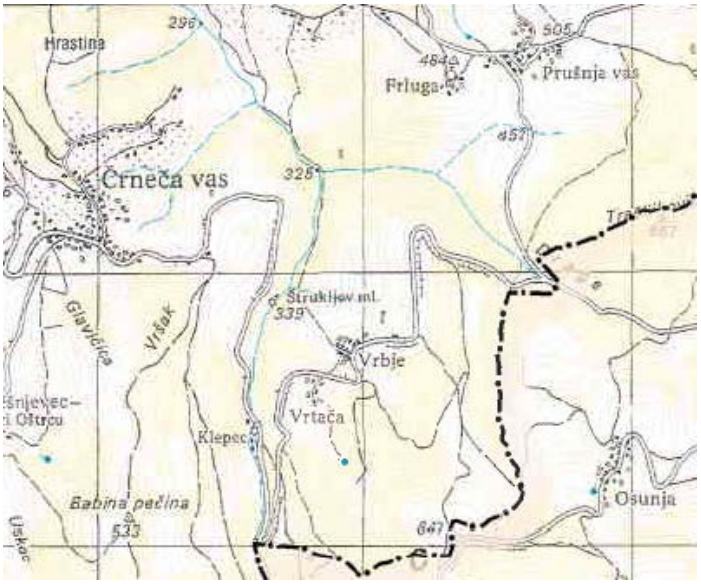
624. The Tribunal, therefore, determines that the course of the land boundary in the area of the Čabranka River follows the cadastral limits of the Parties.

(h) Črneča Vas

625. Finally, Slovenia claims a small area, with an approximate surface of 2.8 ha, to the east of the settlement of Črneča Vas.[1170] Slovenia's claim would lead to an inflection of the boundary, such that the fork in the road connecting the Slovenian settlements of Frluga/Prušnja Vas in the north and Vrbje in the south would be located on Slovenian territory, as is shown on the following figure extracted from Slovenia's claim map.

1169 Police Station Črnomelj: Safety and Security Assessment of the Kolpa Region in the Municipality Of Črnomelj, 7 December 1990, and Internal Affairs Administration Ljubljana okolica, Police Inspection: Assessment of the Security Situation along the Border with the Republic of Croatia, 10 December 1990, pp. 13-14, Annex SI-691.

1170 Slovenia's Memorial, Volume 2, Maps 5-16, Croatia's Counter-Memorial, Volume III, map 20. *See* Croatia's Counter-Memorial, Figure CM 5.38.



(Slovenia's Memorial, Volume 2, Map 22)

626. Slovenia states that "the roads and the intersection have always been managed by Slovenia."[1171] In particular, Slovenia relies on the Official Gazette of the SR of Slovenia, No. 30/1988[1172] to establish its management of the road.[1173] In response to Croatia's position, Slovenia denies that the Expert Group had in fact compared the relevant cadastral records of Croatia and Slovenia in the area.[1174]

627. Croatia alleges that Slovenia has "claimed a 2.8 ha plot simply in order to control the intersection of two roads that had always been accepted as part of Croatian territory."[1175] In this regard, Croatia refers to an extract from a Slovenian Atlas, reproduced below, in which the road intersection clearly lies on Croatian territory.[1176]

1171 Slovenia's Reply, para. 2.105.

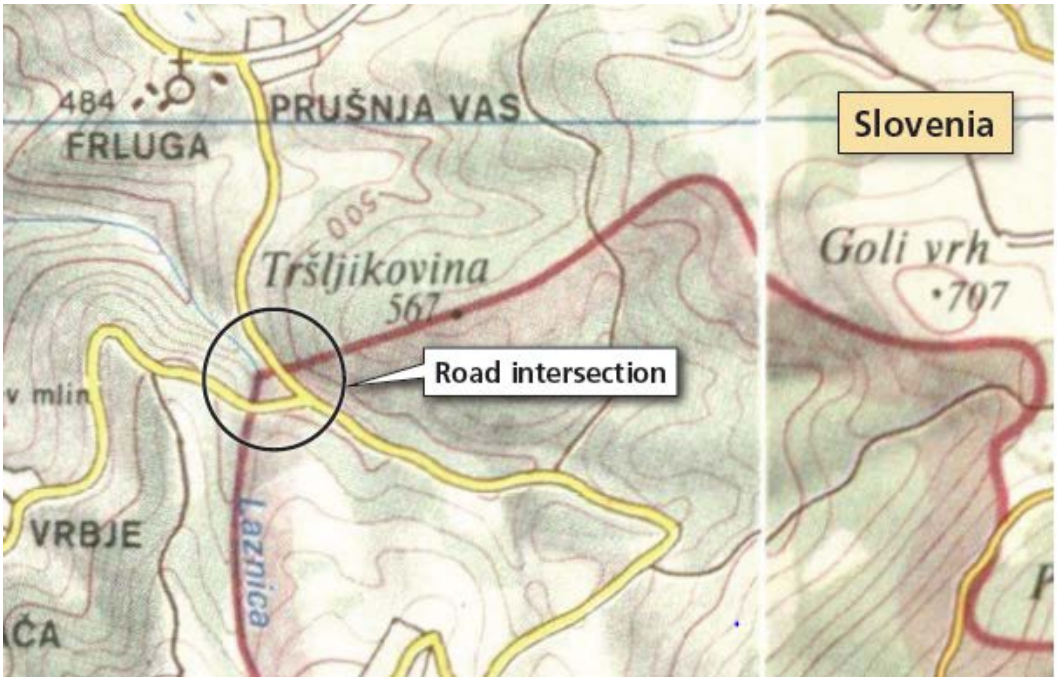
1172 Article 7, Annex SI-952, which states: "Important local routes for road traffic connections in the Krško Municipality shall be streets, squares and roads in urban settlements that are local community centres and the following local routes: . . . 40. Črneča vas – Vrbje – Vrtača – Prušnja vas."

1173 Slovenia points out that pursuant to the relevant legislation on roads applicable at the time, the classification of, *inter alia*, local roads was within the jurisdiction of the relevant municipal authorities. *See* Slovenian Act on Roads (*Official Gazette of the Socialist Republic of Slovenia*, Nos. 38/1981, 7/1986, 37/1987, 2/1988, Articles 7 and 10, Annex SI-951).

1174 Slovenia's Reply, para. 2.105.

1175 Croatia's Counter-Memorial, para. 5.108.

1176 *Ibid*.



(Croatia's Counter-Memorial, Figure CM 5.39)[1177]

628. The Tribunal observes, at the outset, that the limits of the cadastres in the area appear to be aligned. While the Tribunal has taken note of Slovenia's observation that the Expert Group may, in fact, not have compared the cadastral records in this specific area, the Tribunal also notes that Slovenia has not substantively disputed Croatia's contention that the cadastres are aligned. In any event, Slovenia has not submitted any evidence to the effect that its cadastre does not align with Croatia's cadastre. Accordingly, the Tribunal finds that the aligned cadastres provide a *prima facie* indication of the location of the boundary.

629. As the Tribunal has already concluded in respect of other areas, evidence of *effectivités* cannot normally be regarded as evidence of legal title. This also holds true in the present circumstances: the mere fact that Slovenian authorities may have extended road maintenance up to the road intersection is of little probative value for the existence of legal title. On the other hand, the longstanding alignment of the cadastres in Croatia and Slovenia constitutes significant evidence to that effect.

630. The Tribunal accordingly determines that the boundary in the area to the east of Črneča Vas follows the aligned cadastral limits of Croatia and Slovenia.

1177 Extract from Croatia's Counter-Memorial, Figure CM 5.39.

(i) Novi Kot/Prezid, Draga/Prezid, Babno Polje/Prezid

631. The boundary between the Parties crosses the Karst (Kras) plateau. Near the mountains of Škodovnik and Beli vrh, the boundary encircles the Croatian municipality of Prezid in the east, north, and west. In this zone, three areas are discussed.

i. Draga/Prezid and Novi Kot/Prezid

632. The first one has been identified by the Expert Group as area 9.1. It covers 3.8 km of the boundary and 1.4 ha and concerns the western boundary between the cadastral municipality of Draga in Carniola's (and Slovenia's) Kočevje district and the cadastral municipality of Prezid in Croatia's Čabar district.[1178] The second one, in the vicinity of Novi Kot, is mentioned only by Slovenia. It has a comparable size.[1179]

The Parties' Positions

633. Slovenia submits that, in these areas, the "aligned boundary of the cadastral municipalities must follow the bilaterally defined boundary between the former Kingdom of Croatia and Slavonia and the former Duchy of Carniola."[1180] Croatia agrees.[1181]

634. During the course of the proceedings, the Parties also agreed that the "boundary must be identified on the ground in accordance with the documentation on the boundary from the time of the delimitation carried out in 1909 between Carniola and Croatia."[1182] On that basis, they agree that area 9.1 belongs to Croatia, with the exception of plot No. 1648.[1183]

1178 Slovenia's Memorial, para. 6.144; *see also* Slovenia's Counter-Memorial, para. 5.18.

1179 Slovenia's Memorial, Figure 6.30.

1180 Slovenia's Memorial, para. 6.144; Croatia's Memorial, para. 6.34; Joint Croatian-Slovenian Expert Group for Collating Unaligned Borders of Cadastral Districts, Minutes on Field Works in the Area of Unaligned Borders of c.d. Prezid and c.d. Draga Performed from 8 to 10 July 1997, 11 December 1997), Annex HR-82. *See also* Letter to the Imperial-Royal Provincial Government in Laibach [Ljubljana] from the Imperial-Royal Ministry of the Interior, 6 June 1911, Annex SI-42; Letter to Republic Secretariat for Justice, Organisation of Administration and the Budget from Public Attorney's Office of the Socialist Republic of Slovenia, 24 March 1978, Annex SI-296.

1181 Croatia's Memorial, para. 6.34.

1182 Slovenia's Counter-Memorial, para. 5.23; Croatia's Reply, para. 4.13; Slovenia's Reply, para. 2.115 (with reference to corrected Map 35).

1183 Croatia's Counter-Memorial, paras 5.24-25; Joint Croatian-Slovenian Expert Group for Collating Unaligned Borders of Cadastral Districts, Minutes on Field Works in the Area of Unaligned Borders of c.d. Prezid and c.d. Draga Performed from 8 to 10 July 1997, 11 December 1997, p. 7, Annex HR-82; Croatia's Reply, para. 4.13; Transcript, Day 3, pp. 151:17-152:4.

635. With respect to the second area, Slovenia recalls that the border proposed in 1909 was accepted by Carniola and Slovenia, then surveyed and demarcated on the ground.[1184] Slovenia submits that that border is still valid. This is not disputed by Croatia, which does not address the matter.

The Tribunal's Analysis

636. The Tribunal considers that there is no longer a dispute between the Parties in relation to those two areas. The Tribunal accordingly determines that the boundary follows the aligned limits of the cadastres of Croatia and Slovenia.

ii. Babno Polje/Prezid

637. The disputed area 9.2 covers 0.7 ha. It is claimed by Croatia as part of the cadastral district of Prezid and by Slovenia as part of the cadastral district of Babno Polje.

The Parties' Positions

638. Both Parties agree that, in that region, the boundary is the historic Austro-Hungarian boundary. They also agree that two boundary markers No. 105 and No. 106 had been duly placed on the ground in 1913. However, Slovenia submits that the boundary between those two markers is a straight line, whereas Croatia contends that it is a curve which follows the limit of a Croatian plot No. 2725. The area covered by that plot is part of plot No. 860 on the Slovenian cadastre.

639. According to Slovenia, the boundary in this area corresponds to its cadastral boundaries, as shown by a sketch-map of the triangulation of the boundary between the Babno Polje and the Prezid cadastral municipalities drawn in 1918.[1185] Slovenia notes that Croatia disregards the demarcation documentation in this sector which confirms Slovenia's claim, and continues to rely on its own cadastral map.[1186] Slovenia states:

> The land boundary as marked on the 1918 sketches runs from border stone No. 105 north and in a fairly straight line to border stone No. 106; there the boundary line turns sharply to the east. Border stone No. 106 is situated at the southeastern boundary of disputed plot No. 860. Under these circumstances, the part of plot No. 860 which overlapped with the Croatian cadastral records could not be part of Croatia.[1187]

1184 Slovenia's Memorial, para. 6.144 and Figure 6.30.

1185 Slovenia's Memorial, para. 6.145.

1186 Transcript, Day 3, p.152:5-12.

1187 Slovenia's Memorial, para. 6.145.

640. Croatia states that the dispute arises from disagreement on how marker No. 105 and marker No. 106 should be connected.[1188] Croatia argues that the boundary between the stones should be drawn in accordance with the boundary during the Austro-Hungarian period, as depicted on a cadastral survey map dated 1860 and confirmed by Croatian *effectivités*.[1189] Croatia underlines that the only evidence Slovenia relies on is a sketch-map of "uncertain provenance".[1190]

The Tribunal's Analysis

641. The Tribunal notes that the disputed area was already mentioned both on the Prezid and the Babno Polje cadastral maps in the nineteenth century,[1191] and that it was still mentioned on those two maps in 1996.[1192] Changes in ownership were registered both on Slovenian and Croatian land registries.[1193]

642. The Tribunal observes that when the boundary was demarcated in 1913, markers No. 105 and No. 106 were placed around 100 m from one another. If it had then been decided to incorporate plot No. 2725 into Croatia, it would have been easy to place another marker at the north-western extremity of that plot—which was not done. Moreover on a field sketch of the provincial boundary between Carnolia and Croatia drawn in June 1918 by an Imperial-Royal Senior Surveyor, the boundary line appears as a nearly straight line joining the two markers.[1194] The Tribunal considers that this line was the boundary at the time and that it remains so. Accordingly, the Tribunal determines that the boundary is as indicated on the Imperial-Royal field sketch of June 1918.

1188 Croatia's Counter-Memorial, para. 5.39.

1189 Croatia's Counter-Memorial, para. 5.40; *see* Decision on Inheritance of Late Jakov Paulin, Municipal Court in Delnice, Delnice, 29 March 1967, p. 1, Annex HR-194.

1190 Croatia's Counter-Memorial, para. 5.42; *see* Slovenia's Memorial, para. 6.145; Letter to Republic Secretariat for Justice, Organisation of Administration and the Budget from Public Attorney's Office of the Socialist Republic of Slovenia, 24 March 1978, Annex SI-296.

1191 Cadastral municipality Babno polje (1823), Sheet No. I, Annex SI-832; Cadastral municipality Hrib (1823), Sheet Nos. I, IX, Annex SI-833; Cadastral municipality Prezid (1860), Sheet No. I, Annex SI-838.

1192 Mixed Slovenian-Croatian Expert Group for the Comparison of Discrepancies in the Course of Cadastral Boundaries, Minutes of the Field Inspection of Mismatched Cadastral Municipalitiy Boundaries in a part of the Prezid Cadastral Municipality and the Babno polje Cadastral Municipality, 12 June 1996, Annex SI-290.

1193 Inheritance Act (1965), *Official Gazette of the Socialist Federative Republic of Yugoslavia*, No. 42/1965; Cerknica Local Court: Historical Extract No. 77/97 from Land Register for cadastral municipality Babno polje, Land Register Entry No. 317, 20 May 1997, Annex SI-980; Decision on Inheritance of Late Jakov Paulin, Municipal Court in Delnice, Delnice, 29 March 1967, Annex HR-194.

1194 Sketch No. 1, Provincial boundary between Camiola and Croatia (June 1918), Annex SI-51.

3. Istria Region

643. The Istria Region lies between the Central Region in the east and the Adriatic Sea at the Bay in the west. The main geographic feature of the region is the Dragonja River, which cuts across the northern part of the Istrian peninsula from east to west before emptying into the Adriatic Sea at the Bay.[1195] The Parties disagree as to the definition of the region. According to Croatia, the region extends from Gorski Kotar to the mouth of the Dragonja River (at the point where it debouches into the Adriatic Sea at the Bay).[1196] According to Slovenia, the region extends from the former tripoint between Slovenia, Croatia and the Julian March, situated in the Snežnik area (at the foot of mount Škodovnik), to the Bay.[1197]

644. Most of the region had the status of Austrian Crown Land under the Dual Monarchy.[1198] At the end of World War I, the Dual Monarchy collapsed, and the region was transferred to Italy and integrated into the Julian March, pursuant to the Treaty of Saint-Germain-en-Laye and the Treaty of Rapallo.[1199]

645. During World War II, political resistance emerged in Istria and the Julian March.[1200] AVNOJ, the federal entity exercising authority and serving as umbrella for other liberation movements, confirmed in 1943 decisions of the National Anti-Fascist Council of the People's Liberation of Croatia ("ZAVNOH") and of the Liberation Front of the Slovene People to incorporate Croatian Istria and the Slovenian Littoral into their respective territories.[1201]

646. The need for a delimited boundary in Istria arose as a federal State composed of six republics was envisaged[1202] and tensions between members of the resistance movement—commonly referred to as the "partisans"—concerning their respective "jurisdiction(s)" arose.[1203] The Croatian and Slovenian partisan authorities met in the village of Malija to address the matter.[1204] Croatia argues that, at that meeting, the border between Croatia and Slovenia in Istria was agreed.[1205] Slovenia

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1195 Croatia's Memorial, para. 5.1.

1196 Croatia's Memorial, para. 5.3.

1197 Slovenia's Memorial, paras 6.03, 6.148.

1198 *See* Croatia's Memorial, paras 5.9-10; Slovenia's Memorial, paras 6.149-50.

1199 *See* note 11 and 13; *See also* Croatia's Memorial, para. 5.11; Slovenia's Memorial, para. 6.151.

1200 Croatia's Memorial, paras 5.12-13; Slovenia's Memorial, para. 6.152.

1201 *See* Croatia's Memorial, paras 5.14-16; Slovenia's Memorial, para. 6.153.

1202 Croatia's Memorial, para. 5.16.

1203 Slovenia's Memorial, para. 6.156.

1204 Croatia's Memorial, paras 5.17-24; Slovenia's Memorial, paras 6.156-57.

1205 Croatia's Memorial, para. 5.24.

argues that the "arrangement" was "aimed at instituting a mere practical solution for the specific purpose of the liberation efforts."[1206]

647. Under the 1945 Belgrade Agreement,[1207] the Dragonja River and the entire boundary between the Parties were located within Zone B.[1208] In 1947, under the 1947 Peace Treaty with Italy the eastern part of the Julian March and Istria were incorporated into Yugoslavia. The western part up to the Adriatic Sea became part of the FTT.[1209]

648. The 1947 Peace Treaty with Italy attributed the eastern part of the Julian March and Istria, without any distinction, to Yugoslavia.[1210] Similarly, the order of the People's Assembly of the FPRY of 15 September 1947 did not contain any indication concerning the attribution of these territories to Croatia or Slovenia.[1211]

649. Slovenia explains:

> On 20 February 1947, the Supervising Authority of the Regional People's Liberation Committee for the Slovenian Littoral (PPNOO) and the Regional People's Committee for Istria in Labin (the Croatian civil administration), in consensus and with the approval of the military administration of the Yugoslav army, adopted an Ordinance establishing the Istrian County. This county comprised the Koper and Buje Districts. The Istrian County would become part of the FTT as the new Zone B after the integration of the eastern part of Istria and the former Julian March into Yugoslavia. The Istrian County was, in other words, the last part of Istria under Yugoslav military administration within the FTT regime after the 1947 Peace Treaty.[1212]

650. The Ordinance established an Assembly of the Istrian Area's People's Committee and gave it "entire civil jurisdiction".[1213] Zone B of the FTT was therefore administered by a jointly

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1206 Slovenia's Memorial, para. 6.157.

1207 Agreement between the United States of America, the United Kingdom of Great Britain and Northern Ireland and Yugoslavia relating to the provisional administration of Venezia Giulia, done in Belgrade on 9 June 1945, Annex HRLA-11.

1208 Croatia's Memorial, para. 5.26.

1209 Slovenia's Memorial, para. 6.160.

1210 Slovenia's Memorial, para. 6.166.

1211 Slovenia's Memorial, para. 6.167.

1212 Slovenia's Memorial, para. 6.190; *see* Croatia's Memorial, para. 5.31. *See also* Decision on the Establishment of the Istrian Area, *Official Gazette of the People's Committee of the Istrian Area*, No. 1/1947, Article 1, Annex HRLA-14.

1213 Decision on the Establishment of the Istrian Area, *Official Gazette of the People's Committee of the Istrian Area*, No. 1/1947, Article 1, Annex HRLA-14; Croatia's Memorial, para. 5.31; Slovenia's Memorial, para. 6.191.

established body and not, as was the case for the former Zone B of the Julian March, by Slovenian and Croatian civil administrations respectively along a *de facto* delimitation line.[1214]

651. On 25 April 1952, the Assembly of the Istrian Area's People's Committee and the Military Administration of the Yugoslav Army issued a Decision on the Division of the Istrian Area into Districts and Municipalities.[1215]

652. On 5 October 1954, the FTT was dissolved pursuant to the London Memorandum, signed by the United States, United Kingdom, Italy, and Yugoslavia.[1216] Zone B of the FTT was transferred to Yugoslavia. A Yugoslav federal Act implemented the memorandum and attributed the district of Koper to Slovenia and the district of Buje to Croatia.[1217] Croatia adopted legislation providing that the laws of Croatia applied in the district of Buje and another law taking account of the new district for purposes of administrative organization.[1218] Slovenia did the same for the district of Koper.[1219]

653. Croatia contends that it is agreed between the Parties that in the Istrian Region, unlike in the Mura River and Central Regions, no historic boundaries ever existed and the boundaries were only established after World War II.[1220] Addressing the source of title in the Istria Region, Croatia refers to agreements reached between members of Slovenian and Croatian partisan groups of the

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1214 Slovenia's Memorial, para. 6.191.

1215 *See* Decision on the Division of the Istrian Area into Districts and Municipalities, *Official Gazette of the People's Committee of the Istrian Area*, No. 6/1952, Annex HRLA-22; *see also* Croatia's Memorial, para. 5.36; Slovenia's Memorial, para. 6.192.

1216 Memorandum of Understanding regarding the Free Territory of Trieste among the United States, United Kingdom, Italy and Yugoslavia, done in London on 5 October 1954, 235 U.N.T.S. 99, Annex HRLA-32; Croatia's Memorial, para. 5.37; Slovenia's Memorial, para. 6.194.

1217 Decision of the Federal Executive Council on the Acceptance of the Agreement Contained in the Memorandum of Understanding between the Government of the Federal People's Republic of Yugoslavia, the Italian Republic, the United States of America and the United Kingdom, on the Free Territory of Trieste, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 43/1954, Sec. 3, *reprinted in* North-Adriatic Institute of the Yugoslav Academy of Arts and Sciences, *The Incorporation of Istria into the Federal State of Croatia in the Democratic Federal Yugoslavia 1943-1968* (Rijeka, 1968), p. 329, Annex HRLA-33; Croatia's Memorial, para. 5.37; Slovenia's Memorial, para. 6.195.

1218 Law on the Application of the Constitution, the Laws and Other Legal Acts of the People's Republic of Croatia on the Territory of the District of Buje, *Official Gazette of the People's Republic of Croatia*, No. 53/1954, Article 1, Annex HRLA-31; Law on Amending the Law on Subdivision of the People's Republic of Croatia into Districts, Cities and Municipalities, *Official Gazette of the People's Republic of Croatia*, No. 53/1954, Article 2, Annex HRLA-30; *see* Croatia's Memorial, paras 5.38-39; Slovenia's Memorial, para. 6.197.

1219 Act to Extend the Applicability of the Constitution, Laws and Other Regulations of the People's Republic of Slovenia to the Koper Area, *Official Gazette of the People's Republic of Slovenia*, No. 43/1954, Annex SI-140; *Official Gazette of the People's Republic of Slovenia*, No. 24/1955, Annex SI-143; Slovenia's Memorial, para. 6.196; Croatia's Memorial, paras 5.43-45.

1220 Transcript, Day 1, pp. 81:22-82:7, *citing* Slovenia's Memorial, para. 6.03, Slovenia's Reply, para. 2.143.

resistance movement in 1944 concerning their respective "jurisdiction(s)".[1221] Croatia contends that through such agreements, the boundary of Croatia and Slovenia in the Istria Region was agreed.[1222] In Western Istria specifically, Croatia refers to the establishment of a *de facto* boundary along the course of the Dragonja River pursuant to the informal arrangements between partisan groups in 1944 that remained the *de facto* situation until 1955, when it was confirmed by an agreement between the Executive Councils of Croatia and Slovenia.[1223] Croatia relies further on Croatian administration of the area on the southern or left bank of the Dragonja River from 1957 until the critical date.[1224]

654. Relying on the 1996 Report, Croatia identifies eight disputed areas in the Istria Region.[1225] The largest is disputed area 11.9,[1226] which was within a single Austrian, and then Italian municipality, meaning that there was neither a quasi-international boundary in this area nor a municipal boundary separating any part of the area claimed by Croatia from any part of the area claimed by Slovenia.[1227]

655. Beyond these areas, Croatia faults Slovenia for asserting three "new" claims that it had not raised at the time of independence.[1228] The three new claims encompass approximately 9 ha. Croatia argues that these new claims are at variance with Slovenia's own law as well as with Slovenia's statement in its Memorial that the boundary in eastern Istria corresponds to cadastral limits.[1229]

656. Croatia emphasises that the Parties agree on certain points with regard to Istria. According to Croatia, the Parties agree that there is no historical boundary and the relevant chain of legal instruments linking the title to the critical date refers back to the Austro-Hungarian boundaries.[1230] According to Croatia, the Parties also agree that the western part of Istria was not incorporated into Croatia or Slovenia until 1954; and that when it was so incorporated, the boundary was unresolved.[1231]

1221 Croatia's Memorial, paras 5.17-24.

1222 Croatia's Memorial, para. 5.24.

1223 Transcript, Day 2, pp. 33:18-34:8.

1224 Transcript, Day 2, p. 34:4-8.

1225 Croatia's Counter-Memorial, para. 4.1.

1226 Transcript, Day 2, p. 31:15-17 *citing* Tab 6.1 for a reference to the disputed area 11.9.

1227 Transcript, Day 2, p. 33:12-17.

1228 Croatia's Counter-Memorial, para. 4.9; Transcript, Day 2, p. 32:14-19.

1229 Croatia's Counter-Memorial, paras 4.125-26.

1230 Transcript, Day 5, pp. 166:20-167:5; Transcript, Day 3, pp. 169:7, 129:24-26.

1231 Transcript, Day 5, p. 167:7-9.

657. Slovenia asserts that in the Istria Region, the legal title relevant for the determination of the boundary and for the application of the *uti possidetis* was established only after World War II. It adds that the boundary was nevertheless based on pre-existing cadastral boundaries.[1232]

658. Slovenia recalls that the eastern part of the former Julian March and Istria were incorporated into Yugoslavia in accordance with the post-war treaties, specifically, the 1947 Peace Treaty, while the western part of Istria first became part of the FTT and was included into Slovenia and Croatia only in 1954.[1233]

659. Slovenia analyses title in the eastern part of the former Julian March, transferred to Yugoslavia under the 1947 Peace Treaty with Italy, in the following way:

> The legislation concerning the territorial organisation of Slovenia, on the one hand, and Croatia, on the other hand, shows that, upon the transfer of part of Zone B to Yugoslavia, both republics received those municipalities, settlements and districts that had been administrated by the corresponding Slovenian or Croatian civil administration within Zone B. These administrative units were organized for this specific purpose in the eve of the Peace Treaty in 1947. In other words, the transfer was carried out with regard to the established *de facto* line between districts administrated by the Slovenian authorities and those ruled by Croatian authorities, respectively. After the transfer, this *de facto* agreed line became the legal boundary between Slovenia and Croatia.[1234]

660. Slovenia therefore asserts that, in the eastern part of Istria and the former Julian March, "the cadastre constitutes not only a proof of the boundary line; it is the established legal title for the delimitation of the boundary."[1235]

661. Slovenia adds that the boundary in the eastern part of Istria "has been modified slightly"[1236] after its establishment in 1947. It refers to the transfer of the Gradin area from Croatia to Slovenia, endorsed by the Federal People's Assembly of Yugoslavia in 1956.[1237]

662. Slovenia asserts that the boundary in the western part of Istria, established in 1954, corresponds to the boundary between the Koper District and the Buje District.[1238]

1232 Slovenia's Memorial, para. 6.148; Transcript, Day 3, p. 154:5-9.

1233 Slovenia's Memorial, para. 6.160; Slovenia's Counter-Memorial, para. 6.08.

1234 Slovenia's Memorial, para. 6.170 (footnote omitted); *see* Slovenia's Counter-Memorial, para. 6.10.

1235 Slovenia's Memorial, para. 6.174.

1236 Slovenia's Memorial, para. 6.175.

1237 Slovenia's Memorial, paras 6.176-79; Decree Endorsing the Change of Borders between the PR of Croatia and the People's Republic of Slovenia, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 15/1956, Article 1, Annex SI-149; *see* Slovenia's Counter-Memorial, para. 6.13.

1238 Slovenia's Memorial, paras 6.195-97; *see* Slovenia's Counter-Memorial, para. 6.12.

663. According to Slovenia, the Parties agree that the boundary between them in both parts of the Istria sector was established *de novo*, and that the cadastre played a very important role in this *de novo* delimitation of the boundary. However, Slovenia says, Croatia fails to indicate on what legal basis this was done: the cadastre constitutes the legal basis in the Istria sector because the division and delimitation in this area was done by competent authorities with reference to cadastral limits.[1239]

664. Concerning what Croatia calls Slovenia's "three new claims", Slovenia submits that the Mixed Expert Group did not find the cadastral boundaries aligned in the area as it did not compare them.[1240] Slovenia emphasises that its own position is supported by cadastral records and official maps.[1241]

(a) Leskova Dolina and Snežnik/Prezid

665. There is a discrepancy between the cadastral records of Leskova Dolina and Snežnik (Slovenia) and Prezid (Croatia),[1242] which has given rise to disputed areas 9.3 and 9.4 as identified by the Expert Group. The boundary claimed by Croatia is marked on the ground by eight concrete stones. The boundary claimed by Slovenia is marked by 16 concrete columns.[1243]

666. With 66.55 ha, area 9.3 is the largest. Area 9.4 is composed of six smaller plots. Those seven forest plots were owned by Mr. Viktor Tomšič from 1943 to 1948/1950[1244] and are conveniently called the Tomšič plots.

1239 Transcript, Day 3, p. 156:6-20.

1240 Slovenia's Reply, para. 2.134.

1241 Slovenia's Reply, para. 2.135; *see* Surveying and Mapping Authority of the Socialist Republic of Slovenia: State Base Map, Socialist Republic of Slovenia, Risnjak-Čabar – 11, 1976, Annex SI-M-71; Surveying and Mapping Authority of the Republic of Slovenia: State Topographic Map, Snežnik 184, 1995, Annex SI-M-75; Cadastral municipality of Sušak (1819), Sheet Nos. I, III, IV, V, Annex SI-828; Cadastral municipality of Sušak (Rectification, 1877), Sheet Nos. III, IV, VSI-839; Surveying and Mapping Authority of the Republic of Slovenia: State Topographic Map, Novokračine 198, 1995, Annex SI-M-76; *see also* the 1837 rectified copies of the maps of the cadastral municipality Lisac in Slovenia's Reply, cadastral municipality Lisac (Rectification, 1837), Sheet Nos. III, IV, Annex SI-837; the 1879 rectified copies of the cadastral municipality of Lipa (bordering the cadastral municipalities of Sušak and Lisac), in Slovenia's Reply, cadastral municipality Lipa (Rectification, 1879), Sheet Nos. I, IV, V, Annex SI-840. Slovenia corrects the depiction of its claim at Slovenia's Reply, para. 2.136.

1242 Slovenia's Memorial, para. 6.180.

1243 Minutes from the Field Survey Performed in Collating Unaligned Borders of Cadastral Districts, Border Sector IX, Case 3 (Prezid/Leskova Dolina), Joint Expert Group, Prezid, 13 June 1996, Annex HR-78; Slovenia's Counter-Memorial, Figure 6.4.

1244 Extract from the Land Register, cadastral municipality of Snežnik, Folio No. 190, 6 November 1991, Annex SI-241.

667. It is not disputed that the Tomšič plots were part of Croatia before the First World War. It is also undisputed that they became part of the Italian Julian March under the Treaty of Rapallo of 12 November 1920. They passed under the sovereignty of Yugoslavia under the 1947 Peace Treaty with Italy.

668. The territory attached to Yugoslavia under the 1947 Peace Treaty with Italy was shared between Croatia and Slovenia. However no federal legislation fixed the boundary between the two Republics. Each Republic enacted legislation on the administrative division of its territory.

669. The administrative and territorial division of Croatia was fixed by an Act dated 28 June 1947,[1245] amended on 26 May 1948.[1246]

670. On the Slovenian side, the Supervising Authority of the Regional People's Liberation Committee for the Littoral issues enacted, on 8 February 1947, a decree on the organisation of administrative division of districts and localities.[1247] On the basis of that text, a new decree, dated 23 February 1948, fixed the administrative division of the Republic.[1248]

671. Under that decree, the former Italian district of Monte Nevoso (Mount Snežnik) was shared between two new districts called Leskova Dolina and Snežnik. Area 9.3 became part of the municipality of Cerknica within the cadastral district of Leskova Dolina. Area 9.4 became part of the municipality of Ilirska Bistrica within the cadastral district of Snežnik. It was later decided by Slovenia to incorporate both areas into the municipality of Čabar within the cadastral district of Prezid.[1249]

1245 Law on Administrative and Territorial Subdivision of the People's Republic of Croatia, *Official Gazette of the People's Republic of Croatia*, No. 60/1947, Annex HRLA-16; Act on the Administrative and Territorial Division of the People's Republic of Croatia, 1947, *Official Gazette of the People's Republic of Croatia*, No. 60/1947, Annex SI-106.

1246 Law on Changes and Amendments to the Law on Administrative and Territorial Subdivision of the People's Republic of Croatia, *Official Gazette of the People's Republic of Croatia*, No. 42/1948, Annex HRLA-20; Act Amending the Act on the Administrative and Territorial Division of the People's Republic of Croatia of 28 June 1947, 1948, *Official Gazette of the People's Republic of Croatia*, No. 42/1948, Annex SI-114.

1247 Supervising Authority of the Regional People's Liberation Committee, Decree on the Organisation of Administrative Division of Districts and Localities, 8 February 1947, Annex SI-100; Supervising Authority of the Regional People's Liberation Committee, Secretariat, Department for the Establishment of the People's Authority, Plan for New Administrative Division of the Slovenian Littoral within the Boundaries of the Area to Be Annexed to the Federal People's Republic of Yugoslavia, 8 February 1947, Annex SI-101.

1248 Act on the Administrative Division of the People's Republic of Slovenia, 1948, *Official Gazette of the People's Republic of Slovenia*, No. 9/1948, Annex SI-113.

1249 Croatia's Memorial, para. 6.5; Slovenia's Memorial, para. 6.184-86.

i. The Parties' Positions

672. Slovenia recalls that pursuant to the Treaty of Rapallo the disputed areas were integrated into the Kingdom of Italy and a new frontier was demarcated and fixed by border stones on the ground.[1250] Disputed areas 9.3 and 9.4 were thus part of the Italian Julian March from 1920 to 1947. Under the Treaty of Paris of 1947, Slovenia argues, the whole area of Snežnik as it was under Italian sovereignty became part of Slovenia's territory, including the disputed areas.[1251] Slovenia also points to its administration of the region since 1947.[1252] Thus, according to Slovenia, the current boundary between the two Parties is the former boundary between Italy and Yugoslavia.

673. For its part, Croatia submits that Slovenia could not avail itself of that boundary, which must be considered as null and void. In Croatia's view, the Treaty of Rapallo, which had ceded to Italy large parts of Croatia's former territory,[1253] was rejected in 1943 by the Slovene and Croat partisan organisations as well as AVNOJ.[1254] Croatia submits that AVNOJ decided that Croatian lands that had been annexed to Italy would be restored to Croatia, and that annexed Slovenian parts of the former Austrian Crown Lands would be incorporated into Slovenia.[1255] Croatia adds that "both disputed areas lie on the Croatian side of the historic boundary between the Kingdom of Croatia and Austria that had been delimited in 1860 and demarcated in the field in 1913."[1256]

1250 Slovenia's Memorial, para. 6.184; Transcript, Day 3, pp. 154:20-155:5.

1251 Slovenia's Memorial, para. 6.186; Transcript, Day 3, p. 159:14-17.

1252 Slovenia's Memorial, para. 6.187; *see* Slovenia's Counter-Memorial, paras 6.34-35; *see also* Slovenia's Reply, para. 2.127.

1253 Croatia's Memorial, para. 6.29; Transcript, Day 2, p. 12:19-22.

1254 Croatia's Reply, para. 4.8; *see* Croatia's Memorial, paras 6.16-17; Resolution of the Second Session of the National Anti-fascist Council of People's Liberation of Croatia, Plaški, 14 October 1943, Sec. 4, reprinted in North-Adriatic Institute of the Yugoslav Academy of Arts and Sciences, *The Incorporation of Istria into the Federal State of Croatia in the Democratic Federal Yugoslavia, 1943-1968* (Rijeka, 1968), p. 197, Annex HRLA-6; Declaration of the Liberation Front of the Slovenian People on the Incorporation of the Slovenian Littoral into Slovenia and Yugoslavia, 16 September 1943, Article 1, reprinted in North-Adriatic Institute of the Yugoslav Academy of Arts and Sciences, *The Incorporation of Istria into the Federal State of Croatia in the Democratic Federal Yugoslavia*, 1943-1968, Rijeka, 1968, p. 209, Annex HRLA-4; Decision of the Anti-fascist Council of People's Liberation of Yugoslavia on the Incorporation of Slovenian Littoral, Venetian Slovenia, Istria and Croatian Adriatic Islands to Yugoslavia, Jajce, 30 November 1943, Documents of the General Staff of the People's Liberation Army of Yugoslavia 1943-1944 in Military History Institute, *Almanac of Documents and Records on People's Liberation War of the Yugoslav Peoples* Vol. II, Book 11, p. 446 (1963), Annex HRLA-9; Transcript, Day 2, pp. 13:23-14:3; Transcript, Day 2, p. 14:4-10.

1255 Transcript, Day 6, p. 8:13-19.

1256 Croatia's Counter-Memorial, para. 5.17.

674. Croatia argues that, on the international plane, the Treaty of Paris returned to Yugoslavia most of the land that had been lost by the Treaty of Rapallo,[1257] restoring the "historic Austro-Hungarian boundary" in the area.[1258]

675. As regards Yugoslav domestic law, Croatia invokes federal legislation adopted in 1946 and 1947. It first mentions the "Law on the Nullity of Laws and Regulations adopted prior to 6 April 1941" dated 23 October 1946[1259] and submits that the relevant provisions of that federal Law were declared applicable to "the territory attached to the Federal People's Republic of Yugoslavia pursuant to the Peace Treaty with Italy" through a mandatory interpretation dated 3 November 1947.[1260] Croatia also mentions the Federal Order of 15 September 1947, which extended "the applicability of the constitution, laws and other legal regulations of the Federal People's Republic of Yugoslavia" to the same territory.[1261] In both Croatia and Slovenia,[1262] Orders extending the law of the two Republics to the attached territory were enacted some days later. These Orders are drafted in comparable terms.[1263]

676. Slovenia rejects Croatia's position that the Treaty of Rapallo was annulled during or after World War II. It argues that AVNOJ did not challenge pre-war treaties, and did not have the power to annul them.[1264] Moreover, Slovenia points out that the internal legislation upon which Croatia relies—the Order to Extend the Applicability of the Constitution, Acts and Other Regulations of the FPRY to the Territory that was Attached to the FPR Yugoslavia under the Peace Treaty with Italy of September 1947—specifically provides that "[t]he legal regulations of the bodies of the

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1257 Transcript, Day 2, p. 14:11-14.

1258 Croatia's Memorial, para. 6.31; *see also* Croatia's Memorial, para. 6.20; Transcript, Day 2, p. 19:7-11.

1259 Law on the Nullity of Laws and Regulations Adopted prior to 6 April 1941, 23 October 1946, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 86/1946, 25 October 1946, Annex HRLA-80.

1260 Mandatory Interpretation of Provisions of Articles 1, 2, 4, 7, 10, and 11 of the Act on Invalidation of Legal Regulations Issued prior to 6 April 1941 and During Enemy Occupation (1947), *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 96/1947, Annex SI-855.

1261 Order to Extend the Applicability of the Constitution, Laws and Other Legal Regulations of the Federal People's Republic of Yugoslavia that was attached to the Federal People's Republic of Yugoslavia under the Peace Treaty with Italy, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 80/1947, Annex SI-108.

1262 In the case of Slovenia, *cf.* also a preceding decree dated 5 June 1945.

1263 Order to Extend the Applicability of the Constitution, Laws and Other Regulations of the People's Republic of Slovenia to the Territory Attached to the Federal People's Republic of Yugoslavia under the Peace Treaty with Italy to the Extent this Territory Shall Be Incorporated into the People's Republic of Slovenia (1947), *Official Gazette of the People's Republic of Slovenia*, No. 39/1947, Annex SI-109; Order to Extend the Applicability of the Constitution, Laws and Other Regulations of the People's Republic of Croatia to the Territory of Istria, the Towns of Rijeka and Zadar and to the Island of Lastovo (1947), *Official Gazette of the People's Republic of Croatia*, No. 87/1947, Annex SI-110.

1264 Transcript, Day 3, p. 160:12-21.

people's authority, which were issued in this territory, shall remain valid unless they are contrary to federal Acts and other legal regulations."[1265]

677. Slovenia also objects to Croatia's claim that the 19th century boundary between Austria and Hungary could have been re-established in the area.[1266] Even if the Treaty of Rapallo had lost its effect in the manner contended by Croatia, the Tomšič plots became part of Slovenia's Istria sector when the boundary was determined anew in 1947.[1267] Slovenia contends that it is plain that the entire district of Ilirska Bistrica, including the disputed area, became part of Slovenia in 1947, as confirmed by legal acts following the Treaty of Paris,[1268] including the 1948 Act on Administrative Division of Slovenia. As a result, Slovenia included the Tomšič plots in its territory as part of the Illirska Bistrica and the cadastral municipality of Snežnik, while Croatia enacted no legislation to include the plots in its cadastral municipality of Prezid.[1269] This confirms that the plots became part of Slovenia.[1270]

678. Finally, Croatia adds that *effectivités*, consisting mainly of forestry management activities, confirm its sovereignty.[1271] A letter from a Slovenian forestry inspector dated 6 February 1989 adduced by Slovenia as Annex SI-954 in connection with disputed area 9.3 concedes, according to Croatia, that Croatia had administered the disputed area during the four decades preceding the critical date.[1272]

679. Slovenia argues that the *effectivités*, invoked by Croatia, as well as Annex SI-954 confirm Slovenia's title to the district.[1273]

ii. The Tribunal's Analysis

680. Croatia first submits that the Treaty of Rapallo[1274] was null and void. As a consequence, Croatia argues, "[t]he borders established under the Rapallo Treaty were erased and had no further effect. They could not be used for any purpose, let alone for Yugoslavia's territorial organisation."

1265 Slovenia's Reply, para. 2.122.

1266 Slovenia's Counter-Memorial, para. 6.16.

1267 Slovenia's Counter-Memorial, para. 6.19; Transcript, Day 8, p. 134:1-7.

1268 Slovenia's Counter-Memorial, paras 6.29-30.

1269 Transcript, Day 8, p. 137:2-6; Transcript, Day 3, p. 164:16-19.

1270 Transcript, Day 3, pp. 164:16-165:1.

1271 Croatia's Memorial, paras 6.32-33.

1272 Transcript, Day 6, p. 11:5-13 *citing* the letter dated 6 February 1989 under Tab 6.15 and Annex SI-954.

1273 Transcript, Day 8, p. 137:7-15; Transcript, Day 3, p. 165:2-3.

1274 *See* note 13, Annex HRLA-3.

[emphasis added][1275] Thus, according to Croatia, Slovenia cannot avail itself of those borders. In support of this argument, Croatia invokes, among other evidence, declarations made by Yugoslav partisan organisations in 1943,[1276] but does not advance any legal argument to establish the nullity of the Treaty of Rapallo under international law. Therefore, that submission must be dismissed.

681. Regarding the Federal legislation, the 1946 Law does provide in its Article 2 that "[t]he laws and regulations . . . that were in force as of 6 April 1941 have lost their legal force." However, Article 4 provides:

> The legal rules contained in the laws and other regulations mentioned in Article 2 of this Law . . . may under this Law be applied to matters not regulated by existing regulations, but only if they are not in contravention of the Constitution of the FPRY, the constitutions of the people's republics, the laws and other existing regulations enacted by the competent authorities of the new State, and of the principles of the constitutional order of the Federal People's Republic of Yugoslavia and its republics.[1277]

682. Similarly, the 1947 Federal Order, which seems to have at least partially abrogated the 1946 Law, stipulates in Article 2:

> The legal regulations of the Federal People's Republic of Yugoslavia shall come into force in the territory attached on the day of its attachment to the Federal People's Republic of Yugoslavia.
>
> The legal regulations of the bodies of the people's authority, which were issued in this territory, shall remain valid unless they are contrary to federal laws and other legal regulations.
>
> As from the day of the attachment, all regulations issued by the Italian state authorities and the Allied occupation authorities shall cease to be valid in the attached territory.[1278]

1275 Transcript, Day 2, p. 18:1-4.

1276 Declaration of the Liberation Front of the Slovenian People on the Incorporation of the Slovenian Littoral into Slovenia and Yugoslavia, 16 September 1943, Article 1, reprinted in North-Adriatic Institute of the Yugoslav Academy of Arts and Sciences, *The Incorporation of Istria into the Federal State of Croatia in the Democratic Federal Yugoslavia, 1943-1968*, Rijeka, 1968, p. 209, Annex HRLA-4; Resolution of the Second Session of the National Anti-fascist Council of People's Liberation of Croatia, Plaški, 14 October 1943, sec. 4, reprinted in North-Adriatic Institute of the Yugoslav Academy of Arts and Sciences *The Incorporation of Istria into the Federal State of Croatia in the Democratic Federal Yugoslavia, 1943-1968*, Rijeka, 1968, p. 197, Annex HRLA-6; Decision of the Anti-fascist Council of People's Liberation of Yugoslavia on the Incorporation of Slovenian Littoral, Venetian Slovenia, Istria and Croatian Adriatic Islands to Yugoslavia, Jajce, 30 November 1943, Documents of the General Staff of the People's Liberation Army of Yugoslavia 1943-1944 in Military History Institute, *Almanac of Documents and Records on People's Liberation War of the Yugoslav Peoples* Vol. II, book 11, p. 446 (1963), Annex HRLA-9.

1277 Law on the Nullity of Laws and Regulations Adopted prior to 6 April 1941, 23 October 1946, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 86/1946, 25 October 1946, Annex HRLA-80.

1278 Order to Extend the Applicability of the Constitution, Laws and Other Legal Regulations of the Federal People's Republic of Yugoslavia that was attached to the Federal People's Republic of Yugoslavia under the Peace Treaty with Italy, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 80/1947, Annex SI-108.

683. The corresponding Croatian and Slovenian Acts contain the same provision.

684. The Tribunal will not enter into an in-depth analysis of all the legal consequences of those pieces of legislation. It will be enough for it to observe that those domestic laws could not have nullified the international boundary established by the Treaty of Rapallo, which was the boundary between Italy and Yugoslavia under international law from 1920 to 1947. The Tribunal will add that the purpose of those pieces of legislation was not to nullify the Treaty of Rapallo. Rather, they were only enacted to determine the law applicable in the territory attached to Yugoslavia under the Treaty of Paris.

685. The Tribunal thus arrives at the conclusion that the argument of Croatia cannot be upheld. The eastern limit of the Monte Nevoso district of the Italian Julian March became, in 1947, the eastern limit of the Slovenian districts of Snežnik and Leskova Dolina. That limit corresponds to the former boundary between Italy and Yugoslavia which became the border between the two Republics and is now the boundary between the Parties.

686. The other elements pleaded by the Parties do not allow the Tribunal to arrive at a different conclusion. In support of its *effectivités,* Croatia avails itself of a field survey performed by members of the Expert Group in 1996 stating that "[u]ninterruptedly since the defeat of Fascist Italy and through present day," area 9.3 "has been in possession of the forest office Prezid."[1279] Slovenia does not contest this, but it recalls that it protested against the exploitation of the forest.[1280] However, Slovenia only cites one protest made in 1958, and it therefore appears that from that date to at least 1988, the forest was exploited without further protest by the Snežnik forest office.[1281] In any event, that exploitation cannot be regarded as an act done by Croatia *à titre de souverain* (see paragraph 575).

1279 Minutes from the Field Survey Performed in Collating Unaligned Borders of Cadastral Districts, Border Sector IX, Case 3 (Prezid / Leskova Dolina), Joint Expert Group, Prezid, 13 June 1996, Annex HR-78.

1280 Letter from Ljubljana District People's Committee, Forestry Authority to Prezid Forest Management, 20 June 1958, Annex SI-499; Letter from Ljubljana District People's Committee, Forestry Authority to Prezid Forest Management, 14 October 1958, Annex SI-500.

1281 Basics of Management (1955-1970), Economic Unit "Milanov vrh - Crni laz", Forestry Office Prezid – Tršće, Annex HR-12; Basics of Management (1970-1979), Economic Unit "Milanov vrh", Forestry Office Prezid, Annex HR-29; Minutes from the Field Survey Performed in Collating Unaligned Borders of Cadastral Districts, Border Sector IX, Case 3 (Prezid/Leskova Dolina), Joint Expert Group, Prezid, 13 June 1996, Annex HR-78; Cerknica Local Court: Historical Extract No. 77/97 from Land Register for cadastral municipality Babno polje, Land Register Entry No. 317, 20 May 1997, Annex SI-980; Letter No. 321-34/98-13-IV/Ho from Republic Committee for Agriculture, Forestry and Food of Socialist Republic of Slovenia to Inter-municipal Inspectorate of the Cerknica, Ilirska Bistrica and Postojna Municipalities, 18 October 1988, Annex SI-953; Letter No. 321/A-19/88-6 from Inter-Municipal Inspectorate of the Cerknica, Ilirska Bistrica and Postojna Municipalities to the Assembly of Cerknica Municipality, 6 February 1989, Annex SI-954.

687. For its part, Slovenia recalls that the Tomšič's plots were expropriated in 1948/1950 by the Slovenian authorities[1282] and that his former properties were then registered in 1951 as "general people's property" on the land register of Snežnik.[1283] Slovenia stresses that area 9.3 was "registered as general people's property managed by the people's committee of Čabar"[1284] in Croatia only in 1970. Moreover, when Mr. Tomšič tried in the 1990s to recover his property under the Denationalisation Act then adopted, he presented his request to the Slovenian authorities and tribunals.[1285] The Tribunal considers that those elements further support the Tribunal's conclusion set out in paragraph 685.

688. The Tribunal determines that the boundary between Croatia and Slovenia in areas 9.3 and 9.4 follows the course of the former boundary between Italy and Yugoslavia as it stood from 1920 to 1947.

(b) Gomance

689. Slovenia has also presented a claim for a small area, with an approximate surface of 2.0 ha, immediately to the south of the settlement of Gomance.

690. Croatia asserts that the cadastral limits in the region are generally aligned, but it does not adduce any specific evidence in respect of Gomance.

691. Slovenia observes that Croatia "does not provide any evidence for this assertion" that the cadastres are aligned. It also contends that the Expert Group did not compare the cadastral lines in this area.[1286]

692. More specifically, Slovenia maintains that its own claim in the area follows cadastral limits—for the present area, the southern limit of Slovenia's cadastral municipality of Snežnik.[1287] As evidence, Slovenia adduces two official topographic maps, produced by the Surveying and

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1282 District Commission for Agrarian Reform in Ilirska Bistrica, Additional Decision concerning Expropriation of Viktor Tomšič, 22 May 1950, Annex SI-475.

1283 Extract from the Land Register, Cadastral Municipality of Snežnik, Folio No. 190, 6 November 1991, Annex SI-241.

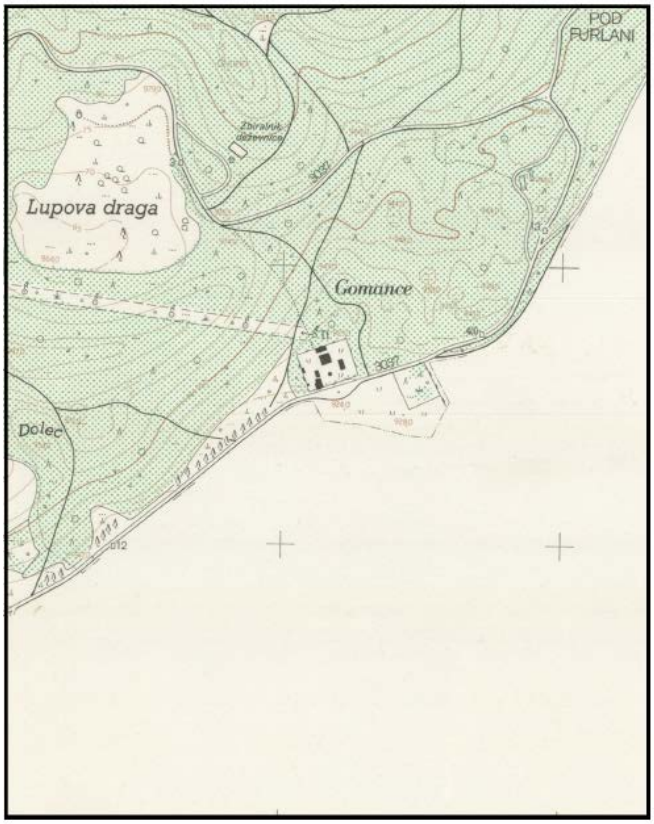
1284 Minutes from the Field Survey Performed in Collating Unaligned Borders of Cadastral Districts, Border Sector IX, Case 3 (Prezid/Leskova Dolina), Joint Expert Group, Prezid, 13 June 1996, Annex HR-78.

1285 Decision of Ilirska Bistrica Municipality regarding the Claim of Vitorio Tomsic and others for the Return in Ownership and Possession of the Immovable Property, 5 September 1994, Annex SI-749.

1286 Slovenia's Reply, para. 2.134.

1287 Slovenia's Reply, para. 2.135.

Mapping Authority of the Socialist Republic of Slovenia in 1976[1288] and by the Surveying and Mapping Authority of the Republic of Slovenia in 1995.[1289] Both maps are included below. However, Slovenia has not provided its cadastral records for the relevant district.

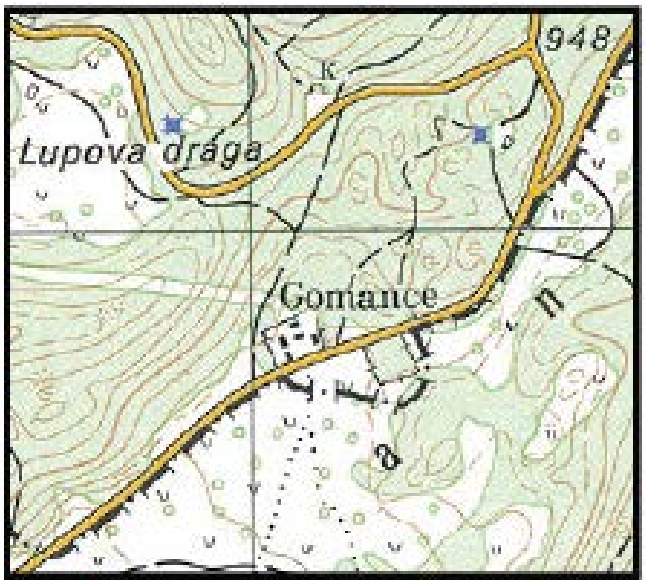


(Surveying and Mapping Authority of the Socialist Republic of Slovenia: State Base Map, Socialist Republic of Slovenia, Risnjak-Čabar – 11, (1976), Annex SI-M-71 (extract))[1290]

1288 Surveying and Mapping Authority of the Socialist Republic of Slovenia: State Base Map, Socialist Republic of Slovenia, Risnjak-Čabar – 11 (1976), Annex SI-M-71.

1289 Surveying and Mapping Authority of the Republic of Slovenia: State Topographic Map, Snežnik 184 (1995), Annex SI-M-75.

1290 Surveying and Mapping Authority of the Socialist Republic of Slovenia: State Base Map, Socialist Republic of Slovenia, Risnjak-Čabar – 11 (1976), Annex SI-M-71 (extract).



(Surveying and Mapping Authority of the Republic of Slovenia: State Topographic Map, Snežnik 184 (1995), Annex SI-M-75 (extract))[1291]

693. At the outset, the Tribunal notes Croatia's contention that the cadastral limits, as they presently stand, are aligned and correspond to Croatia's claim. Croatia has not provided any evidence, beyond that assertion.

694. Slovenia has presented two official topographic maps, each prepared by Slovenia's Surveying and Mapping Authority. The maps are of high quality and large scale. They place the area in dispute—a small plot of land apparently located opposite the main courtyard of a farm consisting of five buildings—on Slovenia's territory. The two maps, published almost two decades from each other, suggest that a consistent view on the boundary in the area was taken by the Slovenian geodetic authorities. The Tribunal also notes, however, that Slovenia chose not to submit any cadastral records in respect of the Snežnik district, even though it did so in a comparable situation further to the west, in Sušak.[1292]

695. Having considered the evidence on the record, the Tribunal finds that, overall, the evidence presented by Slovenia is convincing. Faced in this arbitration with Slovenian official maps of the sort reproduced above, Croatia could be expected to adduce pertinent rebuttal evidence, had such evidence been in its possession. As matters stand, the Tribunal must give more weight to

1291 Surveying and Mapping Authority of the Republic of Slovenia: State Topographic Map, Snežnik 184 (1995), Annex SI-M-75 (extract).

1292 Cadastral Municipality of Sušak (1819), Sheet Nos. I, III, IV, V, Annex SI-828; Cadastral Municipality of Sušak (Rectification, 1877), Sheet Nos. III, IV, V, Annex SI-839.

Slovenia's clear and specific evidence of title than to Croatia's unsubstantiated assertion of cadastral alignment.

696. Accordingly, the Tribunal determines that the area with an approximate surface of 2.0 ha immediately to the south of the settlement of Gomance forms part of Slovenia's territory.

(c) Klana/Lisac and Zabiče/Sušak as well as Lisac/Sušak

697. The Expert Group identified two disputed areas, areas 10.1 and 10.2, in the east of the part of Istria that were the subject of the Parties discussions at Malija in 1944.[1293] In addition, the Tribunal observes that there is a further area of triangular shape to the south-west of these disputed areas in which the Parties' claims in the present proceedings diverge.

698. Both Croatia and Slovenia base their claims in areas 10.1 and 10.2 on the historic boundaries of the Austrian cadastral districts that were integrated into Slovenia and Croatia respectively,[1294] although they disagree as to where these boundaries are located. Slovenia points out that the post-World War II delimitation in area 10 was conducted with reference to cadastral limits.[1295] Slovenia finds these limits in cadastral maps created by the surveys carried out in 1819/1820. Croatia submits that areas 10.1 and 10.2 were incorporated into Croatia in 1948 as part of the District of Rijeka,[1296] and uses its cadastral district boundaries as marked on the ground and depicted on cadastral maps dating back to 1878 as the basis for its claimed boundary.[1297]

699. Area 10.1 is considered by Croatia to be part of its Klana/Lisac cadastral districts, while Slovenia considers area 10.1 to be part of its Zabiče/Sušak cadastral districts. Area 10.1 encompasses 2.9 ha; the boundary in that area is approximately 1.6 km long.[1298]

700. Area 10.2 is located in the Croatian cadastral district of Lisac and the Slovenian cadastral district of Sušak. Area 10.2 runs for 0.3 km and encompasses 0.5 ha.[1299]

1293 Croatia's Counter-Memorial, paras 4.8, 4.120, 4.122, 4.128.

1294 Slovenia's Memorial, para. 6.10.

1295 Transcript, Day 3, p. 156:14-17, *see also* Slovenia's Memorial, paras 6.173-74; Slovenia's Reply, paras 2.128-31.

1296 Croatia's Counter-Memorial, para. 4.120 n.220, para. 4.122 n.222.

1297 Croatia's Counter-Memorial, paras 4.120-24.

1298 Croatia's Counter-Memorial, paras 4.8, 4.122.

1299 Croatia's Counter-Memorial, para. 4.120.

i. The Parties' Positions

701. Croatia submits that its claim in this area "accurately reflects" the boundary between Croatia and Slovenia as its claim is "faithful to the boundary as demarcated on the Ground."[1300] Croatia states that the Joint Expert Group observed in 1997 that the boundary stones dating from 1874 match the boundary of Croatia's cadastral districts in the area. It notes that the Joint Expert Group's minutes record that the "discrepancy is caused by an erroneous depiction of the border of [Slovenia's] c.d. Sušak and c.d. Zabiče (border stones No. 47, 46, 45) on detailed sheets of cadastral plans of those cadastral districts."[1301]

702. Croatia acknowledges that these minutes were not signed by the Joint Expert Group's Slovenian participants. However, Croatia suggests that this was due to Slovenia suspending its work within the Joint Expert Group[1302] and does not affect the correctness of the minutes' conclusions.

703. Croatia further submits a cadastral map of Lisac dating from 1878, as well as photographic illustrations of boundary stones, to demonstrate that "boundary stone numbers 46 and 47 are found in the locations depicted on the 1878 cadastral map and correspond precisely to Croatia's boundary claim."[1303] Croatia concedes that a further boundary stone, bearing the number 48, has been moved from its original location.[1304]

704. Slovenia refers to and attaches the maps produced by surveys undertaken in 1819 and 1820 for the cadastral municipalities of Klana,[1305] Lisac,[1306] Zabiče,[1307] and Sušak,[1308] and notes that according to these records, Slovenia's claim corresponds to the cadastral evidence.[1309]

1300 Croatia's Counter-Memorial, paras 4.8, 4.122-24.

1301 Croatia's Counter-Memorial, para. 4.123, *citing* Minutes on Field Works in the Area of Unaligned Borders of Croatian c.d. Lisac and c.d. Klana and the Slovenian c.d. Sušak and c.d. Zabiče Performed from 14 to 16 October 1997, Joint Expert Group, Annex HR-307.

1302 Croatia's Counter-Memorial, para. 4.124, *citing* Report of the Croatian Members of the Joint Expert Group, 12 October 1998, Annex HR-308, which stated that "the Slovenian side has until further notice aborted all activities related to the work within the Joint expert Group."

1303 Croatia's Counter-Memorial, para. 4.124, Figure CM 4.12.

1304 Croatia's Counter-Memorial, para. 4.124 n.226.

1305 Sheet Nos. I and XV of the Cadastral Municipality of Klana (1819), Annex SI-826.

1306 Sheet No. II of the Cadastral Municipality of Lisac (1819), Annex SI-827.

1307 Sheet Nos. III, XII of the Cadastral Municipality of Zabiče (1820), Annex SI-829.

1308 Sheet Nos. I, III, IV and V of the Cadastral Municipality of Sušak (1819), Annex SI-828.

1309 Slovenia's Reply, para. 2.131.

705. Slovenia also provides a map depicting the cadastral limits between these municipalities in 1819/1820.[1310] Slovenia points out that "Croatia never submitted the original surveys of its cadastral municipalities to the scrutiny of the Mixed Expert Group"[1311] and has not responded to Slovenia's submission of its cadastral evidence in the present proceedings.[1312]

706. Moreover, Slovenia dismisses Croatia's reliance on the 1874 border stones, stating that "only one of the stones, stone nNo. 47, seems to be located on the boundary claimed by Croatia,"[1313] while other stones (up to stone No. 47), represent the boundary between Lisac and the Croatian municipality of Klana, (rather than the boundary with the Slovenian municipality of Sušak).[1314] Slovenia further states that the cadastral maps of Sušak as rectified in 1877 "bear no indication at all of any of these stones."[1315]

707. Slovenia notes that both the unsigned minutes of the Expert Group referred to by Croatia and the draft minutes prepared by the Slovenian Mixed Expert Group members reflect the fact that no further stones were found west of stone No. 47.[1316] In fact, there is no explanation as to why stone No. 48 is not indicated by its number and position on Croatia's submitted cadastral map, or why the stone was moved.[1317]

708. The second of the disputed areas is area 10.2, which is considered by Croatia to be part of its cadastral district of Lisac, while Slovenia considers it to be part of its cadastral district of Sušak. The area encompasses 0.5 ha; the boundary in this area is approximately 0.3 km long.[1318]

709. Croatia submits that its claim in this area matches the cadastral district boundary shown on the above-mentioned cadastral map prepared in 1878, while "Slovenia's cadastral district limits are based on an earlier survey, prepared in 1820."[1319] Croatia further submits that "[t]his was

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1310 Slovenia's Reply, para. 2.131, *citing* Figure 2.26.

1311 Slovenia's Reply, para. 2.131.

1312 Transcript, Day 3, p. 165:13-17.

1313 Slovenia's Reply, para. 2.130.

1314 Slovenia's Reply, para. 2.130, *referring* to Croatia's Counter-Memorials, Figure CM 4.12.

1315 Slovenia's Reply, para. 2.130, *citing* Sheet Nos. III and V of the Cadastral Municipality of Sušak (1877), Annex SI-839.

1316 Slovenia's Reply, para. 2.130, *citing* Mixed Slovenian-Croatian Expert Group for the Comparison of the Cadastral Boundaries Displaying Discrepancies: Minutes on Field Works in the Area of Unaligned Borders of Croatian c. d. Lisac and c. d. Klana and the Slovenian c.d. Sušak and c.d. Zabiče Performed from 14 to 16 October 1997, Annex SI-982.

1317 Slovenia's Reply, para. 2.130.

1318 Croatia's Counter-Memorial, paras 4.8, 4.120.

1319 Croatia's Counter-Memorial, para. 4.121.

recognized by the geodetic authorities of Slovenia in a letter to their Croatia counterparts dated 22 June 1971," and quotes the following part of the letter:

> The discrepancy between c.d. Sušak (SR Slovenia) and c.d. Lisac (SR Croatia, Municipality of Rijeka) arose upon the cadastral survey around 1820, so that one and the same plot was measured twice and registered in both cadastral districts mentioned. Comparing the situation in c.d. Sušak and c.d Lisac, we have come to the conclusion that the status shown in cadastral plans for c.d. Lisac is correct. We base this conclusion on the comparison of the ownership of the mentioned plot (plot no. 1261 c.d Sušak: plot no. 1798 c.d Lisac). It is correct that the names of the owners are different, but their residence is identical, i.e. Lisac.[1320][emphasis added by Croatia]

710. Slovenia argues that in the original survey carried out in 1819 the limits of both cadastral municipalities coincided.[1321] Slovenia acknowledges the 1878 cadastral map for Lisac produced by Croatia but states that Croatia has not explained the circumstances of the alleged modification of the cadastre of Lisac.[1322] Slovenia provides an extract from the Land Register of Sušak, in which the disputed plot forming area 10.2 (plot 1261) is recorded and observes that Croatia "has . . . failed to produce any of the relevant cadastral records concerning the disputed plots."[1323] Slovenia finally dismisses Croatia's reliance on the letter from the geodetic administration of Slovenia, describing it as emanating from a "local cadastral official", who seemed unaware of the fact that in 1820 the cadastral boundaries matched.[1324]

ii. The Tribunal's Analysis

711. The Tribunal observes that it is not disputed that the boundaries between the cadastral municipalities of Klana, Lisac, Zabiče, and Sušak were surveyed in 1819/1820.[1325] Slovenia bases its claim on these surveys. Croatia, however, claims that the boundary lies in a different position, as depicted on an 1878 cadastral map of Lisac. As evidence of the legal authority of this 1878 map, Croatia points to three boundary markers allegedly placed on the ground in 1874, which it

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1320 Croatia's Counter-Memorial, paras 4.8, 4.121, *citing* Letter from the Head of the Cadastral Office of Ilirska Bistrica to the Geodetic Administration of the Socialist Republic of Slovenia, 22 June 1971, Annex HR-206.

1321 Slovenia's Reply, para. 2.132, *citing* Sheet Nos. I, III, IV and V of the Cadastral Municipality of Sušak (1819), Annex SI-828; Sheet No. II of the Cadastral Municipality of Lisac, 1819, Annex SI-827; Sheet Nos. III and V of the Cadastral Municipality of Sušak (1877), Annex SI-839.

1322 Slovenia's Reply, para. 2.132.

1323 Slovenia's Reply, para. 2.132, *citing* Historical Extract from Land Register for Cadastral Municipality of Sušak, plot No. 1261, 12 March 2014, Annex SI-999.

1324 Slovenia's Reply, para. 2.133.

1325 Sheet Nos. I and XV of the Cadastral Municipality of Klana (1819), Annex SI-826; Sheet No. II of the Cadastral Municipality of Lisac (1819), Annex SI-827; Sheet Nos. I, III, IV and V of the Cadastral Municipality of Sušak (1819), Annex SI-828; Sheet Nos. III, XII of the Cadastral Municipality of Zabiče (1820), Annex SI-829.

says demarcate area 10.1.[1326] Croatia further points to a letter from the Slovenian geodetic authorities, which it claims demonstrates Slovenia's acknowledgement of the correctness of the boundary now claimed by Croatia in area 10.2.[1327]

712. On the basis of the relevant cadastral maps from 1819/1820 submitted by Slovenia, it appears to the Tribunal that, at the time of the 1820 survey, the cadastral limits, in area 10, were aligned, as the Sušak cadastral maps include the relevant areas, while the Lisac cadastral maps do not.[1328] By contrast, the later maps of the area differ: the 1878 Lisac cadastral maps submitted by Croatia include areas 10.1 and 10.2 within Lisac,[1329] while the 1877 Sušak cadastral maps submitted by Slovenia include these areas within Sušak.[1330]

713. A later source of title may take precedence over an earlier source, provided that it is equally valid and authoritative. Since the later maps from the 1870s contradict each other, it falls to the Tribunal to determine whether or not the limits of the municipalities of Lisac and Sušak were varied in the period between 1819/1820 and the 1870s. Not having been provided with any explanation or context regarding the alleged boundary change, the Tribunal must determine this question upon the evidence placed before it by the Parties.

714. In this regard, the Tribunal finds that the observations contained in the 1997 minutes of the Expert Group do support Croatia's claim in area 10.1 (specifically the conclusion that "[t]he border of [Croatia's] c.d. Lisac should be accepted as an aligned border of cadastral districts, as it is maintained in the cadastral operate of that district, since its depiction on the cadastral plan matches the situation on the ground.")[1331] However, since the minutes were not signed by the Expert Group's Slovenian participants, the Tribunal concludes that the minutes themselves have limited evidentiary value.

1326 Croatia's Counter-Memorial, Figure CM 4.12.

1327 Croatia's Counter-Memorial, paras 4.8, 4.121, *citing* Letter from the Head of the Cadastral Office of Ilirska Bistrica to the Geodetic Administration of the Socialist Republic of Slovenia, 22 June 1971, Annex HR-206.

1328 Sheet No. V of the Cadastral Municipality of Sušak, 1819, Annex SI-828; Sheet No. II of the Cadastral Municipality of Lisac (1819), Annex SI-827.

1329 Croatia's Counter-Memorial, Figure CM 4.11; Figure CM 4.12.

1330 Sheet Nos. III and V of the Cadastral Municipality of Sušak (1877), Annex SI-839.

1331 Croatia's Counter-Memorial, para. 4.123, *citing* Minutes on Field Works in the Area of Unaligned Borders of Croatian c.d. Lisac and c.d. Klana and the Slovenian c.d. Sušak and c.d. Zabiče Performed from 14 to 16 October 1997, Joint Expert Group, Annex HR-307.

715. In respect of the 1971 letter cited by Croatia, authored by the Slovenian Head of the Cadastral Office of Ilirska Bistrica,[1332] the Tribunal acknowledges that it indeed contains language supporting Croatia's claim in area 10.2 (specifically the conclusion that "the status shown in cadastral plans for c.d. Lisac is correct").[1333] However, that assessment was premised on the assumption that "[t]he discrepancy between c.d. Sušak (SR Slovenia) and c.d. Lisac (SR Croatia, Municipality of Rijeka) [*i.e.*, area 10.2] arose upon the cadastral survey around 1820."[1334] Since no such discrepancy appears to have existed in 1820 in respect of area 10.2, the letter has limited probative value.[1335]

716. Turning then to the remaining evidence that has been placed before it, the Tribunal notes that two of the three boundary stones identified by Croatia in support of its claim have contested evidentiary value. Croatia has conceded that stone No. 48 has been moved from its original location, and as such it may not be relied upon as evidencing the location of the relevant municipal border between Lisac and Sušak. In addition, Slovenia alleges that stone No. 46 is located on the boundary between the two Croatian municipalities of Lisac and Klana (rather than the boundary with the Slovenian municipality of Sušak)—an allegation to which Croatia has not responded.

717. The evidentiary value of stone No. 47 is uncontested. Its location on the ground corresponds to the location marked on the 1878 cadastral map of Lisac. Slovenia does not claim that it was moved, or that any other irregularity occurred in respect of this stone. Nor does Slovenia allege, as it does in respect of stone No. 46, that it was intended to demarcate anything other than the municipalities of Lisac and Sušak. As such, the location of stone No. 47 is fully consistent with Croatia's argument that a change of border occurred in the area in question.

718. In contrast, the cadastral limits put forward by Slovenia cannot be reconciled with the existence and location of the stone. Slovenia has not provided the Tribunal with an alternative explanation for what the stone's significance could be—indeed in the absence of any evidence to the contrary, it appears to the Tribunal that for over 140 years the stone's location has not been questioned by Slovenia.

1332 Letter from the Head of the Cadastral Office of Ilirska Bistrica to the Geodetic Administration of the Socialist Republic of Slovenia, 22 June 1971, Annex HR-206.

1333 *Ibid.*

1334 *Ibid.*

1335 Sheet No. V of the Cadastral Municipality of Sušak, Annex SI-828; Sheet No. II of the Cadastral Municipality of Lisac, 1819, Annex SI-827.

719. Uncontested border stones typically represent evidence of high probative value in international boundary disputes. In respect of area 10, stone No. 47 confirms the authority of the 1878 map of Lisac, while casting doubt on the 1877 map of Sušak. On balance, the Tribunal is persuaded that the boundary was adjusted after 1820, as documented in the 1878 map of Lisac submitted by Croatia. The Tribunal accordingly determines that the boundary between Croatia and Slovenia in this area follows the boundary between Lisac and Sušak as far as it is depicted on that map.

720. This conclusion also holds true for the additional area of triangular shape to the south-west of disputed areas 10.1 and 10.2 in which the Parties' claims in the present proceedings diverge, as this area is also depicted on the same 1878 map as belonging to the cadastral district of Lisac.[1336]

(d) Kućibreg/Topolovec

721. Area 11.4 is considered by Croatia to be part of Kućibreg in the Buje District,[1337] and by Slovenia to be part of Topolovec in the Koper District. The Parties differ with respect to the limits of those districts. Area 11.4 is located in the vicinity of Hrvoji and covers approximately 7.0 ha. The disputed border measures approximately 3.7 km.

722. As a result of the historical events previously described, this area had undergone a series of administrative reorganisations in 1947 and 1956. The Parties agree that, in 1956, eight settlements within the cadastral municipality of Gradin were transferred to Slovenia pursuant to a recommendation by the 1955 Border Commission. The dispute concerns the territorial limits of the land transferred to Slovenia, which determines the boundary.[1338]

723. The transfer was initiated by the adoption by the Croatian *Sabor* of the 1955 "Decision on the Change of the Border between the People's Republic of Croatia and the People's Republic of Slovenia."[1339]

724. In 1956, the People's Assembly of Slovenia enacted a parallel "Decision Assenting to the Declaration of the *Sabor* of the People's Republic of Croatia on the Change of the Border between

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1336 Croatia's Reply, Vol. III/6, Maps 95-1, 95-2; 95-3 of the Cadastral Municipality of Lisac.

1337 Transcript, Day 2, p. 32:14-21.

1338 Slovenia's Memorial, para. 6.205; Slovenia's Reply, para. 2.139; Croatia's Counter-Memorial, para. 4.104.

1339 Decision of the Parliament of the People's Republic of Croatia on the Change of the Border between the People's Republic of Croatia and the People's Republic of Slovenia, *Official Gazette of the People's Republic of Croatia*, No. 1/1956, Annex HRLA-37.

the People's Republic of Croatia and the People's Republic of Slovenia."[1340] As constitutionally required, the Federal People's Assembly of Yugoslavia gave its formal assent in a "Decree Endorsing the Change of Borders between the People's Republic of Croatia and the People's Republic of Slovenia."[1341] The eight settlements were formally incorporated into the territory of Slovenia by enactment of the Act Amending the Act on the Geographical Scope of Districts and Municipalities in the People's Republic of Slovenia.[1342]

i. The Parties' Positions

725. Croatia submits that "the territorial limits of the land Croatia transferred to Slovenia" are "defined by cadastral district boundaries that had been set in conformity with the 1947 border delimiting the FTT from Croatia."[1343]

726. The establishment of the FTT necessitated a formal division of the cadastral district of Topolovec (since 1993, Kućibreg) to identify the part that was incorporated into Croatia, for which a separate designation—along with corresponding cadastral records and maps—was created.[1344] The cadastral boundaries as identified by those 1947 maps and records remained "fully operational in 1956" when the eight settlements were transferred to Slovenia.[1345]

727. Croatia asserts that it was clear "throughout the discussions leading to the transfer" that the territory conveyed was limited to the eight settlements.[1346] Croatia argues that they were conveyed "with their pre-existing limits as defined by Croatian law."[1347]

728. While the transfer of the settlements in 1956 is not disputed, Slovenia argues that the border in this area runs along the pre-existing cadastral boundaries prior to the 1947 division[1348] and that "[n]othing in the cadastral records suggests that Croatia had taken account of this . . . for its

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1340 Decision Assenting to the Decision of the *Sabor* of the People's Republic of Croatia on the Change of the Border between the People's Republic of Croatia and the People's Republic of Slovenia, *Official Gazette of the People's Republic of Slovenia*, No. 7/1956, Annex SI-148.

1341 Decree Endorsing the Change of Borders between the People's Republic of Croatia and the People's Republic of Slovenia, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 15/1956, Annex SI-149.

1342 Act Amending the Act on the Geographical Scope of Districts and Municipalities in the People's Republic of Slovenia, *Official Gazette of the People's Republic of Slovenia*, No. 13/1956, Annex SI-150.

1343 Croatia's Counter-Memorial, para. 4.115.

1344 *Ibid*.

1345 *Ibid*.

1346 Croatia's Counter-Memorial, paras 4.106-12.

1347 Croatia's Counter-Memorial, para. 4.112.

1348 Memorial of Slovenia, para. 6.205; Slovenia's Counter-Memorial, para. 6.05.

administrative division or implemented any changes to the territorial extent of the settlements."[1349]

729. Slovenia points out that the Croatian and Slovenian acts, as well as the federal decree endorsing the transfer, refer to "settlements".[1350] Slovenia takes "settlements" to mean the "economic territorial units" predating the 1947 division.[1351] Slovenia also argues that at the time the transfer took place, the FTT delimitation line "had no legal existence or relevance anymore."[1352]

730. In response to Croatia's argument that a new cadastral district was created to give effect to the 1947 division, Slovenia points out that any adjustment of the cadastral boundary could not be effected by Croatia alone.[1353] Slovenia faults Croatia for relying on a 1971 letter by Slovenia's Geodetic Administration, as the author's observation that the republican boundary runs along straight lines and cuts through numerous parcels does not prove that this boundary follows the former FTT/Yugoslavia boundary and that this was confirmed by Slovenia as Croatia alleges, and in any event the matter fell outside the author's competence.[1354]

ii. The Tribunal's Analysis

731. The Tribunal acknowledges that historic events have added complexity to the task of ascertaining the limits of the territory transferred from Croatia to Slovenia in 1956. The Tribunal will focus on those events bearing upon the delimitation of territory and/or the division of administration pertaining to this area.

732. The Parties appear to accept that the creation of the FTT in 1947 led to the establishment of a new delimitation line dividing the cadastral municipality of Topolovec, which served as the boundary between the FTT and the FPRY.[1355] They also agree that the part of Topolovec located on FTT

1349 Memorial of Slovenia, paras 6.206-07.

1350 Slovenia's Memorial, para. 6.206; Decision on the Change of the Border between the People's Republic of Croatia and the People's Republic of Slovenia, *Official Gazette of the People's Republic of Croatia*, No. 1/1956, Annex SI-147; Decision Assenting to the Decision of the *Sabor* of the People's Republic of Croatia on the Change of the Border between the People's Republic of Croatia and the People's Republic of Slovenia, *Official Gazette of the People's Republic of Slovenia*, No. 7/1956, Annex SI-148; Decree Endorsing the Change of Borders between the People's Republic of Croatia and the People's Republic of Slovenia, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 15/1956, Annex SI-149.

1351 Slovenia's Memorial, para. 6.206.

1352 Slovenia's Memorial, para. 6.207.

1353 Slovenia's Reply, para. 2.140.

1354 Slovenia's Reply, para. 2.141.

1355 Slovenia's Memorial, para. 6.201; Croatia's Counter-Memorial, para. 4.113.

territory was initially included in the new Istrian County,[1356] while the division between the Koper and Buje Districts was maintained.[1357] It is also undisputed that, in 1952, the Istrian County was abolished and its powers were transferred to the Districts of Koper and Buje.[1358]

733. There is no question that the 1947 delimitation line assumed the status of an international border from 1947 until the *de facto* dissolution of the FTT in 1954. The more difficult question is the effect of the 1947 delimitation line in the Topolovec cadastral district after this area had been incorporated into the territory of Yugoslavia in 1954.

734. A State is free to organise the administration and territorial extent of its constituent republics in any manner, without regard to any former international borders within its territory. In Istria, Yugoslavia was not required to give any weight to the boundaries of the FTT after its *de facto* dissolution in 1954. It was entitled to freely redraw the administrative borders in this area. However, the evidence before the Tribunal demonstrates that, in fact, the Yugoslav authorities opted to maintain this geographic and administrative division. Federal legislation provided that "the rights and duties of the republic authorities [over the districts of Koper and Buje] shall be exercised by the authorities of the People's Republic of Slovenia . . . [and the People's Republic of Croatia, respectively]."[1359]

735. The recommendation of the 1955 Border Commission that Croatia transfer the eight settlements in question to Slovenia does not, in the Tribunal's view, evidence an effort to undo the 1947 delimitation line and to re-establish the cadastral boundaries that pre-dated 1947. The impetus for the recommendation arose out of requests of the local population from the municipality of Gradin in view of the latter's geographic and economic connection to the District of Koper.[1360] It was

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1356 Ordinance on the Establishment of the Istrian County, *Official Gazette of the Istrian County People's Committee*, No. 1/1947, 20 February 1947, Annex SI-107.

1357 Ordinance concerning the Division of the Istrian County into Districts and Municipalities, *Official Gazette of the Istrian County People's Committee*, No. 6/1952, Annex SI-122.

1358 Order Transferring the Powers of the Istrian County People's Committee to Koper and Buje District People's Committees and Buje District People's Committees, *Official Gazette of the Military Administration of the Yugoslav Army of the Yugoslav Zone of the Free City of Trieste*, No. 3/1952, Annex SI-123.

1359 Yugoslav Federal Act on the Applicability of the Constitution, Laws and other Federal Legal Regulations on the Territory, Article 2, Annex SI-138.

1360 Letter from the Executive Council of the People's Republic of Slovenia to the Executive Council of the People's Republic of Croatia, 17 June 1955, Annex HR-158; Minutes of the meeting of the Commission of the Executive Council of the People's Republic of Croatia and the Executive Council of the People's Republic of Slovenia held on 14 July 1955 at the Buje District People's Committee, 14 July 1955, Annex SI-145.

ostensibly based on considerations of practicality and does not evince any State intent to question the legal effects of the 1947 delimitation line.

736. It is significant that Slovenia accepts that "the entire territories concerned, on both sides of the former delimitation line between the FTT and Yugoslavia, had become part of Croatia." The Tribunal considers that this also amounts to an implicit acceptance of Croatia's authority to determine the limits of the settlements to be transferred, subject to any overriding authority of the Federation. The Tribunal notes that the various decisions giving effect to the transfer of the settlements do not describe the territorial limits of the transferred territory, and the absence of any determination by the Yugoslav Federal Assembly. The Tribunal ought therefore to follow the position taken by Croatia at the time of the transfer. Hence, the Tribunal finds that the 1956 transfer was effected on the basis of Croatia's cadastral records and maps. They indicate that the outer limits of the transferred settlements correspond to the new cadastral district giving effect to the 1947 delimitation line.[1361]

737. Accordingly, the Tribunal determines that the boundary between Croatia and Slovenia in the area follows the outer limits of the settlements transferred in 1956 as reflected in the cadastral records and maps provided at the time of the transfer by Croatia.

(e) Merišće and Krkavče as well as Lower Dragonja Region

738. Area 11.7 extends for 3.9 km and encompasses 11.8 ha. Area 11.7 is considered by Croatia to be part of Merišće, and by Slovenia to be part of Krkavče.

739. Area 11.9 relates to the hamlets of Škrile, Veli Mlin, Bužin and Škudelin situated in the lower Dragonja region, which are considered by Croatia to be part of Buje and by Slovenia to be part of Koper. This area encompasses 111 ha and extends for approximately 6.2 km. Croatia claims that the boundary is determined by the course of the Dragonja; Slovenia considers that it follows the southern limit of the Sečovlje cadastral municipality, to the south of the Dragonja.

740. In essence, the question of the boundary's location is common to the two disputed areas. Accordingly, the Tribunal will consider the Parties' respective arguments and reach a decision that applies both to areas 11.7 and 11.9.

1361 Croatia's Counter-Memorial, para. 4.119, *citing* Letter from the Geodetic Administration of the Coastal Council of Koper to the Geodetic Administration of the Socialist Republic of Slovenia, Koper, 20 April 1971, Annex HR-203.

i. The Parties' Positions

741. Croatia argues that it has title over both disputed areas pursuant to the "agreement to establish the Dragonja River as the border from the sea to the village of Topolovec"[1362] of 1944, which divided the administration of the territories of western Istria.[1363] The agreement "was confirmed the following month, in March 1944, at a high-level meeting of the Croatian and Slovenian leaderships."[1364] Subsequent actions by the authorities were consistent with that agreement, including the internal legislation enacted on the dissolution of the FTT in 1954—the "Law on Amending the Law on Subdivision of the People's Republic of Croatia into Districts, Cities and Municipalities."[1365] In contrast, Slovenia's internal legislation did not name the settlements covered.

742. According to Croatia, the 1944 "partisan agreement" was confirmed in 1955, upon the recommendation of the 1955 Border Commission, by the highest authorities of both Republics. The Executive Council of the People's Republic of Slovenia accepted the recommendation "to confirm the border on the river Dragonja according to the current situation."[1366] The Executive Council of Croatia confirmed that "the border between 'District of Buje and Kopar is the River Dragonja.'"[1367] Croatia suggests that the 1955 accord between the Executive Councils is the "dispositive source of legal title to Disputed Area 11.9."[1368]

743. Croatia submits that the agreement remained in force and that both Parties acknowledged and respected the Dragonja River as a boundary between them up until the critical date. It refers to

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1362 Croatia's Memorial, para. 5.23.

1363 Report from the District Committee of the Liberation Front of the Slovenian People for Slovenian Istria to the Regional Committee of the Liberation Front of the Slovenian People for the Slovenian Littoral, Report No. 47-634/III, 10 February 1944, Annex HR-3.

1364 Croatia's Memorial, para. 5.23.

1365 Ordinance on the Establishment of the Istrian County, *Official Gazette of the Istrian County People's Committee*, No. 1/1947, Annex SI-107; Decision on Amending the Decision on People's Courts for the Istrian Area, *Official Gazette of the Military Administration of the Yugoslav Army for the Yugoslav Zone of the FTT and the People's Committee of the Istrian Area*, No. 1/1948, Annex HRLA-19; Order of the Commander of the Units of the Yugoslav Army on the Free Territory of Trieste, *Official Gazette of the Military Administration of the Yugoslav Army for the Yugoslav Zone of the FTT and the People's Committee for the Istrian Area*, No. 1/1948, Annex HR-9; Administrative-Territorial Division of the District of Buje with an Indication of Cadastral Districts, 4 June 1948, Annex HR-10; Decision on the Division of the Istrian Area into Districts and Municipalities, *Official Gazette of the People's Committee of the Istrian Area*, No. 6/1952, Annex HRLA-22.

1366 Letter from the Executive Council of the People's Republic of Slovenia to the Executive Council of the People's Republic of Croatia, 25 July 1955, Annex HR-161.

1367 Minutes of the Sessions of the Executive Council of the People's Republic of Croatia, 3 August 1955, Annex HR-163.

1368 Transcript, Day 2, p. 57:9-16.

consistent conduct by officials of Slovenia[1369] and Slovenian publications[1370] acknowledging that the boundary followed the middle of the Dragonja subsequent to the Parties' confirmation of the border in 1955, and to the absence of Slovenian protest against municipal ordinances enacted by Croatia.[1371]

744. Croatia further observes that, in 1963, upon request by the cadastral office in Buje, the Slovenian authorities transmitted to that office the cadastral maps and records covering the settlements on the south bank, which had been maintained in Piran, Koper or Sečovlje since Austrian times.[1372] Croatia relies further on the 1963 Treaty of Udine, which established a border traffic regime covering an area of up to 10 km on each side of the border between Italy and Yugoslavia, which in an annex lists Škudelin, Bužin and Škrile as part of the Croatian municipality of Buje, and pursuant to which Croatia issued the border-crossing permits that were requested by inhabitants of those settlements.[1373]

745. Croatia acknowledges that "from time to time between 1947 and 1955," local Slovene authorities protested the agreed boundary.[1374] Croatia however criticizes Slovenia's reliance on a note by the Koper authorities dated 7 January 1947, underlining that the note was "completely ignored" by the People's Committee of the Istrian Area as well as the Commander of the Yugoslav Army in

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1369 *See e.g.*, Letter from the Secretariat for Legislation and Organization of the People's Republic of Croatia to the Secretariat for Legislation and Organization of the People's Republic of Slovenia, 12 July 1956, Annex HR-168; Letter from the Secretariat of the Interior of the Socialist Republic of Slovenia to the Directorate for Border Issues, Aliens and Travel Documents of the Federal Secretary for the Interior, 4, No. 21/3-2/2-1-42201-17/166, Ljubljana, 4 September 1985, Annex HR-51; Letter from the Local Committee of Sečovlje to the Municipal People's Committee of Buje on the Introduction of Electricity to Škrile, Sečovlje, 16 December 1958, Annex HR-175; Copy of Death Certificate for Mr. Stjepan Banić, issued by the Municipality of Izola, Slovenia, 15 March 1995, Annex HR-296; Certificate on Taxes Paid by Stjepan Banić for Registration of A Motor Vehicle, Municipal Administration for Income of the Municipality of Buje, Buje, 8 October 1971, Annex HR-208.

1370 Roman Savnik, *Western Part of Slovenia in Lexicon of the Slovenian area, Book I* (1968), Annex HR-27.

1371 Law on Amending the Law on Subdivision of the People's Republic of Croatia into Districts, Cities and Municipalities, *Official Gazette of the People's Republic of Croatia*, No. 53/1954, Annex HRLA-30; Statute of the Municipality of Buje, 29 September 1956, Annex HRLA-38; Law on Areas of Municipalities and Districts, *Official Gazette of the People's Republic of Croatia*, No. 39/1962, Annex HRLA-39; Statute of the Municipality of Buje, 24 December 1963, Annex HRLA-41; Statute of the Municipality of Buje, 28 April 1976, Annex HRLA-51.

1372 Transcript, Day 2, pp. 60:1-61:17, *citing* Letter from the Office for Cadastre Buje to the Office for Cadastre Koper, No. 168-1/59, Buje, 18 February 1959, Annex HR-20; Croatia's Memorial, Figures 5.9B to 5.9H.

1373 Transcript, Day 2, pp. 61:18-62:10, *citing* Agreement between the Government of the Socialist Federative Republic of Yugoslavia and the Government of the Italian Republic Regulating the Movement of Persons and Land and Sea Transport and Traffic Between Border Areas, done in Udine on 31 October 1962, *Official Gazette of the Socialist Federal Republic of Yugoslavia*, No. 3/1964,Annex HRLA-91; Permits Issued Pursuant to the Treaty of Udine (1985-1988), Annex HR-230.

1374 Croatia's Counter-Memorial, para. 4.58. Transcript, Day 2, pp. 39:14-40:16.

Istria.[1375] Croatia also objects to Slovenia's reliance on the June 1948 and July 1949 petitions from inhabitants of Veli Mlin and Bužin.[1376] Croatia argues that these petitions undercut Slovenia's argument: if Veli Mlin and Bužin, on the south bank of the Dragonja, were already part of Koper, they would not need to petition to be incorporated into it.[1377] In any event, Croatia points out that the Istrian Area's People's Committee continued to recognize that the hamlets belonged to the Buje district.[1378] Croatia acknowledges that in 1948, the People's Committee for the Istrian Area approved the request of the residents of Mlini to be detached from Buje and attached to Koper.[1379]

746. Croatia claims that unilateral statements by the Slovenian Local People's Committee of Sečovlje mentioning Mlini and Bužin as being affiliated with it are irrelevant.[1380] According to Croatia, when Sečovlje attempted to appropriate the hamlets, local Croatian officials in Buje claimed that the hamlets were under the jurisdiction of the Croatian Local People's Committee of Kaštel. They complained to the Istrian People's District Committee, which invited the Local People's Committees of Kaštel and Sečovlje to settle the issue directly.[1381] Croatia asserts that the matter was resolved when Sečovlje returned to Kaštel the relevant documentation for the residents of Mlini.[1382]

747. Croatia argues that the 1952 Decision on the Division of the Istrian Area into Districts and Municipalities by the Istrian Area's People's Committee and the Yugoslav Military Administration confirmed the Dragonja River as the boundary by listing the hamlets of Bužin and Škudelin as being in the Buje District.[1383] Croatia seeks to rebut Slovenia's assertion that the 1952

1375 Croatia's Counter-Memorial, paras 4.58-59.

1376 Croatia's Counter-Memorial, para. 4.60.

1377 *Ibid*.

1378 *Ibid.*; Transcript, Day 2, pp. 40:8-16.

1379 Transcript, Day 2, pp. 39:22-40:3, *citing* Istrian County People's Committee, Minutes of the 5th regular session, Piran, 29 June 1948, *Official Gazette of the Military Administration of the Yugoslav Army of the Yugoslav zone in the Free Territory of Trieste and the Istrian County People's Committee*, No. 6/1948, Annex SI-115.

1380 Croatia's Reply, para. 3.14; *see* Sečovlje Local People's Committee, List of House Numbers, 1949, Annex SI-473; Population supply register in the Istrian County on 15 December 1948, Final Results, 1951, Annex SI-477. Croatia calls Slovenia's statement that Mlini refers to the hamlet on the left bank of the Dragonja rather than the location of the same name in undisputed Slovenian territory north of the river "unfounded." Croatia's Reply, para. 3.14 n.106.

1381 Croatia's Reply, para. 3.14; Letter from People's District Committee of Istria to Local People's Committee of Kaštel and the Local People's Committee of Sečovlje, Koper, 19 February 1948, Annex HR-328.

1382 Croatia's Reply, para. 3.14; Letter from the Local People's Committee of Sečovlje to the Presidency of the District of Koper, Sečovlje, 27 February 1948, Annex HR-329.

1383 Croatia's Reply, para. 3.15; Decision on the Division of the Istrian Area into Districts and Municipalities, *Official Gazette of the People's Committee of the Istrian Area*, No. 6/1952, Annex HRLA-22 (produced by Slovenia as Annex SI-122). Croatia explains that the reference to Mlini as being in the Koper District in

Decision's listing of the disputed hamlets as being in the Buje District was a "typographical error".[1384] Croatia emphasises that the 1952 Decision was never amended to correct this alleged typographical error.[1385]

748. Croatia argues that a letter dated 9 May 1952 from the Municipal People's Committee of Sečovlje to the Istrian County People's Committee, asking it to allow Škudelin to join Sečovlje, proves the opposite of what Slovenia hopes to achieve. According to Croatia, the letter shows that both the municipal authorities in Sečovlje as well as the inhabitants of Škudelin understood the hamlet to be part of the Buje District.[1386]

749. Croatia also disputes Slovenia's argument that a survey conducted in 1953-1954 by the "Koper Survey and Mapping Authority" could unilaterally transform the boundary.[1387] The Koper Survey and Mapping Authority did not have the authority to change the border. According to Croatia, it is precisely for that reason that the 1955 Border Commission was formed.[1388]

750. As regards the legal effect of the recommendation of the 1955 Border Commission, Croatia rejects Slovenia's argument that it needed to meet the constitutional requirements for a change in the republican boundary. According to Croatia, this was due to it not being a change but merely a

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the 1952 Decision concerns a location of that name lying on the north bank of the Dragonja River, not the hamlet in disputed area 11.9. *See* Croatia's Reply, para. 3.15 n.117; Transcript, Day 2, pp. 40:17-41:10.

1384 Croatia's Reply, para. 3.16; Transcript, Day 2, pp. 41:20-44:2.

1385 Croatia's Reply, para. 3.17.

1386 Croatia's Reply, para. 3.19; Letter of the Municipal People's Committee Sečovlje to the Istrian County People's Committee Commission on the Territorial Division in Municipal People's Committees, No.: 348-1/52-A, 9 May 1952, Annex SI-481.

1387 Croatia's Counter-Memorial, para. 4.62; Transcript, Day 2, pp. 44:16-45:4.

1388 Croatia's Reply, para. 3.20; Transcript, Day 2, pp. 46:1-47:13.

confirmation of the "actual" or "current" boundary.[1389] Croatia notes, that local authorities in Koper "on occasion" continued to manifest their opposition to the actual boundary.[1390]

751. In respect of the mouth of the Dragonja, finally, Croatia had initially reserved the right to claim that the rest of the boundary—namely the final 3.5 km stretch of the river before it reaches the sea—is set in the middle of the natural course of the Dragonja River, so that the lands south of the river and north of the St Odoric Canal are Croatian territory. [1391] In the second round of oral argument, Croatia however confirmed that its position is that the Dragonja River "as it flows through the St Odoric Canal" is the land boundary as of 25 June 1991.[1392]

752. Slovenia broadly accepts the historical events relied upon by Croatia, but disputes Croatia's characterisation of those events. The 1944 "partisan agreement", rather than implying any delimitation of territory, was merely a description of "respective zones of influence" which referred to the river for convenience.[1393] Slovenia also points out that there is no "direct record" of the partisan arrangement, which "seems to have been made orally."[1394] Slovenia underlines that the arrangement was concluded "for recruitment purposes," that "low-rank, regional representatives of a military administration" did not have the competence to establish the boundary, and that they did not even claim to do so.[1395]

1389 Transcript, Day 2, pp. 58:16-59:12; Transcript, Day 5, pp. 169:2-176:11, *citing* Constitutional Law on the Basis of Social and Political Organization of the Federal People's Republic of Yugoslavia and Federal Authorities (1953), *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 3/1953, Article 15, Annex HRLA-25; Constitutional Act on the Foundations of the Social and Political System and on the Authorities of the People's Republic of Slovenia (1953), *Official Gazette of the People's Republic of Slovenia*, No. 3/1953, Article 21, Annex SI-129; Constitutional Act of the People's Republic of Croatia on the Foundations of the Social and Political System and on the Republic Authorities (1953), *Official Gazette of the People's Republic of Croatia*, Article 21, Annex SI-130; Letter to the Executive Council of the Assembly of the People's Republic of Croatia and to the Executive Council of the People's Assembly of the People's Republic of Slovenia from the Commander of the Military Administration of the Yugoslav People's Army for the Yugoslav Zone of the Free Territory of Trieste, 25 June 1953, Annex SI-132; Letter from the Executive Council of the People's Republic of Slovenia to the Executive Council of the People's Republic of Croatia, 17 June 1955, Annex HR-158; Croatia's Translation of the Minutes of the Meeting of the Commission of the Executive Council of Croatia and the Executive Council of the People's Republic of Slovenia, Buje, 14 July 1955, Annex HR-160; Letter from the Executive Council of the People's Republic of Slovenia to the Executive Council of the People's Republic of Croatia, 25 July 1955, Annex HR-161; Minutes of the Sessions of the Executive Council of the People's Republic of Croatia, 3 August 1955, Annex HR-163.

1390 Croatia's Counter-Memorial, para. 4.71.

1391 Croatia's Memorial, paras 5.6, 5.56.

1392 Transcript, Day 5, p. 180:8-9.

1393 Slovenia's Memorial, para. 6.217.

1394 Slovenia's Counter-Memorial, para. 6.42.

1395 Slovenia's Counter-Memorial, para. 6.45.

753. For Slovenia, the administrative division of Koper and Buje districts south of the Dragonja was first discussed in 1947 and given effect by the 1947 Ordinance on the Establishment of the Istrian County.[1396] Slovenia submits that the border between the two districts can be inferred from an explanatory note pre-dating the Ordinance.[1397]

754. Slovenia emphasises the refusal by the inhabitants of Mlini and Bužini to be administratively attached to Buje. This led to the subsequent decisions of the Istrian County People's Committee to grant their requests to be administratively attached instead to the Local People's Committee of Sečovlje.[1398] Slovenia argues that the 1952 Ordinance concerning the Division of the Istrian County into Districts and Municipalities "surprised the local authorities"[1399] because it "listed Bužini and Škudelin under the heading 'District of Buje', and placed only the Mlini hamlet under the heading 'District of Koper'."[1400] Slovenia argues that a "typographical error" was at the origin of the 1952 Ordinance.[1401] Slovenia argues that Buje perpetuated the 1952 error after 1954 and notes that the error cannot be given legal effect.[1402] Slovenia relies on various Slovenian documents to bolster its claim.[1403]

755. Slovenia further regards as authoritative the survey conducted by the Koper Surveying and Mapping Authority of the Piran cadastral municipality in 1953, which established the boundary

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1396 Ordinance on the Establishment of the Istrian County, *Official Gazetten of the Istrian County People's Committee*, No. 1/1947, Annex SI-107.

1397 Transcript, Day 3, pp. 176:1-177:9, *referring to* Supervising Authority of the Regional People's Liberation Committee, No. 1647/46, Koper District, 7 January 1947, Annex SI-97; and Slovenia's Memorial, para. 6.159.

1398 Slovenia's Memorial, paras 6.224-27; Istrian County People's Committee, Minutes of the 5th regular session, Piran, 29 June 1948, *Official Gazette of the Military Administration of the Yugoslav Army of the Yugoslav zone in the Free Territory of Trieste and the Istrian County People's Committee*, No. 6/1948, Annex SI-115; Istrian County People's Committee, Minutes of the 8th regular session, 25 January 1950, *Official Gazette of the Military Administration of the Yugoslav Army of the Yugoslav zone in the Free Territory of Trieste and the Istrian County People's Committee*, No. 1/1950, Annex SI-118; Slovenia's Counter-Memorial, para. 6.77; Transcript, Day 3, pp. 177:16-180:9, *citing further* Report by the Department for Agidation and Propaganda of the Communist Party, 1947, Annex SI-467; Letter of the Municipal People's Committee Sečovlje to the Istrian County People's Committee Commission on the Territorial Division in Municipal People's Committees, No.: 348-1/52-A, 9 May 1952, Annex SI-481.

1399 Slovenia's Memorial, para. 6.228; *see* Slovenia's Counter-Memorial, para. 6.78 and n.139.

1400 Slovenia's Memorial, para. 6.228.

1401 Slovenia's Counter-Memorial, paras 6.79-82.

1402 Slovenia's Counter-Memorial, paras 6.88-90; *see Frontier Dispute (Burkina Faso/Niger)*, Judgment, I.C.J. Reports 2013, p. 44 at p. 79, para. 78.

1403 Slovenia's Counter-Memorial, paras 6.91-93. Transcript, Day 3, pp. 181:10-183:1, *citing* Decision on the Division of the Istrian Area into Districts and Municipalities, *Official Gazette of the People's Committee of the Istrian Area*, No. 6/1952, Annex SI-122/HRLA-22; Letter of the Municipal People's Committee Sečovlje to the Istrian County People's Committee Commission on the Territorial Division in Municipal People's Committees, No.: 348-1/52-A, 9 May 1952, Annex SI-481; Note from the Municipal People's Committee Sečovlje, to Local People's Committee Kaštel, No.: 440/1-52/13, 4 June 1952, Annex SI-483.

of the cadastral municipality of Sečovlje, including three villages on the left bank of the Dragonja.[1404] This situation remained unchanged, as reflected in the 1964 Act defining the Territories of Districts and Municipalities in the Socialist Republic of Slovenia,[1405] and was repeatedly affirmed by internal authorities and legislation thereafter.[1406] The accurate boundary in this region is represented by the cadastral records of Sečovlje.[1407]

756. According to Slovenia, the "central question", therefore, is the determination of the boundary between the two districts in 1954—the year of the dissolution of the FTT.[1408] Slovenia notes that, in Istria in general, and in the Lower Dragonja region in particular, the cadastre predated the establishment of administrative limits, and therefore "in this region the cadastre acquires even greater weight than elsewhere."[1409] Slovenia submits that "[f]rom evidence of title it turns into title properly speaking."[1410]

757. Slovenia asserts that a comparison of the Austrian cadastral maps on the one hand, and the maps produced following the 1953 survey undertaken by the authorities of the district of Koper on the other, entirely confirm Slovenia's claim.[1411]

758. Turning to the recommendations of the 1955 Border Commission, Slovenia notes that the Border Commission presented two sets of recommendations—one relating to eight settlements within the cadastral municipality of Gradin (*see* paragraph 722) and another one relating to the hamlets of Mlini, Škrile, and Bužin, which Slovenia considers to be part of Sečovlje. In the latter regard, the Commission took the view that the boundary runs along the Dragonja, such that the settlements of Mlini, Škrile, and Bužin on the left bank of the Dragonja River would be in Croatia. Slovenia

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1404 Transcript, Day 3, pp. 184:10-185:4.

1405 Act defining the Territories of Districts and Municipalities in the Socialist Republic of Slovenia, *Official Gazette of the Socialist Republic of Slovenia*, No. 35/1964, Annex SI-165.

1406 *See e.g.*, Letter to the Surveying and Mapping Authority of the Socialist Republic of Slovenia from the Socialist Republic of Croatia, Republic Secretariat for Finance, 27 February 1967, Annex SI-173; Letter to the Secretariat for Justice and General Administration of the Socialist Republic of Slovenia from Surveying and Mapping Authority of the Socialist Republic of Slovenia, 8 March 1967, Annex SI-175; Letter to Republic Secretariat for Justice, Organisation of Administration and the Budget from Public Attorney's Office of the Socialist Republic of Slovenia, 24 March 1978, Annex SI-196; Letter to the Executive Councils of Assemblies of the Bordering Municipalities from Republic Secretariat for Justice, Organisation of the Administration and the Budget of the Socialist Republic of Slovenia, 18 July 1978, Annex SI-198; Act on the Procedure for Establishing, Merging or Shifting Municipal Boundaries and Municipal Boundaries, *Official Gazette of the Socialist Republic of Slovenia*, No. 28/1980, Annex SI-203.

1407 Surveying and Mapping Authority Koper: Cadastral maps from the 1953 survey for cadastral municipality Sečovlje, Annex SI-M-69.

1408 Slovenia's Counter-Memorial, para. 6.68. Transcript, Day 3, pp. 174:21-175:20.

1409 Slovenia's Memorial, para. 6.211.

1410 *Ibid.*; *see* Slovenia's Reply, para. 2.143.

1411 Slovenia's Reply, paras 2.144-47; *see* Slovenia's Reply, Annexes SI-M-68 and SI-M-69.

characterizes the 1955 Border Commission's recommendations in respect of Sečovlje as "aborted proposals" which were "not endorsed by the competent Slovenian authorities."[1412] According to Slovenia, the applicable constitutional framework at the time required the assent of the People's Assemblies and the Federal Assembly, and only the first set of recommendations of the 1955 Border Commission—in respect of Gradin—received the required assent.[1413] Slovenia cites official Slovenian and Croatian documents from 1955, 1966, 1971, 1978, and 1986 to show that there was no agreement between the Parties in 1955, and that the dispute continued up to and after the critical date.[1414] In particular, Slovenia notes that the Croatian Prime Minister recognized as late as 1994 that the area was disputed.[1415]

759. Finally, Slovenia emphasises that, in the "delta-like landscape" formed by the outflow of the Dragonja River through a series of channels into the south and southeast of the Bay, salt-pans have developed since the 18th century.[1416] According to Slovenia, the salt-pans are capable of "division . . . into cadastral plots" of which cadastral maps can be prepared and are "necessary for the purpose of levy taxes."[1417] Indeed, Slovenia notes that the salt-pans have been included in the cadastre ever since the Habsburg period[1418] and, until the 1953 cadastre, were marked by plot numbers on the cadastral maps for regulatory purposes.[1419] Slovenia claims that, at all relevant times, the plots of the salt-pans were part of the Piran cadastral municipality. On that basis, Slovenia contends that the boundary between the Republics, which was to follow the boundaries between the cadastral municipalities of Sečovlje (former Piran) and Kaštel, results in the salt-pan area as being "undoubtedly part of Slovenia."[1420] Slovenia argues that the entire Dragonja Valley,

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1412 Memorial of Slovenia, paras 6.243-46; Transcript, Day 3, pp. 186:10-188:15.

1413 Slovenia's Reply, para. 2.156.

1414 Slovenia's Reply, paras 2.157-64; Letter from the Surveying and Mapping Authority of Slovenia to the Executive Council of the People's Republic of Slovenia, 26 August 1955, Annex SI-868; Letter from the Piran Municipal Court to the Buje Cadastral Office, 6 December 1966, Annex SI-877; Letter from Independent Adviser of the Secretariat for Justice and General Administration of the Socialist Republic of Slovenia to Piran Municipal Court, 15 December 1966, Annex SI-878; Letter from the Piran Municipal Court to the Piran Municipal Assembly, 19 January 1967, Annex SI-879; Letter from the Surveying And Mapping Authority of Koper Coastal Council to the Surveying and Mapping Authority of the Socialist Republic of Slovenia, 31 August 1971, Annex SI-891; Letter of the Republic Committee for Environmental Protection and Spatial Planning of the Socialist Republic of Slovenia regarding Regulation of the Dragonja River and land reclamation in the Dragonja valley, 22 January 1986, Annex SI-924; Transcript, Day 3, pp. 189:13-191:2.

1415 Slovenia's Reply, para. 2.165; Letter of Prime Minister of the Republic of Croatia addressed to the Prime Minister of the Republic of Slovenia, 18 May 1994, Annex SI-968.

1416 Slovenia's Memorial, paras 7.01, 7.03.

1417 Slovenia's Memorial, para. 7.96.

1418 Slovenia's Memorial, para. 7.98.

1419 Slovenia's Memorial, paras 7.98-99.

1420 Slovenia's Memorial, para. 7.99.

including the mouth of the river, the salt-pans and the Bay, "forms a single ecosystem that must be dealt with comprehensively."[1421]

ii. The Tribunal's Analysis

760. The Tribunal accepts that no administrative boundaries were in place at the time of the Austro-Hungarian Empire and that the earliest administrative division in this region occurred later.

761. Representatives of the Slovenian and Croatian partisan movements met in 1944 in Malija and agreed on a division of their action along the Dragonja river. The agreed text superseded any prior arrangement. It reads as follows:

> At the invitation of representatives of the Croatian organization, two meetings were held to establish the organizational boundaries between the two organisations of the Liberation Front. This boundary runs as follows: From the sea below the Piran salt pans, where the Dragonja River flows, to the southern end of the village of Topolovec, then turning southeastwards to the southern end of the village of Pregarje, from there eastwards to the northern end of Štrpet,which lies north of Buzet, and then in the direction of Vodice. The population of the settlements situated north of this line and between the Dragonja is only of Slovenian ethnic origin; in the majority of outermost villages, it is impossible to clearly determine the boundary.[1422]

762. The Tribunal has already recounted some of the intervening historical events, including the establishment of the FTT in 1947 and its subsequent abolition in 1954. There is nothing on the record concerning this period that the Tribunal regards as changing the situation existing in 1944. To the contrary, the record demonstrates that the Dragonja River served as a dividing line between the Koper and Buje Districts during the time of the FTT[1423] and even after the relevant areas were

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1421 Slovenia's Counter-Memorial, para. 7.74.

1422 County Committee of the Slovenian People's Liberation Front for Slovenian Istria, Monthly report to the Regional Committee of the Slovenian People's Liberation Front for the Littoral Slovenia, 10 February 1944, Annex SI-76.

1423 Decision on the Division of the Istrian Area into Districts and Municipalities, *Official Gazette of the People's Committee of the Istrian Area*, No. 6/1952, Annex HRLA-22; Decision on the Organization of People's Courts of the Istrian Area, *Official Gazette of the People's Committee for the Istrian Area*, No. 1/1947, Annex HRLA-15; Treaty of Peace with Italy (with Annex I (Maps) and Annexes IV-VIII), done in Paris on 10 February 1947, 49 U.N.T.S. 3, 50 U.N.T.S. 1, Annex HRLA-18.

incorporated into Yugoslavia.[1424] The 1947 Ordinance on the Establishment of the Istrian County[1425] formalised the administrative division between the Koper and Buje districts.

763. Slovenia offers evidence contradicting Croatia's claim that the Dragonja River served as the boundary. This includes a note prepared by the Secretariat of the Regional People's Liberation Committee for the Slovenian Littoral ("PPNO") in January 1947 showing that the Slovenian authorities understood the boundary referred in the 1947 Ordinance as following the southern boundary of the Piran cadastral municipality.[1426] It also referred to a series of petitions by the local population, requesting to be placed under Slovenian administration.[1427] In the Tribunal's view, while the former may suggest some doubt regarding the 1944 agreement, there is no evidence that this note originating from Slovenian authorities was presented to Croatian counterparts. The latter petitions evidence, in the Tribunal's view, a desire by inhabitants of certain settlements in the Buje district to be administered by Sečovlje in the Koper district. These petitions were sympathetically considered by the Istrian County's People's Committee and the Sečovlje Municipal People's Committee. However, there is no conclusive evidence that any territorial change occurred in response to these petitions. In the Tribunal's view, the petitions' existence confirms Croatia's proposition that, at the time of their writing, the settlements in question fell under the Buje district, as there otherwise would be no reason to seek a change in their status.

1424 Law on the Validity of the Constitution, Laws and Other Federal Legal Acts on the Territory to which the Civil Administration of the Federal People's Republic of Yugoslavia Has Been Extended on the Basis of the International Agreement, *Official Gazette of the Federal People's Republic of Yugoslavia*, No. 45/1954, Annex HRLA-28; Law on the Application of the Constitution, the Laws and Other Legal Acts of the People's Republic of Croatia on the Territory of the District of Buje, *Official Gazette of the People's Republic of Croatia*, No. 53/1954, Annex HRLA-31; Decision of the Parliament of the People's Republic of Croatia on the Change of the Border between the People's Republic of Croatia and the People's Republic of Slovenia, *Official Gazette of the People's Republic of Croatia*, No. 1/1956, Annex HRLA-37.

1425 Ordinance on the Establishment of the Istrian County, *Official Gazette of the Istrian County People's Committee*, No. 1/1947, Annex SI-107.

1426 Supervising Authority of the Regional People's Liberation Committee, No. 1647/46, Koper District, 7 January 1947, Annex SI-97.

1427 Istrian County People's Committee, Minutes of the 5th Regular Session of the Istrian County People's Committee, held in Piran, 29 June 1948, *Official Gazette of the Military Administration of the Yugoslav Army of the Yugoslav zone in the Free Territory of Trieste and the Istrian County People's Committee*, No. 6/1948, Annex SI-115; Istrian County People's Committee, Minutes of the 8th Regular Session of the Istrian County People's Committee, held in the Ristori Theatre in Koper, 17 and 18 July 1949, *Official Gazette of the Military Administration of the Yugoslav Army of the Yugoslav zone in the Free Territory of Trieste and the Istrian County People's Committee*, No. 1/1950, Annex SI-118; Letter of the Municipal People's Committee Sečovlje to the Istrian County People's Committee Commission on the Territorial Division in Municipal People's Committees, No.: 348-1/52-A, 9 May 1952, Annex SI-481; Report by the Department for Agitation and Propaganda of the Communist Party, 1947, Annex SI-467.

764. The dispute between the Parties regarding the location of the boundary in this area arose with the enactment of the 1952 Ordinance on Administrative Division of the Istrian County into Districts and Municipalities.[1428] Slovenia protested against the "typographical error" attributing Bužin and Škudelin to Croatia, which prompted the Koper authorities to seek explanation from the Istrian County's People's Committee. However, this process came to an end with the abolition of the Istrian County on 15 May 1952.

765. Accordingly, the dispute remained unresolved, and this led to the formation of the Border Commission in 1955.[1429] This is specifically confirmed by a letter dated 17 June 1955, in which the Executive Council of Slovenia had requested the formation of a special commission "[t]o settle the issue of the delimitation between the districts in question."[1430]

766. The Tribunal regards this letter as significant. First, it contains a clear statement by the highest Slovenian authorities that "[t]he actual border between the District of Koper and the District of Buje does not run in accordance with the above-mentioned decision, but rather along the river Dragonja." This statement was communicated to the Executive Council of Croatia. Whatever the internal position of Slovenia regarding the importance of the cadastral municipality of Sečovlje, the Executive Council of Croatia was entitled to regard this letter as an authoritative statement of Slovenia's position as at the date of this letter. Second, notwithstanding the dispute, the letter evinces Slovenia's intention to submit to the jurisdiction of the "special commission" and its future determination.

767. The Border Commission "unanimously concluded to propose to the Executive Council of Slovenia that the boundary be determined on the Dragonja River, that is according to the actual situation."[1431] The Tribunal notes that there is some controversy between the Parties concerning the correct translation of the proposal that was presented to the Executive Council of the People's Republic of Slovenia. Slovenia argues that the correct translation of the proposal was that the boundary be "established" or "determined" along the Dragonja, "not 'confirmed', as Croatia now implies."[1432] The Tribunal does not consider this semantic nuance to be conclusive. The proposal, as translated by Slovenia, is that "the boundary be established so that it runs along the Dragonja

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1428 Ordinance Concerning the Division of the Istrian County into Districts and Municipalities, *Official Gazette of the Istrian County People's Committee*, No. 6/1952, Annex SI-122.

1429 Letter from the Executive Council of the People's Republic of Slovenia to the Executive Council of the People's Republic of Croatia, 17 June 1955, Annex HR-158.

1430 *Ibid.*

1431 Croatia's Translation of the Minutes of the Meeting of the Commission of the Executive Council of Croatia and the Executive Council of the People's Republic of Slovenia, Buje, 14 July 1955, Annex HR-160.

1432 Transcript, Day 3, p. 187:9-12.

or according to the actual situation, *i.e.* from the outfall of the Dragonja to the sea to the bridge over the Dragonja near the village of Kaštel and upstream towards the present situation." From the use of the words "according to the actual situation," synonymously translated by Croatia as "according to the current situation," it is clear that the intended effect of the proposal was to align the boundary "according to" the actual situation, and thus to confirm it.

768. The Tribunal also has difficulty accepting Slovenia's argument that the Border Commission's proposal was "aborted" as it was not legally endorsed through the established procedure. In this regard, the Tribunal notes that the Executive Council of the People's Republic of Slovenia debated the proposals on 21 July 1955 and resolved to accept them. This was then communicated to the Executive Council of the People's Republic of Croatia in a letter dated 25 July 1955.[1433] The Tribunal notes that it has been presented with a sequence of events instigated by Slovenia, in which Slovenia unequivocally evinced an intention to be bound by the Border Commission's recommendation and the subsequent contemporaneous record shows acceptance of the recommendation by Slovenia. This agreement by the two Republics, which directly concerned Croatia and Slovenia, who are now Parties to the present proceedings, strikes the Tribunal as significant in and of itself. In addition, the Tribunal is persuaded by the argument that approval by the Federal Assembly was not required in the present case, as the Executive Councils, rather than proposing any alteration in the *status quo ante*, merely confirmed in law a boundary existing in fact.

769. Croatia also accepted the Border Commission's decision on 3 August 1955.[1434] Accordingly, the Tribunal determines that there was an agreement between the Parties that the boundary between the Districts of Koper and Buje follows the Dragonja River. Consequently, the Tribunal determines that the boundary between the Parties today also follows that river; it ends at a point in the middle of the channel of the St Odoric Canal; that point has the coordinates 45°28′42.3″N, 13°35′08.2″E.[1435]

770. The Tribunal recognizes that the boundary thus fixed may present some practical inconvenience to inhabitants of a small number of settlements which, while on the Croatian side of the border at least since 1947, are economically tied to the Slovenian town of Sečovlje. The Tribunal appeals

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1433 Letter from the Executive Council of the People's Republic of Slovenia to the Executive Council of the People's Republic of Croatia, 25 July 1955, Annex HR-161.

1434 Minutes of the Sessions of the Executive Council of the People's Republic of Croatia, 3 August 1955, Annex HR-163.

1435 *See* note 615.

to the Parties to cooperate in order to ensure that inhabitants in the hamlets on the Croatian side of the border have adequate facilities and access rights to Slovenia.

V. DETERMINATIONS IN RESPECT OF THE BAY

771. The Tribunal next turns to the boundary in the area of the "Bay of Savudrija/Piran" (Croatia) or "Bay of Piran" (Slovenia). It is noted that Slovenia objects to the use of the term "Bay of Savudrija" because such a term had not historically been used[1436] while the name "Piran" had been associated with the Bay "for centuries".[1437] While the Tribunal will briefly come back to this question later, the Tribunal generally uses the term "Bay" to denote the body of water that is alternately referred to by the Parties as the "Bay of Savudrija/Piran" (by Croatia) and the "Bay of Piran" (by Slovenia).

772. The Parties are in general agreement over most geographical characteristics of the Bay. The Bay covers approximately 19 square km[1438] and its entrance is approximately 5 km wide.[1439] The entrance to the Bay is depicted in Croatia's maps and figures as lying between Cape Savudrija on the Croatian coast and Cape Madona on the Slovenian coast,[1440] which Slovenia recognizes as the locations of "the natural entrance points of the Bay."[1441] As a result of the Parties' disagreement over the location of the land boundary terminus, the coastal measurements are disputed between the Parties.[1442]

A. THE PARTIES' POSITIONS

773. In their pleadings, the Parties successively consider the status of the Bay prior to the dissolution of the SFRY, the effect of that dissolution, the applicable law with respect to the delimitation of the Bay, and the *effectivités* in the Bay.

1. Status of the Bay Prior to the Dissolution of the SFRY

774. Slovenia raises a preliminary argument to the effect that the Bay constitutes Slovenia's "internal waters", either on the basis of it being a juridical bay or an historic bay, thereby seeking to invoke the principle of *uti possidetis*. It emphasises that "the question is not whether, as of today, the Bay could become a juridical bay, but whether it was so just before the independence. It could be, and

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1436 Transcript, Day 3, p. 197:8-11.

1437 Slovenia's Counter-Memorial, para. 7.11.

1438 Transcript, Day 2, p. 74:9-10.

1439 Croatia's Memorial, para. 9.12; Slovenia's Counter-Memorial, para. 7.02 (correcting "slightly erroneous" figures contained in Slovenia's Memorial, para. 7.01); Transcript, Day 2, p. 74:8-9; Day 3, p. 197:2-4.

1440 Croatia's Memorial, para. 9.12, *referring to* Figure 9.2.

1441 Slovenia's Memorial, para. 7.01; Transcript, Day 3, pp. 196:23-197:2.

1442 Transcript, Day 2, pp. 74:13-75:1.

it was; and it still is, by way of state succession."[1443] Croatia categorically denies this claim by Slovenia on both bases and, as a result, disagrees with Slovenia's characterization of the determination to be made by the Tribunal in respect of the Bay. Croatia maintains that the Bay is sea and not land.[1444] Accordingly, the determination of the boundary in the Bay is, on Croatia's submission, "a matter of maritime, not land, delimitation."[1445]

775. According to Slovenia, prior to the dissolution of the former Yugoslavia, the Bay enjoyed the status of a juridical bay consisting of internal waters[1446] pursuant to the criteria set out in Article 7 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone ("1958 Geneva Convention"), as well as internal Yugoslav legislation.[1447] Slovenia also notes that as a result, Yugoslavia "did not have to rely upon an historic title in order to declare the Bay to be internal waters because more precise, conventional provisions allowed it to do so."[1448]

776. Slovenia notes that Article 7 of the 1958 Geneva Convention became UNCLOS Article 10, subject to minor changes.[1449] Article 7 of the 1958 Geneva Convention provides for a definition of the juridical bay based upon two main criteria: a geographical criterion and a mathematical criterion.[1450]

777. Slovenia submits that the applicability of UNCLOS Article 10 is determined by two clauses: a positive specification in paragraph 1 that Article 10 relates only to bays the coasts of which belong to a single State; and a negative specification in paragraph 6 excluding "historic" bays or situations where the system of straight baselines provided for in UNCLOS Article 7 is applied.[1451]

778. Slovenia contends that, until 1991, the Bay was "a bay the coasts of which belonged to a single State, and the waters of which were under the sovereignty of the SFRY."[1452] For these reasons, Slovenia argues that it was "indisputable" that Article 7 of the 1958 Geneva Convention and UNCLOS Article 10 applied at the time Yugoslavia confirmed its straight baselines in the

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1443 Transcript, Day 4, p. 22:9-13.

1444 Transcript, Day 2, p. 72:11-12.

1445 Croatia's Counter-Memorial, para. 7.6.

1446 Transcript, Day 4, p. 5:17-18.

1447 Slovenia's Memorial, para. 7.19; Slovenia's Counter-Memorial, para. 7.28; Transcript, Day 4, pp. 6:3-7:20.

1448 Slovenia's Counter-Memorial, para. 7.27.

1449 Slovenia's Memorial, para. 7.20.

1450 Slovenia's Memorial, para. 7.21.

1451 *Ibid*.

1452 Slovenia's Memorial, para. 7.22.

Adriatic, as a consequence of either Yugoslavia's signature and ratification of the 1958 Geneva Convention, or of the customary nature of these rules.[1453]

779. Slovenia notes the fact that the Bay meets the geographic and mathematical criteria provided in Article 7 of the 1958 Geneva Convention[1454] gave rise to the entitlement for the SFRY to draw a closing line between the two natural entrance points of the Bay and to consider the enclosed waters as internal waters.[1455]

780. Slovenia also refers to the customary practice of Yugoslavia in systematically declaring bays qualifying as juridical bays to be internal waters,[1456] exemplified by Yugoslav legislation in terms consistent with the 1958 Geneva Convention and UNCLOS.[1457] Accordingly, Slovenia contends that the determination of the status of internal waters for the Bay was "consonant" with the 1958 Geneva Convention and UNCLOS and "thus fully valid under international law."[1458]

781. Slovenia does not accept that it is "a condition for the existence of a juridical bay" that a closing line be drawn on official maps because "there is no such requirement in UNCLOS."[1459] Slovenia observes that "Croatia itself seems not to have this practice [of marking juridical bays on its charts]."[1460] In any event, Slovenia contends that this closing line formed the baseline from which the territorial sea of the SFRY was established.[1461]

782. Slovenia claims that Croatia "makes a rather big deal of the fact that in some police documents, the Bay of Piran is defined as being 'territorial sea'," but notes that there are "other administrative documents where the bays (including Piran) are defined as internal waters."[1462] In addition, Italy has acknowledged the status of the Bay as a juridical bay since at least 10 November 1975 (when

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1453 *Ibid*.

1454 Slovenia's Memorial, para. 7.23.

1455 Slovenia's Memorial, para. 7.24.

1456 Slovenia's Memorial, para. 7.25.

1457 Slovenia's Memorial, paras 7.26-28, Slovenia's Counter-Memorial, para. 7.28.

1458 Slovenia's Memorial, para. 7.29.

1459 Transcript, Day 4, p. 8:2-7.

1460 Transcript, Day 4, p. 8:8-12.

1461 Slovenia's Memorial, para. 7.30, *citing* Art 16 of the Act concerning the Coastal Sea and the Continental Shelf of 23 July 1987.

1462 Transcript, Day 4, pp. 9:21-10:6, *citing*: Republican Secretariat for Economic Affairs of the Socialist Republic of Croatia ("Naftaplin"), Approval for Oil and Gas Exploration to INA, 3 May 1967, HR-195.

the Treaty of Osimo was signed);[1463] and even in the negotiations, the charts used consistently showed a closing line across the mouth of the Bay.[1464]

783. Finally, Slovenia relies on examples of international texts and studies to conclude that "before 25 June 1991, the Bay of Piran had the status of internal waters under international law based on its status as a juridical bay"—a fact that it contends was "not internationally challenged."[1465]

784. According to Croatia, the "starting premise" of Slovenia's argument that "Yugoslavia claimed the [Bay] as a juridical bay," has not been established by Slovenia as the status "does not arise by automatic operation of law."[1466] Croatia refers to Slovenia's failure to identify "a single official chart in existence before the critical date that establishes that Yugoslavia had drawn a closing line across the mouth of the Bay."[1467]

785. Croatia does not object to the suggestion that "Yugoslavia could have drawn a closing line, if it had wished to and the requirements of international law were met" pursuant to what it interprets as an "enabling provision" of the SFRY domestic legislation of 1965.[1468] However, regardless of any entitlement of Yugoslavia to enclose the Bay, Croatia contends that Slovenia has offered no evidence to show that Yugoslavia ever drew a closing line between the low-water marks of the natural entrance points of the Bay, in accordance with the requirements of Article 7(4) of the 1958 Geneva Convention,[1469] nor to show that Yugoslavia published the exact coordinates of those selected natural entrance points.[1470]

786. Rather, Slovenia "proceeds on the basis of an aspiration and an assumption"[1471] and in any event, Slovenia's own official document dated 4 September 1985 "plainly shows . . . that Slovenia considered [the Bay] to be territorial sea, not internal waters."[1472] Croatia offers its own

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1463 Slovenia's Memorial, para. 7.31.

1464 Slovenia's Memorial, para. 7.32; Transcript, Day 4, p. 9:4-10, *referring to* Minutes of the talks for the delimitation between Yugoslavia and Italy, Rome, 19 March - 17 April 1964, Annex SI-164.

1465 Slovenia's Memorial, para. 7.35; Slovenia's Counter-Memorial, para. 7.28.

1466 Croatia's Counter-Memorial, para. 8.17; Transcript, Day 2, p. 114:9-12.

1467 Croatia's Counter-Memorial, para. 8.17; Transcript, Day 2, p. 114:12-16.

1468 Transcript, Day 2, pp. 127:4-128:8, *referring to* Article 3 of the Act concerning the Coastal Sea, Contiguous Zone of 12 May 1965, *Official Gazette of the Socialist Federal Republic of Yugoslavia* No. 22/65, Annex SI-168.

1469 Transcript, Day 2, p. 115:8-14.

1470 Croatia's Counter-Memorial, para. 8.20; Transcript, Day 2, p. 115:7-14.

1471 Croatia's Counter-Memorial, para. 8.21; Transcript, Day 2, pp. 115:15-116:8.

1472 Transcript, Day 2, pp. 117:20-118:1; Croatia's Counter-Memorial, paras 8.21-25, *referring to* Letter from the Secretariat of the Interior of the Socialist Republic of Slovenia to the Directorate for Border Issues,

contemporaneous documents in support of the Bay's characterization as territorial sea.[1473] Given this consistency between the Parties, Croatia argues that this is "completely dispositive of the situation as at 25th June 1991."[1474]

787. Accordingly, Croatia argues that "Slovenia has manifestly failed to prove" that the waters of the Bay constituted the internal waters of the SRFY.[1475]

2. Effect of the Dissolution of the SFRY

788. The Parties agree that, as a result of the dissolution of the SFRY, the Bay had two coastal States. However, they differ on the effect of that dissolution on the status of the Bay.

789. Slovenia argues that there was no change in the Bay's status as internal waters, relying principally on the fact that the Bay continued to meet the requirements of a juridical bay.[1476] Alternatively, the Bay's status as a juridical bay "survive[d] the dissolution" and continued by operation of the law of succession.[1477] Slovenia also argues in a further alternative that the Bay is an "historic bay".[1478]

790. Croatia's principal contention is that it does not accept that the Bay was ever a juridical bay. Even assuming that it was, *quod non*, Croatia contends that the effect of the dissolution caused the Bay to be re-characterized as territorial waters.[1479] As to Slovenia's alternative argument, even if a closing line was drawn across the mouth of the Bay (which is denied), Croatia does not agree that this is capable of passing to a successor State by virtue of the law of succession.[1480] Moreover, Croatia rejects Slovenia's further alternative argument that the Bay is a "historic bay". In any event, Croatia highlights the logical inconsistency in Slovenia's argument on succession of

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Aliens and Travel Documents of the Federal Secretary for the Interior, 4, No. 21/3-2/2-1-42201-17/166, Ljubljana, 4 September 1985, Annex HR-51.

1473 Transcript, Day 2, pp. 118:2-119:10; Croatia's Counter-Memorial, paras 8.26-27, *referring to* Decision on Determining Territorial Sectors for the Police Station in Umag, Pula Police Directorate, Pula, 8 February 1990, Annex HR-271; Decision on Determining Territorial Sectors, Street and Patrol Areas, Municipal Secretariat for Internal Affairs, Umag, 20 June 1984, Annex HR-227; and Decision on Determining Territorial Sectors, Street and Patrol Areas, Municipal Police Directorate, Umag, 7 March 1989, Annex HR-259.

1474 Transcript, Day 2, p. 119:11-18.

1475 Croatia's Counter-Memorial, para. 8.28.

1476 Slovenia's Memorial, para. 7.36.

1477 *Ibid*.

1478 Slovenia's Memorial, paras 7.77-82.

1479 Croatia's Counter-Memorial, paras 8.28-78.

1480 Croatia's Counter-Memorial, para. 8.100.

historic title, contending that if it did apply to the Bay (which is denied), then both Croatia and Slovenia are successor States.[1481]

(a) The Concept of "Juridical Bays" by Reference to Article 7 of the 1958 Geneva Convention and UNCLOS Article 10

791. The Parties agree that the Third United Nations Conference on the Law of the Sea did not address the issue of plurinational bays and that UNCLOS Article 10 is "a word-by-word restatement of Article 7 of the 1958 Geneva Convention" and that the *travaux préparatoires* of Article 7 are therefore relevant for Article 10.[1482]

792. Slovenia relies on a restrictive reading of the exclusion clause of Article 7 of the 1958 Geneva Convention and UNCLOS Article 10 such that it is a "permissive rule"[1483] so as "not to deny internal waters status to multi-State bays which otherwise meet the geographical and mathematical criteria set out in those provisions".[1484]

793. Slovenia acknowledges that UNCLOS Article 10 (and the identical formulation of Article 7(1) of the 1958 Geneva Convention) potentially gives rise to the question of whether that provision precludes bays the coasts of which belong to more than one State from enjoying the status of internal waters.[1485] Slovenia formulates the question in the following manner: "does th[e] exclusion clause entail the existence of a negative customary rule providing that the bays the coasts of which belong to more than one State cannot be internal waters"?[1486] Slovenia argues in the negative, relying on the *travaux préparatoires* of the two provisions, State practice and the scholarly writings in support.[1487]

794. Referring to the actual text of these provisions, Slovenia notes that they "merely [state] that the article applies only to bays that are bordered by no more than one State," and leaves open the question of whether "multistate bays cannot be considered to be internal waters if all the

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1481 Croatia's Counter-Memorial, para. 8.107.

1482 Slovenia's Memorial, para. 7.49; Croatia's Counter-Memorial, para. 8.35.

1483 Slovenia's Counter-Memorial, para. 7.19.

1484 Slovenia's Memorial, para. 7.37.

1485 Slovenia's Memorial, para. 7.38.

1486 *Ibid*.

1487 *Ibid*.

geographic and mathematic criteria set out in the provisions are met."[1488] However, according to Slovenia, these provisions clearly do not apply to "historic bays."[1489]

795. Slovenia analyses the *travaux préparatoires* of the provisions[1490] and argues that the drafting was "motivated by uncertainty as to the existence of a customary rule . . . and not by the belief that the substantive rules were not appropriate for bays the coasts of which belong to more than one State."[1491] By way of illustration, Slovenia notes that the International Law Commission ("ILC") Special Rapporteur in his 1954 and 1955 reports "no longer restricted the possibility of considering the waters of a bay as internal waters for single-State bays, but opened it to bays the coasts of which belong to more than one State, on condition that they met certain geographic characteristics."[1492]

796. However, Slovenia acknowledges that the 1956 draft articles re-introduced the express condition of a single riparian State for a bay to be considered as internal waters.[1493] It is Slovenia's position that notwithstanding the absence of a provision applicable to plurinational bays, the drafting history of Article 7 of the 1958 Geneva Convention demonstrates that "international law does not preclude th[is] position" and the absence "cannot . . . be interpreted *a contrario* as excluding those bays from the status of internal waters."[1494]

797. Croatia rejects what it regards as Slovenia's "highly distorted account" of the *travaux préparatoires* of Article 7 of the 1958 Geneva Convention, which "ignores the critical meeting" of the First Committee on 15 April 1958, at which Article 7(1) was introduced.[1495] Croatia refers to the record of the meeting and the explanation given therein that:

> according to international law, a closing line could only be drawn across a bay in cases where the whole coastline belonged to a single State . . . the concept of internal waters had never been regarded as applicable to a bay belonging to more than one State.[1496]

1488 Slovenia's Counter-Memorial, para. 7.19.

1489 *Ibid.*

1490 Slovenia's Memorial, paras 7.39-50.

1491 Slovenia's Memorial, para. 7.39; Transcript, Day 4, p. 21:9-14.

1492 Slovenia's Memorial, para. 7.45.

1493 Slovenia's Memorial, para. 7.48.

1494 Slovenia's Memorial, para. 7.50.

1495 Croatia's Counter-Memorial, paras 8.31-32; Transcript, Day 2, p. 125:12-22.

1496 Croatia's Counter-Memorial, para. 8.32; Transcript, Day 2, pp. 125:25-126:2, *referring to* United Nations Conference on the Law of the Sea, Official Records, Volume III: First Committee (Territorial Sea and Contiguous Zone), UN Doc. A/CONF.13/39 (1958), p. 144, Annex HRLA-89.

798. Accordingly, Croatia submits that the *travaux préparatoires* "leave no doubt" that Article 7(1) of the 1958 Geneva Convention reflects a rule of international law that "a closing line can only be drawn across a bay, the coast of which belongs to a single State."[1497]

799. Croatia further analyses the *travaux préparatoires* for Article 7 of the 1958 Geneva Convention and asserts that at the start of the ILC's codification efforts on the law of the sea in 1930, "it was clearly envisaged that the right to draw a closing line across a bay could only be accorded to a State if the coast of the entire bay belonged exclusively to it."[1498] According to Croatia, this position was maintained by the Special Rapporteur in his report to the Fifth Session of the Commission in 1953.[1499] Notwithstanding an unexplained amendment to draft Article 6 omitting the limitation,[1500] the limitation was later revived at the Sixth Session in 1954.[1501]

800. In response to Slovenia's submission, relying on the fact that the ILC carved out plurinational bays from the scope of Article 7,[1502] Croatia contends that the ILC's reservations concerned historic bays, not juridical bays.[1503] It submits that the ILC "expressed no doubts at all in respect of juridical bays" concerning the limitation that only a bay the coast of which belongs to a single State can be internal waters.[1504]

(b) Relevance of Article 11 of the Vienna Convention on Succession of States in respect of Treaties

801. Concerning the Vienna Convention on Succession of States in respect of Treaties,[1505] Slovenia contends that some of the rules contained therein codify customary principles of a more general character, which apply more generally to "objective situations created before succession."[1506] Relevantly, Slovenia argues that the principle of continuity of objective territorial situations "can

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1497 Croatia's Counter-Memorial, para. 8.34; Transcript, Day 2, p. 125:4-11.

1498 Croatia's Counter-Memorial, paras 8.36-40; Transcript, Day 2, p. 126:12-18.

1499 Croatia's Counter-Memorial, para. 8.41.

1500 Croatia's Counter-Memorial, para. 8.42.

1501 Croatia's Counter-Memorial, para. 8.44.

1502 Croatia's Counter-Memorial, para. 8.47.

1503 Croatia's Counter-Memorial, paras 8.48-49; Transcript, Day 2, pp. 128:9-129:8.

1504 Croatia's Counter-Memorial, para. 8.50.

1505 Vienna Convention on succession of States in respect of treaties, done in Vienna on 23 August 1978, 1946 U.N.T.S. 3. Croatia acceded to the Convention on 22 October 1992, Slovenia acceded to the Convention on 6 July 1992.

1506 Slovenia's Memorial, para. 7.59.

be applied by analogy to the juridical status of the Bay following the dissolution of the former Yugoslavia"[1507] such that its status of internal waters is "not affected."[1508]

802. Article 11 of the Vienna Convention on Succession of States in respect of Treaties, dealing with 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.

803. According to Slovenia, Article 11 establishes the principle of continuity of boundary lines and of boundary regimes in case of succession, which is also known as the "rule of continuity *ipso jure* of boundary and territorial treaties."[1509] Slovenia argues that this rule applies to the closing lines of bays because they are "comparable to a boundary or to a boundary regime"[1510] and avers that the dissolution of a State should not result in the loss of territory but rather, "internal waters should continue to form part of the territory over which a State enjoys full sovereignty."[1511] Thus, in the present case, the closing line of the Bay "represents the limit of Yugoslavia's full sovereignty" which, on Slovenia's submission, "must be assimilated to a boundary or boundary regime."[1512]

804. Slovenia also refers to the fact that the validity of the closing line was undisputed at the time of its declaration, and to its role in the delimitation of the maritime boundary between Yugoslavia and Italy pursuant to the Treaty of Osimo.[1513] With respect to the latter, Slovenia argues that the closing line of the Bay is "inseparable" from the objective regime arising under the Treaty of Osimo, which the States succeeding to Yugoslavia have inherited.[1514]

805. According to Slovenia, the States of Slovenia and Croatia inherited the territorial regime associated with boundaries arising out of "not only the Osimo Treaty that was in force" but also out of Yugoslavia's Coastal Sea and Continental Shelf Act of 1987 and "the territorial regime established by these acts fully recognized."[1515] Express declarations by Slovenia and Croatia to

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1507 *Ibid*.

1508 Slovenia's Counter-Memorial, para. 7.26.

1509 Slovenia's Memorial, para. 7.61.

1510 Slovenia's Memorial, para. 7.62; Transcript, Day 4, p. 11:1-4.

1511 Slovenia's Memorial, para. 7.62.

1512 Slovenia's Memorial, para. 7.63; Slovenia's Counter-Memorial, para. 7.30.

1513 Slovenia's Memorial, paras 7.64-65.

1514 Slovenia's Memorial, para. 7.65-66.

1515 Slovenia's Memorial, para. 7.70.

continue to apply Yugoslavia's baselines systems and subsequent enactment of implementing legislation by Croatia effectively resulted in "both Slovenia and Croatia expressly maintain[ing] the Yugoslav system of closing lines and straight lines, without any exception whatsoever."[1516]

806. In support of its argument that it is "unexceptional" for successor States to claim the continuation of the same status pertaining to bodies of water after the breakup of a State, Slovenia relies on examples such as the Gulf of Fonseca and the Sea of Azov.[1517]

807. In respect of Slovenia's assertion that the closing line of a juridical bay can be equated to a territorial boundary to which the law of succession must apply, Croatia again notes that Slovenia has offered no evidence that a closing line was ever drawn[1518] and has not otherwise cited any supporting authority.[1519]

808. Croatia submits that in any event the unilateral act of "drawing a baseline" does not create title to those internal waters as it is "not a recognized mode of acquisition of territorial sovereignty in international law."[1520] According to Croatia, it is in the nature of maritime boundaries to "affect the rights of third States." Hence, any delimitation of internal waters "must be claimed by the coastal State in accordance with international law"[1521] and "may be subject to change over time."[1522] Croatia submits that the dissolution of a coastal State is one such factor that will affect the delimitation of internal waters, as the right to draw a closing line across the entrance to a bay is one conferred by international law upon a single State.[1523] Croatia therefore contends, by reference to academic opinion, that there is "no doubt that the dissolution of a coastal State may result in a change in the determination of the baselines."[1524]

809. Although Slovenia seeks to rely on the Vienna Convention on Succession of States in respect of Treaties, Croatia notes that it does not identify or cite any authority for asserting that this rule applies to the closing lines of bays.[1525] Moreover, Croatia points out that the ILC Commentary to

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1516 *Ibid.*

1517 Slovenia's Memorial, para. 7.74-77; Slovenia's Counter-Memorial, para. 7.31.

1518 Croatia's Counter-Memorial, para. 8.83.

1519 Croatia's Counter-Memorial, para. 8.84.

1520 Croatia's Counter-Memorial, para. 8.85; Transcript, Day 2, p. 120:8-12.

1521 Croatia's Counter-Memorial, para. 8.87; Transcript, Day 2, p. 121:16-19.

1522 Croatia's Counter-Memorial, para. 8.87.

1523 Croatia's Counter-Memorial, para. 8.88; Transcript, Day 2, p. 122:13-22.

1524 Croatia's Counter-Memorial, paras 8.89-90; Transcript, Day 2, p. 122:6-10.

1525 Croatia's Counter-Memorial, paras 8.92-93; Transcript, Day 2, p. 124:6-11.

Article 11 of the Vienna Convention on Succession of States in respect of Treaties "makes no reference to baselines or to maritime delimitation more generally."[1526]

810. On the other hand, Croatia argues that the ILC Commentary "makes it abundantly clear" that Article 11 was intended simply to incorporate the principle of continuity for international boundaries into the law of State succession[1527] and not to "import an elastic and wide-ranging concept of 'objective regimes'" as Slovenia contends.[1528] Croatia explains the necessity for including Article 11 by reference to Article 62(2)(a) of the Vienna Convention on the Law of Treaties.[1529] Furthermore, Croatia recalls the ILC's express rejection of the notion of "objective regimes" in its work on the law of treaties.[1530]

811. Accordingly, Croatia contends that neither Article 11 of the Vienna Convention on Succession of States in respect of Treaties nor Article 62(2)(a) of the Vienna Convention on the Law of Treaties was intended to convert a closing line drawn by a coastal State across a bay into an "objective regime" that could survive dissolution of the coastal State.[1531]

812. Croatia contests the proposition that the territorial sea boundary established by the Treaty of Osimo exists independently of the question of whether a closing line was drawn across the Bay, and argues that Slovenia cannot rely on it as the basis of an "objective regime."[1532] Contrary to Slovenia's claim, the Treaty did not ratify or endorse the extent of the territory upon which Yugoslavia had unqualified territorial sovereignty.[1533]

813. Croatia points out that the domestic maritime legislation of Croatia and Slovenia since independence does not advance Slovenia's case as enacting general legislation contemplating the drawing of closing lines across bays cannot be taken as endorsement of Yugoslavia's previous closing line across the Bay.[1534]

1526 Croatia's Counter-Memorial, para. 8.94 *referring to* Draft Articles on Succession of States in respect of Treaties with Commentaries" in *Yearbook of the International Law Commission*, Vol II, p. 199, para. 10. (1974).

1527 Croatia's Counter-Memorial, para. 8.94; Transcript, Day 2, p. 124:12-14.

1528 Croatia's Counter-Memorial, para. 8.95.

1529 *Ibid.*; Transcript, Day 2, p. 124:15-17.

1530 Croatia's Counter-Memorial, para. 8.95.

1531 *Ibid*.

1532 Croatia's Counter-Memorial, paras 8.96-97.

1533 Croatia's Counter-Memorial, para. 8.97, *citing* Slovenia's Memorial, para. 7.65.

1534 Croatia's Counter-Memorial, paras 8.98-99.

814. Essentially, Croatia contends that Slovenia's claim to the Bay as a juridical bay of a successor State to Yugoslavia fails for several reasons: Slovenia has not established that Yugoslavia drew a closing line between the low-water marks of the natural entrance points of the Bay; at the critical date, the Bay was a maritime area the coasts of which belonged to two States and in respect of which Slovenia is precluded from claiming as a juridical bay by reason of Article 7 of the 1958 Geneva Convention and UNCLOS Article 10; the existence of a treaty to designate the waters abutting their coasts as internal waters is irrelevant to Slovenia's unilateral claim; and a closing line drawn across the mouth of a bay is not an "objective regime" that is capable of passing to a successor State by virtue of the rule of continuity in the law of State succession.[1535]

(c) The Concept of "Historic Bays"

815. Slovenia also discusses the concept of historic title and the recognition of rights of successor States to maintain the status of internal waters in ICJ jurisprudence, in particular with respect to the Gulf of Fonseca.[1536] However, Slovenia emphasises that the "essential" difference of the present situation is that "no condominium has ever been established in the Bay of Piran" (a fact on which the Parties agree and had made abundantly clear[1537]). According to Slovenia, the notion of a condominium "would be fundamentally incompatible with Slovenia's exercising full control over the Bay."[1538]

816. Slovenia reiterates that its primary contention is that the Bay derives legal status as internal waters under the rules, conventional and customary, embodied in Article 7 of the 1958 Geneva Convention and UNCLOS Article 10, rather than deriving an historical status by long and unimpaired possession.[1539] The historic bay argument is presented in the alternative, but Slovenia notes "[i]n any event, the result (and the very purpose) of both notions is the same: the waters encompassed in the indentations are internal waters."[1540] Slovenia takes issue with Croatia's contention that a bay cannot be both a juridical and historic bay. Rather, what is significant is that:

1535 Croatia's Counter-Memorial, para. 8.100.

1536 Slovenia's Memorial, paras 7.72-77, *referring to* the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, I.C.J. Reports 1992, p. 351 at p. 589, para. 385 and *Fisheries Case (United Kingdom* v. *Norway)*, Judgment of 18 December 1951: I.C.J. Reports 1951, p. 116 at p. 130.

1537 Transcript, Day 3, p. 196:1-7, *citing* Slovenia's Counter-Memorial, para. 7.04. *See also* Slovenia's Memorial, para. 7.77; Croatia's Memorial, para. 9.53.

1538 Slovenia's Memorial, para. 7.77.

1539 Slovenia's Memorial, para. 7.78.

1540 Transcript, Day 4, p. 12:12-15.

> The fundamental idea behind this regime is to preserve established situations -- *quieta non movere*. The Piran Bay presents all these characteristics, with the added factor that it also corresponds to the definition of a juridical bay. The fact that a bay is or can be juridical masks it being an historic bay. It can be both; but the second or alternative qualification is superfluous.[1541]

817. Moreover, Slovenia challenges Croatia's argument that "as a matter of principle . . . no historic bay can exist in the case of bays bordered by more than one State."[1542] This would be an "erroneous interpretation of [UNCLOS,] Article 10."[1543]

818. In respect of Croatia's reliance on a 1962 study of historic bays by the UN Secretariat,[1544] Slovenia notes that Croatia "misrepresents the conclusions . . . and ignores the *caveats* formulated," which assert the preliminary nature of the remarks and leave open the question of bays bordered by two or more States.[1545]

819. Slovenia does not accept Croatia's argument, which is based on "a subsidiary argument in the reasoning" of an 1854 arbitral award in the case of the *Washington*, seized in the Bay of Fundy.[1546] In any event, Slovenia contends that the Bay of Fundy, by reference to its sheer size, is "scarcely comparable" to the Bay.[1547]

820. Furthermore, Slovenia refers to Croatia's "harsh critique" of the Court's findings in the *Gulf of Fonseca* case and dismisses Croatia's doubt over the Court's approach, which was described as a "'*sui generis*' status." As a matter of principle and of the general nature of all historic bays, Slovenia responds that the category of historic bays was "deliberately not subjected to strict criteria."[1548] Slovenia asserts that the *Gulf of Fonseca* case stands for the principle that the Court accepted that "an historic title could result from pre-independence practice," which is the same as the Bay.[1549]

1541 Transcript, Day 4, p. 13:8-15.

1542 Slovenia's Counter-Memorial, para. 7.32.

1543 *Ibid*

1544 Slovenia's Counter-Memorial, para. 7.34, *referring to* Croatia's Memorial, paras 9.49-50, *citing* UN Secretariat, *Juridical Regime of Historical Waters, Including Historic Bays*, U.N. Dec. A/CN.4.143, 9 March 1962 in *Yearbook of the International Law Commission*, Vol. II, pp. 1-26 (1962).

1545 Slovenia's Counter-Memorial, para. 7.35.

1546 Slovenia's Counter-Memorial, para. 7.36.

1547 Slovenia's Counter-Memorial, para. 7.37.

1548 Slovenia's Counter-Memorial, para. 7.38.

1549 *Ibid*.

821. Slovenia highlights that Croatia's argument that Slovenia is required to prove its historical rights over the Bay exclusively on the basis of post-independence sovereign activities is logically inconsistent with Article 5 of the Arbitration Agreement.[1550]

822. Moreover, Slovenia observes that some eminent authors advocated that "juridical bays having undergone a process of State dissolution can constitute a special type of 'historic bays'."[1551] According to Slovenia, the continuing status of the Bay does not require its "historicity" to have been immemorial for this status to be recognized. Instead, the presence of the following conditions warrants its continued status: acquisition of status in conformity with international rules; uninterrupted status since its institution; lack of opposition from third States; and acquiescence of particularly interested States.[1552] In light of the Bay's fulfilment of all these conditions, Slovenia submits that "under general international law, the Bay has always enjoyed the status of internal waters and has retained that status up to the present."[1553] Slovenia also raises the fact that the Bay is essential to the development of the town of Piran, in contrast to the lack of permanent settlement on the Croatian coast, as a circumstance in support of the qualification of the Bay as a particular case of an historic bay.[1554]

823. Croatia notes that it was first made aware of Slovenia's assertions of historic title over the Bay through Slovenia's 1993 Memorandum on the Bay of Piran, which referred to the Bay as "an example *sui generis* demanding an exclusive respect for the historic considerations" of Slovenia's exercise of jurisdiction over the Bay as a republic of the SFRY.[1555] According to Croatia, whereas UNCLOS Article 15 "refers to the possibility of *adjustments* to the equidistance line to take into account a historic title in the delimitation of the territorial sea," Slovenia is instead attempting to use a historic title argument to remove the entirety of the Bay from the purview of UNCLOS.[1556]

824. Croatia rejects Slovenia's interpretation of "historic waters" in this context, noting that Slovenia has not cited "a single document evidencing Yugoslavia's assertion of a historic title to the Bay."[1557] In this regard, Croatia recalls that "the burden of proof on a coastal state to establish an

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1550 Slovenia's Counter-Memorial, para. 7.39.

1551 Slovenia's Memorial, para. 7.79; Slovenia's Counter-Memorial, para. 7.42.

1552 Slovenia's Memorial, para. 7.80.

1553 Slovenia's Memorial, paras 7.81 and 7.83; Slovenia's Counter-Memorial, para. 7.43, *referring to Fisheries Case (United Kingdom* v. *Norway)*, Judgment of 18 December 1951: I.C.J. Reports 1951, p. 116 at p. 130.

1554 Slovenia's Counter-Memorial, paras 7.45-46, *referring to North Atlantic Coast Fisheries (Great Britain v. United States of America)*, Award of 7 September 1910, R.I.A.A., Vol. XI, p. 167 at p. 199.

1555 Croatia's Memorial, para. 9.42.

1556 Croatia's Memorial, para. 9.43.

1557 Croatia's Counter-Memorial, para. 8.110; Transcript, Day 2, p. 133:22-23.

historic title to waters is a very high one" and no "exceptional circumstances" exist in relation to the Bay.[1558] In any event, Croatia cites the ICJ in defining such waters as those "treated as internal waters but which would not have that character were it not for the existence of historic title."[1559] Croatia thus argues that the Bay is within the delimitation area of two States with adjacent and opposite coasts, and as such, "properly characterized as territorial sea of both the riparian States."[1560]

825. In this regard, Croatia disputes Slovenia's reliance upon the judgment of a Chamber of the ICJ in the *Gulf of Fonseca* case.[1561] Croatia cites studies by the Codification Division of the Office of Legal Affairs of the Secretariat of the UN for the proposition that the concept of "historic waters" or "historic bays" have been "almost exclusively deployed in circumstances where there was a single riparian State bordering the area of water in question."[1562] According to Croatia, the Gulf of Fonseca—the bay at issue in *Gulf of Fonseca* case—was identified by the Codification Division as an exception to this general rule; however, it is "readily distinguishable" from the present dispute.[1563] Moreover, Croatia asserts that there is no international practice supporting a claim to place a plurinational bay under the internal sovereignty of a single riparian State through the application of historic title.[1564]

826. With respect to practices concerning the Bay prior to the Parties' independence, Croatia argues that Slovenia cannot argue for historic title to the Bay based on events prior to its gaining Statehood,[1565] because the necessary "historical links [for a claim of historic waters] cannot be established by an entity without standing in international law."[1566]

827. Moreover, Croatia recalls that, under the SFRY, the relevant authorities of both Croatia and Slovenia exercised jurisdiction over their respective parts of the Bay, which were attributed on the basis of an informal equidistant line of delimitation in the Bay.[1567] Croatia highlights aspects of what it considers "a consistent practice that the southern part of the Bay was under the

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1558 Transcript, Day 2, pp. 133:16-134:1.

1559 Croatia's Memorial, para. 9.44, *citing Fisheries Case (United Kingdom* v. *Norway),* Judgment of 18 December 1951: I.C.J. Reports 1951, p. 116 at pp. 125, 130; Croatia's Counter-Memorial, para. 8.110.

1560 Croatia's Memorial, para. 9.45; Croatia's Counter-Memorial, para. 8.110.

1561 Croatia's Memorial, para. 9.43.

1562 Croatia's Memorial, para. 9.46.

1563 Croatia's Memorial, paras 9.46-48, and 9.52-53.

1564 Croatia's Memorial, para. 9.56.

1565 Transcript, Day 2, p. 133:1-4.

1566 Croatia's Memorial, para. 9.60.

1567 Croatia's Memorial, para. 9.58; Croatia's Counter-Memorial, para. 8.108.

administrative jurisdiction and control of Croatia . . . . "[1568] In support of this, Croatia cites the role of its authorities in enforcing maritime safety and security regulations. In particular, Croatia points to a 1973 incident involving the Italian tanker *Nonno Ugo*'s grounding in the shallows of the bay, and a 1988 incident in which Slovenian police handed over to Croatian authorities an Italian fishing vessel captured south of the Bay's median line on the basis that "she was in Croatian territorial waters."[1569] Croatia also cites the role of its authorities in the regulation of fish farming facilities and commercial fishing in the Bay's southern portion.[1570] According to Croatia, if Slovenia's position were to be accepted, this would lead to a "rupture of a longstanding *status quo*."[1571]

828. Croatia also argues that Slovenia has "conflated the concepts of juridical bay and the historic bay."[1572] Importantly, Croatia contends that each concept "has its own legal regime" and a bay cannot simultaneously be a juridical bay and a historic bay.[1573] Croatia acknowledges that Article 7 of the 1958 Geneva Convention and UNCLOS Article 10 carve out an exception for "historic" bays, to which distinct rules in customary international law apply.[1574] In this context, Croatia considers whether Slovenia can assert a claim to the Bay as a "historic bay".

829. Croatia reiterates the "obvious difficulty" confronted by Slovenia that it was not in a position to exercise authority over the Bay as a subject of international law until it attained independence in 1991.[1575] Croatia does not accept Slovenia's attempt to circumvent this obstacle by asserting that Yugoslavia's exercise of authority constituted historic title,[1576] which survived dissolution and was inherited by Slovenia and Croatia upon independence, or Slovenia's "circular argument" by which it claims that "it (and not Yugoslavia) had exercised the continued authority necessary to attain historic title to the Bay before its independence."[1577]

830. Croatia also underlines the "legal contradiction" upon which Slovenia's argument rests.[1578] Assuming that both States have "inherited" the historic title of the former Yugoslavia, Croatia

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1568 Croatia's Memorial, para. 9.58.

1569 Croatia's Memorial, paras 9.62-63; Croatia's Reply, paras 6.4-9, 6.12-13.

1570 Croatia's Memorial, para. 9.64.

1571 Croatia's Counter-Memorial, para. 8.108.

1572 Croatia's Counter-Memorial, para. 8.101.

1573 *Ibid*.

1574 Croatia's Counter-Memorial, para. 8.102.

1575 Croatia's Counter-Memorial, para. 8.103.

1576 Transcript, Day 2, p. 133:10-16.

1577 Croatia's Counter-Memorial, para. 8.104.

1578 Croatia's Counter-Memorial, para. 8.105.

questions Slovenia's ability to "now claim sovereignty over the entire Bay based upon its *effectivités*"[1579] and displace Croatia's right as the "joint-sovereign" of the Bay."[1580] Moreover, Croatia refers to further "internal contradiction[s] and circularity" of Slovenia's argument concerning Yugoslavia's acquisition of its historic title to the Bay, noting that the sovereign acts of Yugoslavia to establish historic title are the same *effectivités* that Slovenia now asserts.[1581]

831. In any event, Croatia notes that Slovenia cites only the *Gulf of Fonseca* case to argue that Yugoslavia's historic title to the Bay was "transmitted" to the Parties by succession.[1582] Croatia disputes its precedential value based on the "widespread criticism among leading publicists."[1583] Furthermore, Croatia contends that Slovenia has "misread" the case to argue that it has exclusive sovereignty over the Bay when the "inevitable conclusion would be that the two states have joint sovereignty over the bay."[1584]

832. Croatia asserts that Slovenia also ignores another facet of the *Gulf of Fonseca* case, namely the fact that the waters of the Gulf were not conferred with the status of "internal waters", but instead recognized as being subject to the right of innocent passage of third States.[1585] Accordingly, Croatia contends that the view of writers describing the waters as "having the characteristics of the territorial sea" should be accepted.[1586]

3. Applicable Law with respect to the Delimitation of the Bay

833. According to Slovenia, the fact that the Bay qualifies as internal waters "entails the non-applicability of the [UNCLOS] provisions on delimitation" and requires the application of "the rules applicable to the delimitation of the land boundary . . . in particular … the principle *uti*

1579 *Ibid*.

1580 Croatia's Counter-Memorial, paras 8.105-06, *referring to Frontier Dispute (Burkina Faso v. Mali)*, Judgment, I.C.J. Reports 1986, pp. 554 at pp. 586-87; Transcript, Day 2, pp. 135:18-136:4; 138:9-12.

1581 Croatia's Counter-Memorial, para. 8.107; Transcript, Day 2, p. 139:5-13.

1582 Croatia's Counter-Memorial, para. 8.115.

1583 Croatia's Counter-Memorial, para. 8.116.

1584 Croatia's Counter-Memorial, paras 8.117-19; Transcript, Day 2, pp. 135:17-136:4.

1585 Croatia's Counter-Memorial, para. 8.120; Transcript, Day 2, p. 136:5-15.

1586 Croatia's Counter-Memorial, paras 8.120-23.

possidetis juris."[1587] Slovenia contends that the reading of several provisions of UNCLOS in their context,[1588] the ICJ jurisprudence[1589] and State practice[1590] support this proposition.

834. To further bolster its argument that land boundary principles apply, Slovenia notes "that the area of the salt-pans has always been part of the cadastral records."[1591]

835. Slovenia observes that, in the area in which the outflow of the Dragonja River has created a delta-like landscape, "salt-pans have been in existence since the 14th century."[1592] These salt-pans are a matter of "critical economical and ecological importance" for Slovenia.[1593] On the other hand, Slovenia contends that Croatia "completely ignores the salt-pans."[1594]

836. Slovenia submits that even if the Tribunal accepts Croatia's argument that UNCLOS Article 15 applies to the delimitation within the Bay, this would not support Croatia's proposed delimitation boundary.[1595] In this regard, Slovenia notes the express reference in Article 15 to "historic title" and "other special circumstances", and cites case law for the premise that such factors are not "corrective", but rather create "an exception to the drawing of a median line."[1596]

837. According to Croatia, Slovenia's argument fails for two reasons: first, the rules for the delimitation of land boundaries cannot abrogate Croatia's interest in the "joint historic title to the Bay";[1597] and second, Slovenia has offered no authority for its proposition that "the rules for the delimitation of land boundaries should apply to the waters of a bay."[1598]

838. In any event, Croatia's view is that the principle of *uti possidetis* does not appear to assist Slovenia's case as there is no relevant administrative boundary to transform into an international frontier.[1599] According to Croatia, there is no evidence that Yugoslavia asserted a historic title to

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1587 Slovenia's Memorial, para. 7.85.

1588 Slovenia's Memorial, para. 7.86, *referring to* UNCLOS, Articles 2(1), 7(3), 8(1).

1589 Slovenia's Memorial, paras 7.90-91.

1590 Slovenia's Memorial, para. 7.92.

1591 Slovenia's Reply, para. 3.27.

1592 Slovenia's Memorial, paras 7.01, 7.03; Transcript, Day 3, p. 197:11-14.

1593 Slovenia's Counter-Memorial, para. 7.02; *see also* Slovenia's Memorial, Chapter 7.I.B.

1594 Slovenia's Counter-Memorial, para. 7.02.

1595 Transcript, Day 7, p. 18:14-20, p. 56:1-8.

1596 Transcript, Day 7, p. 57:4-13.

1597 Croatia's Counter-Memorial, paras 8.124-26.

1598 Croatia's Counter-Memorial, paras 8.127-28; Transcript, Day 2, p. 137:1-12.

1599 Croatia's Counter-Memorial, paras 8.129-30.

the Bay,[1600] or evidence supporting any basis for the application of land boundary delimitation principles to the Bay.[1601] Croatia also asserts that if the Bay were internal waters at the time of the Parties' independence, both States would have inherited title irrespective of Slovenia's *effectivités* because such conduct "is only relevant to the acquisition of territory if it does not co-exist with any legal title."[1602]

839. Croatia also argues that the "special study" of the Sečovlje salt-pans by Slovenia[1603] amounts to "no more than [to] offer oblique references to the salt pans as being 'more related to the Bay than to the land proper,' and being intimately connected to the Bay."[1604] Furthermore, in Croatia's view, Slovenia offers no explanation as to why the salt-pans are "remotely relevant to maritime delimitation."[1605]

840. If the Tribunal rejects Slovenia's claim to the entire Bay as internal waters, Croatia submits that "the Tribunal must proceed to delimit the bay as territorial waters on the basis of the equidistance principle" under UNCLOS Article 15.[1606]

4. *Effectivités* in the Bay

841. In the event that it becomes necessary to consider a determination and delimitation with respect to the Bay on the basis of its status of internal waters to which the principle of *uti possidetis* applies, this section considers the Parties' respective arguments concerning *effectivités* in the Bay.

842. Beyond the salt-pans, Slovenia relies on "ample evidence" of its *effectivités* to demonstrate its exercise of jurisdiction over the whole of the Bay, notably in the form of police patrols, regulation of fisheries and ecological protection activities.[1607]

843. In respect of police patrols, Slovenia recalls its exercise of police jurisdiction over the whole Bay "as a single unit" during Yugoslav times.[1608] Although the primary authority competent for controlling the coastal sea of the former Yugoslavia was the Yugoslav army, the "remoteness of

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1600 Transcript, Day 2, p. 133:9-15.

1601 Transcript, Day 2, pp. 136:16-137:7.

1602 Transcript, Day 2, pp. 137:8-138:1.

1603 Croatia's Counter-Memorial, para. 8.134, *referring to* Slovenia's Memorial, pp. 406-18.

1604 Croatia's Counter-Memorial, para. 8.134.

1605 Croatia's Counter-Memorial, para. 8.135.

1606 Transcript, Day 5, p. 50:22-26.

1607 Slovenia's Memorial, paras 7.108-40, Slovenia's Counter-Memorial, paras 7.55, and 7.63-75; Slovenia's Reply, paras 3.13-3.17, 3.19, and 3.22-23; Transcript, Day 3, p. 200:5-11.

1608 Slovenia's Memorial, para. 7.108; Slovenia's Counter-Memorial, para. 7.64; Transcript, Day 4, p. 3:6-8.

the Slovenian section of the maritime border" meant that "in reality" this area was under the surveillance of the Koper Border Police Station[1609] and the Yugoslav navy would only venture to this area "upon request from the Slovenian authorities."[1610] According to Slovenia, the Koper Border Police Station controlled an area which "included the entire Bay of Piran,"[1611] over which it was "charged with a broad range of responsibilities corresponding to typical police control competences."[1612] Slovenia notes that its "authorities would only refer the matter to the Croatian police when the incidents occurred to the *south* of the Savudrija promontory."[1613]

844. Slovenia submits that the fact that the entire Bay was, before independence, under the control of the Koper Border Police Station was well-known[1614] and to be contrasted with the lack of intervention by Croatian authorities in the Bay.[1615] Slovenia characterizes this presence as "limited to a very narrow strip of maritime area allowing for survey of the shore"[1616] and "entirely and exclusively land-oriented" and says that it could not in any way be described as evidencing distinct zones of control that "were divided by an informal equidistance line."[1617] In particular, Slovenia highlights its maintenance of a Koper Border Police radio station on the Savudrija Promontory between 1970 and 1991.[1618]

845. Slovenia submits that the situation changed on the eve of independence, whereby the Koper and the Umag police administrations agreed that the Slovenian police "would temporarily extend its control area somewhat to the south of the Savudrija promontory."[1619] Slovenia contends that Croatia agreed to and was "fully aware of this provisional division of areas of control."[1620] Pursuant to the agreement reached in Pula in 1991, Slovenia was to retain control and surveillance over the entire Bay after independence.[1621]

1609 Slovenia's Memorial, paras 7.109-10; Transcript, Day 4, p. 3:11-12.

1610 Transcript, Day 4, p. 3:8-11.

1611 Slovenia's Memorial, para. 7.111.

1612 Slovenia's Memorial, para. 7.112.

1613 Slovenia's Reply, para. 3.17 (emphasis in original).

1614 Slovenia's Memorial, para. 7.114.

1615 Slovenia's Memorial, para. 7.115; Slovenia's Counter-Memorial, para. 7.66.

1616 Transcript, Day 4, p. 3:13-17, *referring to* Slovenia's Counter-Memorial, para. 7.65; Slovenia's Memorial, paras 7.109-16.

1617 Transcript, Day 4, pp. 3:17-4:6.

1618 Slovenia's Reply, paras 3.20-21.

1619 Slovenia's Memorial, para. 7.117; Transcript, Day 4, p. 5:2-8.

1620 Slovenia's Memorial, paras 7.117-18.

1621 Slovenia's Memorial, paras 7.119 and 7.123.

846. Slovenia contends that "ever since the 1954 London Memorandum . . . regulation of fishing in the Bay has fallen within the competence of the Republic of Slovenia."[1622] Slovenia has established two fishing reserves in the Bay: one in the Bay of Strunjan and the other in the Bay of Portorož.[1623] Slovenia details the introduction and operation of its legislation concerning the fisheries reserves, which "remained unchanged" since independence.[1624] Moreover, Slovenia refers to a number of other activities, such as shellfish farming, by which it "exploited the resources of the Bay" to demonstrate the Bay's underlying importance.[1625]

847. According to Slovenia, its authorities have "intensely engaged in marine research and monitoring the quality of the waters of the Bay."[1626] Slovenia refers to the studies of the Institute for Exploration of the Sea of the Socialist Republic of Slovenia and of the Marine Biology Station, demonstrating the breadth of ecological research activities that were conducted in the whole of the Bay since 1965 and 1976, respectively, and the lack of references in scientific papers to Croatia engaging in research in the same area.[1627]

848. Slovenia contends that the situation before independence was that Croatian authorities acknowledged Slovenia's competence with respect to the environmental issues in the Bay and on its surrounding coast to the extent that they considered "the entire coast surrounding [the Bay] as being a 'Slovenian coastal area' for the purposes of environmental protection."[1628] By reference to the salt-pans and the Bay, Slovenia asserts that the "entire Dragonja Valley" forms a "single ecosystem" requiring comprehensive management, which was executed by Slovenia when the area was declared to be a natural park.[1629]

849. In respect of Croatia's claim that it exercised jurisdiction over the southern half of the Bay, and the evidence raised in support,[1630] Slovenia argues that Croatia's examples of this exercise are "neither numerous nor do they support Croatia's allegation."[1631] One such example is the incident

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1622 Slovenia's Memorial, para. 7.124.

1623 Slovenia's Memorial, paras 7.124-25.

1624 Slovenia's Memorial, paras 7.126-33; Transcript, Day 3, p. 202:2-5.

1625 Slovenia's Counter-Memorial, paras 7.68-7.69; Slovenia's Reply, para. 3.25.

1626 Slovenia's Memorial, para. 7.134; Transcript, Day 3, p. 203:2-5.

1627 Slovenia's Memorial, paras 7.135-39; Slovenia's Counter-Memorial, para. 7.72; Slovenia's Reply, para. 3.23; Transcript, Day 3, p. 203:5-7.

1628 Slovenia's Memorial, para. 7.140.

1629 Slovenia's Memorial, paras 7.101-06; Slovenia's Counter-Memorial, para. 7.74; Slovenia's Reply, paras 3.24, and 3.26.

1630 Slovenia's Counter-Memorial, para. 7.56.

1631 *Ibid*.

of the grounding of the Italian tanker, the *Nonno Ugo*, on which Croatia relies to illustrate and confirm shared jurisdiction over the Bay. Slovenia submits that this incident was "completely on the Croatian coast" and that Slovenian local and central authorities organised the rescue operations.[1632] Slovenia asserts that, at best, Croatia's evidentiary submissions demonstrate that its presence in the Bay "was both occasional, scarce and limited in its geographical scope" to an area very close to the shore.[1633]

850. Slovenia criticizes other examples relied upon by Croatia as "inaccurate,"[1634] bearing "no relevance for the delimitation of the Bay,"[1635] and "unreliable for creating a stable pattern of conduct since they lack the geographical precision needed for that purpose,"[1636] and notes that they stand in "stark contrast with [Slovenia's position]."[1637] Moreover, Slovenia contends that they "highlight Croatia's difficulty in finding evidence to support its claim,"[1638] and serve to confirm Slovenia's case.[1639]

851. Croatia contends that it has exercised jurisdiction over the southern half of the Bay in respect of police authority, authorization of fishing and mariculture.[1640] In its view, Slovenia's assertions of *effectivités* relies on two broad claims: first, that "the Bay continued to be *de facto* under exclusive Slovenian jurisdiction" prior to independence; and second, that Croatia showed "little interest, if any, in the administration of the Bay."[1641]

852. Turning to the assertion of Slovenia that it had "*de jure and de facto*" jurisdiction over the whole Bay, Croatia does not accept that the evidence provided by Slovenia establishes its "exclusive" jurisdiction over the Bay.[1642] There is "no evidence on the record . . . that any exclusive jurisdiction had been conferred by the federal authorities of the former Yugoslavia to the constituent [R]epublic of Slovenia over the bay" to establish *de jure* jurisdiction.[1643] In fact, there

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1632 Transcript, Day 4, pp. 4:7-5:1, *referring to* Slovenia's Counter-Memorial, para. 7.57.

1633 Slovenia's Reply, paras 3.02, 3.04-11; Transcript, Day 4, pp. 3:14-4:6.

1634 Slovenia's Counter-Memorial, para. 7.57.

1635 Slovenia's Counter-Memorial, para. 7.58.

1636 Slovenia's Reply, para. 3.11.

1637 Slovenia's Counter-Memorial, paras 7.60-62.

1638 Slovenia's Counter-Memorial, para. 7.59.

1639 *Ibid*.

1640 Croatia's Memorial, paras 9.61-65.

1641 Croatia's Counter-Memorial, para. 8.133.

1642 Croatia's Counter-Memorial, para. 8.136 (emphasis in original).

1643 Transcript, Day 2, pp. 77:20-78:4.

was no formal division of jurisdiction over the Bay as between the constituent republics,[1644] however, Croatia contends that Slovenia's evidence is consistent with a division of jurisdiction over the northern and southern parts of the Bay, as argued by Croatia,[1645] and contrary to Slovenia's claim of *de facto* exclusive control.[1646]

853. Moreover, Croatia relies upon "incontrovertible evidence" which confirms that both Parties exercised administrative jurisdiction and control over distinct areas of the Bay as constituent republics of Yugoslavia[1647] and establishes Croatia's *effectivités* in the Bay.[1648]

854. Concerning Slovenia's assertion of "exclusive" control over the Bay demonstrated by its police patrolling, Croatia argues that documents are "take[n] out of context, or overstate[d] in significance or ignores [inconsistent] parts of the documents"[1649] and attacks each document relied upon by Slovenia.[1650] Croatia also refers to, and relies upon, federal documents of the SFRY evidencing recognition of the delimitation of jurisdiction between the Republics of Croatia and Slovenia.[1651]

855. Contrary to Slovenia's claims that it exercised exclusive jurisdiction over the Bay in the former SFRY, Croatia refers to "clear evidence"[1652] that a division of jurisdiction existed in respect of police jurisdiction,[1653] and fishing activities, search and rescue operations and safety of navigation in the Bay.[1654]

856. Regarding Slovenia's objection to evidence concerning incidents occurring close to the Croatian shore,[1655] Croatia does not accept this as a credible basis for asserting that Croatia did not exercise jurisdiction over the southern half of the Bay given the fact that "most illegal fishing incidents occur close to the shore."[1656] Moreover, Croatia cautions against "delimitation based on

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1644 Transcript, Day 2, p. 76:21-23.
1645 Croatia's Counter-Memorial, para. 8.136.
1646 Transcript, Day 2, p. 78:5-12.
1647 Croatia's Counter-Memorial, para. 8.137; Transcript, Day 2, p. 78:13-15.
1648 Croatia's Counter-Memorial, para. 8.137.
1649 Croatia's Counter-Memorial, para. 8.138.
1650 Croatia's Counter-Memorial, paras 8.138-60; Croatia's Reply, paras 6.25-30.
1651 Croatia's Counter-Memorial, paras 8.161-62.
1652 Croatia's Counter-Memorial, para. 8.163.
1653 Croatia's Counter-Memorial, paras 8.164-71.
1654 Croatia's Counter-Memorial, paras 8.171-84.
1655 Transcript, Day 5, pp. 36:22-37:9.
1656 Transcript, Day 2, p. 78:18-23.

haphazard incidents of maritime interventions [which] has no future in international adjudication; it certainly does not have a past."[1657]

857. Croatia also rejects Slovenia's contention that the regulation of fishing in the Bay "fell under [Slovenia's] exclusive competence."[1658] Croatia reiterates information on the regulation and authorization of fishing and aquaculture activities in the Bay, which contradicts Slovenian claims of exclusive competence.[1659] Croatia cites a 1978 exchange of letters between authorities in the Municipalities of Buje and Piran to assert that these authorities "were tasked with reaching agreement on the boundaries of the fishing reserves in their respective parts of the Bay."[1660]

858. In respect of ecological protection activities, Croatia argues that Slovenia "conveniently forgets to mention" marine research conducted by the Croatian Centre for Marine Research in Rovinj[1661] and dismisses Slovenia's evidence as "superficial and unpersuasive."[1662] Croatia notes that "the fact that Slovenian institutions may have monitored the parameters of the waters of the Bay does not establish that Slovenia had the exclusive right to do so before the critical date."[1663]

859. Croatia also dismisses other particulars of "Slovenian Activities in Maritime Areas under SFRY" as "wholly irrelevant";[1664] without explanation of its "significance (if any)";[1665] and unsupported by "any documentary evidence."[1666]

860. In Croatia's view, what is "abundantly clear" from the "totality of the historical evidence relating to police patrolling, fisheries regulation and ecological protection activities within the Bay is that "coordination and cooperation in respect of each constituent republic's maritime zone was the order of the day."[1667]

1657 Transcript, Day 5, p. 37:10-24.

1658 Croatia's Counter-Memorial, para. 8.185, *referring to* Slovenia's Memorial, paras 7.124-25.

1659 Croatia's Counter-Memorial, paras 8.187-91; Croatia's Reply, paras 6.31-32.

1660 Croatia's Reply, paras 6.14-16, 6.19; Transcript, Day 2, pp. 82:12-83:12, *referring to* Letter from the Assembly of the Municipality of Piran to the Municipality of Buje Asking for Consent to the Draft Decision on Sea Fisheries, Piran, 18 April 1978, Annex HR-353.

1661 Croatia's Counter-Memorial, para. 8.193.

1662 Croatia's Counter-Memorial, para. 8.194.

1663 Croatia's Reply, para. 6.34.

1664 Croatia's Counter-Memorial, paras 8.196-97.

1665 Croatia's Counter-Memorial, para. 8.198.

1666 Croatia's Counter-Memorial, paras 8.199-204.

1667 Transcript, Day 2, pp. 82:22-88:6.

5. Regime for the Use of the Bay

861. Slovenia noted at the hearing, "for the sake of completeness," that the Bay is one area where a special "regime" could be appropriate in the event that the Tribunal is willing to consider the entirety of the Bay to have the status of Slovenian internal waters.[1668] In such case, Slovenia would be willing to accept the following:

> Croatian police operations may take place within the Bay of Piran, on the understanding that they would be limited to a narrow strip of water along the coast of Croatia, and are conducted for the sole purpose of the security and safety of the Croatian coast bordering the bay.[1669]

B. THE TRIBUNAL'S ANALYSIS

862. The Bay is a well-marked indentation of the Gulf of Trieste located within the south-east part of that Gulf. The Parties share the coasts of the Bay, with the Slovenian coast bordering the north-east and south-east of the Bay and the Croatian coast bordering the south-west of the Bay.

863. Slovenia submits that the Bay had the status of internal waters as a juridical bay (or alternatively, as an historic bay) prior to the dissolution of Yugoslavia. It kept that status as a consequence of the principle of automatic succession to boundaries and boundary regimes and to historic titles. UNCLOS does not exclude the possibility of a juridical bay bordered by several States. It remains only to fix the States' limits within the Bay. Slovenia also says that those limits must respect the principle of *uti possidetis*, which it says is in favour of Slovenia for the whole Bay.

864. Croatia contests all the points thus made by Slovenia. It submits that the Bay has never been, is not, and cannot be internal waters. It was territorial waters of Yugoslavia and remained so. It must be delimited in conformity with UNCLOS Article 15. In the absence of any special circumstances, this delimitation must be made along the equidistance line.

865. The Tribunal will examine the status of the Bay before deciding on the delimitation.

1. Status of the Bay

866. The Tribunal will first consider whether the Bay consisted of internal waters prior to the dissolution of Yugoslavia. If so, the Tribunal will then have to decide whether the Bay kept that status after the independence of Croatia and Slovenia.

1668 Transcript, Day 8, p. 50:12-14.

1669 Transcript, Day 8, p. 50:15-21.

(a) Status of the Bay Prior to the Dissolution of the SFRY

867. According to customary international law, internal waters must be closely linked with land, and are subject to the sovereignty of the coastal State.[1670] The existence of the category of internal waters has been confirmed by Article 1 of the 1958 Geneva Convention and UNCLOS Article 2. Both Articles state that: "[t]he sovereignty of a coastal State extends, beyond its land territory and internal waters . . . to an adjacent belt of sea, described as the territorial sea."

868. Yugoslavia signed and ratified the 1958 Geneva Convention on 29 April 1958 and 28 January 1966, respectively. That Convention entered into force for Yugoslavia on 1 March 1966. Then Yugoslavia signed UNCLOS on 10 December 1982 and ratified it on 5 May 1986. UNCLOS entered into force on 16 November 1994. Croatia and Slovenia became Parties to UNCLOS by succession.[1671]

869. Both Conventions describe the way in which the outer and inner limits of the territorial sea must be fixed. In this respect, the situation of bays is dealt with in Article 7 of the 1958 Geneva Convention, and UNCLOS Article 10, which reproduces Article 7 with purely formal changes.

870. Article 7 of the 1958 Geneva Convention provides that:

> 1. This article relates only to bays the coasts of which belong to a single State.
> 2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semicircle whose diameter is a line drawn across the mouth of that indentation.
> 3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semicircle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation.
> 4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two

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1670 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, I.C.J. Reports 1986, p. 14 at p. 111, para. 213 (stating that "internal waters . . . are subject to the sovereignty of the coastal State"; *Fisheries Case (United Kingdom v. Norway)*, Judgment, I.C.J. Reports 1951, p. 116 at p. 133.

1671 Croatia became a Party on 5 April 1995 and Slovenia on 16 June 1995. *See* Status of the United Nations Convention on the Law of the Sea, of the Agreement relating to the implementation of Part XI of the Convention and of the Agreement for the implementation of the provisions of the Convention relating to the conservation and management of straddling fish stocks and highly migratory fish stocks, United Nations Division for Ocean Affairs and the Law of the Sea, *available at* <www.un.org/Depts/los/reference_files/status2010.pdf>.

low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceed twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

6. The foregoing provisions shall not apply to so-called "historic" bays, or in any case where the straight baseline system provided for in article 4 is applied.

871. UNCLOS Article 10 provides that:

1. This article relates only to bays the coasts of which belong to a single State.

2. For the purposes of this Convention, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water mark of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed 24 nautical miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds 24 nautical miles, a straight baseline of 24 nautical miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

6. The foregoing provisions do not apply to so-called "historic" bays, or in any case where the system of straight baselines provided for in article 7 is applied.

872. It is not disputed that, at the time of the SFRY, the coasts of the Bay belonged to a single State and that the status of the Bay was to be determined according to the provisions of the Articles just quoted.[1672] Nor is it contested that the Bay fulfilled the conditions fixed by the Conventions to be proclaimed internal waters by Yugoslavia as a juridical bay. Its area (approximatively 18.2 square km) is larger than that of a semi-circle whose diameter is a line drawn across the mouth of the Bay (approximatively 9.5 square km). The distance between the low-water marks of the two natural entrance points of the Bay, Cape Madona in the north and Cape Savudrija in the south, is

[1672] Those provisions, according to the ICJ, "might be found to express general customary international law." *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, I.C.J. Reports 1992, p. 351 at p. 588, para. 383.

2.7 NM, far less than the 24 NM mentioned in the Conventions.[1673] As a consequence, Yugoslavia was entitled under international law to declare the Bay to be internal waters.

873. Several Acts were enacted before 1991 by the SFRY concerning its internal waters:

> (a) Under the 1948 Coastal Sea Act, the internal waters of the Federal Republic included bays and river mouths, the breadth of which did not exceed 12 nautical miles.
>
> (b) This Act was replaced in 1965 by a new Coastal Sea Act. Article 3 (1) item 1 of that Act provided that "the internal waters shall comprise . . . (1) the ports and bays on the coast of the mainland and of islands". It then gave a definition of the bays covered by that provision.

874. That Act was in turn replaced in 1987 by a third Act,[1674] which was still applicable in 1991. Article 3 of that Act reproduced Article 3(1) item 1 of the 1965 Act. It also gave a definition of bays comparable to that contained in the 1965 Act. That definition reads as follows:

> The term "bay" in paragraph 1, item 1 of this article, shall be deemed to include a well-marked indentation in the coast which has a surface area as large as, or larger than, that of a semi-circle whose diameter is a line drawn across the mouth of that indentation.
>
> The area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water mark of its natural entrance points.

Article 16 of the Act added that: "The territorial sea of the SFRY is a sea belt whose breadth is 12 NM measured from the baseline towards the high seas." That Article further specified that "The baseline is formed by," *inter alia* "[t]he straight lines closing the mouths of bays."

875. It is not contested that the Bay enters within the purview of the definition given by the 1987 Act. However Croatia recalls that Article 7 of the 1958 Geneva Convention (as well as UNCLOS Article 10) provides that, when the conditions for the establishment of a juridical bay are fulfilled, "a closing line may be drawn between [the] two low-water marks" of the natural entrance points of the bay, "and the water enclosed thereby shall be considered as internal waters." Croatia stresses that Yugoslavia never drew the closing line of the Bay and never published any corresponding official chart at an appropriate scale. As a consequence, the Bay never became internal waters.

876. The Tribunal recalls that the 1987 Act (as well as the 1965 Act) explicitly provided that bays shall be part of the internal waters of the SFRY (using in Croatian and Slovenian the present indicative tense). It then gave a definition of bays which covers the Bay. Under the Act, the outer limit of a

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1673 In the present Award, the Tribunal has used the Système International NM of 1,852 metres.

1674 Act concerning the Coastal Sea and the Continental Shelf dated 23 July 1987, published in *Official Journal of the Socialist Federal Republic of Yugoslavia*, 25 July 2009, p. 1211 and in the *United Nations Law of the Sea Bulletin* No. 18/1991.

bay is the "line joining the low water-line of its natural entrance points." That line closes a bay and constitutes the baseline for the measurement of the territorial sea. Thus under the 1987 Act, the closing line of the Bay was the line joining Cape Madona and Cape Savudrija. South-east of that line, the Bay was part of Yugoslavia's internal waters. North-west, the Yugoslav territorial sea started, whose breadth was to be measured from that baseline.

877. The Tribunal further notes that, contrary to Croatian allegations, there is no obligation under the 1958 Convention to publish charts indicating closing lines of juridical bays. Article 4(6) of that Convention creates such an obligation only for straight baselines. Later, UNCLOS Article 16 established new obligations of publicity for all baselines, including those drawn at the mouth of juridical bays. However the Tribunal will not have to consider whether, as alleged by Croatia, in doing so, UNCLOS subordinates the existence or legality of juridical bays to such publicity. In any event the Bay had become part of Yugoslavia internal waters under the 1958 Geneva Convention, before the entry into force of UNCLOS in 1994. Thus the existence and legality of its status cannot be challenged for non-compliance by Croatia and Slovenia with the procedural requirements of Article 16. Moreover the two countries had diverging views on that status and it would have been difficult, if not impossible, in the circumstances for them to agree on charts or coordinates describing a line closing the Bay. In fact, in concluding the arbitration agreement, they gave to the Tribunal authority to take a decision in this respect.

878. The Tribunal considers that the fact that the closing line of the Bay was not reproduced on maps does not allow it to arrive at a different conclusion. The applicable Conventions do not subordinate the existence or the legality of juridical bays to such reproduction and it is not rare for States to incorporate bays or estuaries within their internal waters without publishing official maps with closing lines.

879. Moreover, the Tribunal notes that in the present case there can be no significant doubt on the course of that line. It further observes that, during the discussions between Italy and Yugoslavia for the delimitation of their boundaries, a sketch map of the relevant maritime areas was produced in 1964 by Italy in which the closing line of the Bay was clearly indicated.[1675] This map seems to have been the point of departure of the negotiation which was completed some years later by the signature of the Osimo Treaty.

[1675] Minutes of the talks for the delimitation between Yugoslavia and Italy, held in Rome from 19 March to 17 April 1964, 24 May 1964, Annex SI-164.

880. The Tribunal thus concludes that on 25 June 1991, the date of independence of Croatia and Slovenia, the Bay was Yugoslav internal waters. Its closing line was a line joining the low-water marks of Cape Madona and Cape Savudrija. The Tribunal determines the precise coordinates of these points to be 45°31′49.3″N , 13°33′46.0″E and 45°30′19.2″N, 13°30′39.0″E , respectively.[1676]

(b) Effect of the Dissolution of the SFRY

881. The Tribunal recalls that the Bay was established as a juridical bay, with the character of internal waters, at a time when its coasts belonged only to one State. The status of the Bay was then determined in conformity with international law. The question to be addressed is whether the dissolution of the SFRY has altered this status.

882. A comparable question was addressed in 1992 by the ICJ in relation to the Gulf of Fonseca. In that case the Court noted that the Gulf had been under Spanish sovereignty until 1821. Later it was bordered by three States, El Salvador, Honduras and Nicaragua. The Court decided that the rights of those States in the Gulf "were acquired like their land territory by succession from Spain." [1677] The Gulf, having been internal waters before 1821, kept that status after decolonisation.

883. Similarly, in the present case, the Bay was internal waters before the dissolution of the SFRY in 1991, and it remained so after that date. The dissolution, and the ensuing legal transfer of the rights of Yugoslavia to Croatia and Slovenia as successor States, did not have the effect of altering the acquired status.

884. The Tribunal further notes that Article 7(1) of the 1958 Geneva Convention and UNCLOS Article 10(1) relate "only to bays the coasts of which belong to a single state." As a consequence of the dissolution of the SFRY, the Bay no longer falls under these provisions. The limitation of the scope of application of these provisions does not, however, imply that they exclude the existence of bays with the character of internal waters, the coasts of which belong to more than one State.

885. In any case, the effect of the dissolution of the SFRY is a question of State succession. The Tribunal thus determines that the Bay remains internal waters within the pre-existing limits.[1678]

1676 *See* note 615.

1677 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, I.C.J. Reports 1992, p. 351 at pp. 589, 599-600; paras 385, 401.

1678 *See supra*, para. 880.

2. Delimitation within the Bay

886. In the absence of any provision on the delimitation of internal waters in the Conventions concerning the law of the sea, such delimitations are to be made on the basis of the same principles as are applicable to the delimitation of land territories. In the present case, that delimitation must thus be made on the basis of *uti possidetis*.[1679]

887. In this regard, the respective role of titles and *effectivités* in the application of *uti possidetis* must be recalled. As stated by the ICJ in a judgment often referred to:

> a distinction must be drawn among several eventualities. Where the act corresponds exactly to law . . . the only role of *effectivité* is to confirm the exercise of the right derived from a legal title. When the fact does not correspond to the law . . . preference should be given to the holder of the title. In the event that the *effectivité* does not correspond to any legal title, it must invariably be taken into consideration. Finally there are cases in which the legal title is not capable of showing exactly the territorial expanse to which it relates. The *effectivités* can then play an essential role in showing how the title is interpreted in practice.[1680]

888. In the present case, the Parties agree that there had been no formal division of the Bay between the two Republics prior to the dissolution of Yugoslavia and that they inherited no legal title from that time. They also agree that no condominium had ever been established in the Bay. Delimitation must thus be made on the basis of the *effectivités* at the date of independence. Both Parties invoke various *effectivités*, mainly relating to regulation of fisheries and police patrol. On those bases, Slovenia submits that it exercised exclusive jurisdiction over the whole of the Bay which must be considered as Slovenian territory. In contrast, Croatia contends that it exercised jurisdiction over the south-west half of the Bay and that Slovenia exercised jurisdiction over the other half. The Bay must thus be shared along the median line.

889. Before entering into the arguments advanced by the Parties, the Tribunal will recall that, as stated by the Permanent Court of International Justice:

> a claim to sovereignty based not upon some particular act or title . . . but merely upon display of authority involves two elements . . . the intention and will to act as sovereign and some actual exercise or display of such authority.[1681]

1679 *See supra*, paras 334-336.

1680 *Frontier Dispute (Burkina Faso/Mali)*, Judgment, I.C.J. Reports 1986, p. 554 at p. 586, para. 63. *See also Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, p. 625 at p. 678, para. 125.

1681 *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment, 1933 P.C.I.J. Series A/B, No. 53, pp. 45-46) quoted in the judgment of the ICJ in *Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia/ Malaysia)*, Judgment, I.C.J. Reports 2002, p. 625 at p. 682, para. 134.

However as observed by the Permanent Court of International Justice and recalled more recently by the ICJ,[1682] in many cases, tribunals have been satisfied with very little in the way of the actual exercise of sovereignty, for instance in the case of very small islands which were uninhabited or not permanently inhabited. The situation is comparable in respect of the internal waters of the Bay, over which the Parties had exercised limited activity before their independence.

890. The Tribunal will first observe that for a significant period of time the Bay has been under the sovereignty of a single State and that, until recently, it was generally known as the Bay of Piran. The Slovenian coast is relatively densely populated,[1683] having for instance in 2002 a permanent population of some 12,000 people. The economic life of that population was traditionally based on fishing, marine transport and the exploitation of salt-pans. Tourism has developed in recent decades. By contrast, the Croatian coast of the Bay was deserted for centuries. That coast has no permanent settlements, with the exception of two tourist facilities which were recently opened, but are not permanently occupied. That situation is reflected in the activities of the Parties in the Bay.

891. Both Parties first submit that they issued regulations relating to fishing in the Bay and avail themselves of those regulations as evidence of *effectivités.*

892. In this respect the Tribunal first notes the existence in the Bay of a fishing reserve east of a line starting at the salt storage of Monfort in Portorož on the Slovenian side and extending towards the quarry of Slovenija Ceste at Kanegra on the Croatian side. That reserve had been established in 1962 by decree of the Secretariat of the Executive Council of Agriculture of Slovenia,[1684] confirmed by the Slovenian Marine Fisheries Act of 1967.[1685]

893. The 1967 Act was modified in 1976. The new Slovenian Marine Fisheries Act[1686] then adopted recalled the existence of the Bay's fishing reserve, as well as of other fishing reserves, but left to the municipal assemblies the determination of the limits of those reserves and of the methods of fishing in the reserves. On that basis, the Assembly of the Piran municipality adopted in 1978 a

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1682 *Ibid.*

1683 Aerial-photographs of the coasts surrounding the Bay of Piran, 1954, Annex SI-M-30; Aerial-photographs contrasting the two coasts (Slovenia's Hearing Folder, First Round, Session 2, Projections 2E).

1684 Decree Restricting the Fishing in the Bay of Portoroz, *Official Gazette of the People's Republic of Slovenia*, No. 2/1962, Annex SI-159.

1685 Marine Fisheries Act, *Official Gazette of the People's Republic of Slovenia*, No. 34/1967, Annex SI-177.

1686 Marine Fisheries Act, *Official Gazette of the Socialist Republic of Slovenia*, No. 25/1976, Annex SI-193.

decree[1687] which fixed the limits of the Bay's fishing reserve without changing them. An ordinance of 1987 emanating from the Assembly of the Koper Community of coastal municipalities[1688] extended the fisheries reserve to the mouth of the Dragonja River.

894. As to the Croatian side, the Tribunal is not informed of any decision taken in this respect before 1976. In that year, the Municipality of Buje adopted a decision on sea fisheries in general,[1689] which included a provision creating a fishing reserve in the Bay and fixing its limits along the line previously fixed in the Slovenian decisions.

895. It must be added that, as a follow up of a meeting of representatives of the Municipalities of Buje and Piran in 1975[1690] concerning the cooperation between those Municipalities, the Municipality of Buje asked for the consent of the Municipality of Piran before fixing the limits of the reserve in 1976,[1691] and that the Municipality of Piran did the same with the Municipality of Buje in 1978.[1692]

896. The Tribunal notes that the fishing reserve thus established covers the entire Bay, coast to coast, east of the closing line mentioned in paragraph 880 above. However, one finds in the texts no indication whatsoever of any sharing of areas or responsibilities between the Parties in the management of the reserve. Neither do these texts contemplate cooperation between the Parties.

897. The fact that the local authorities in Buje and Piran each requested the agreement of the other before fixing the limits of the fishing reserve in 1976 and 1978 implied that they did not have exclusive jurisdiction to establish such a reserve, but it gave no indication of the territorial extent of the rights recognized as belonging to each of them.

1687 Sea Fisheries Decree (28 July 1978), *Official Announcements by the Municipality of Piran*, No. 19/1978, Annex SI-199.

1688 Ordinance on Sea Fisheries, *Official Gazette of Municipalities of Ilirska Bistrica, Izola, Koper, Piran, Postojna and Sežana*, No. 42/1987, Annex SI-217.

1689 Decision on Sea Fisheries, *Official Gazette of the municipality of Buje*, No. 8/1976, Annex HR-351, confirmed by Decision on Sea Fisheries, Assembly of the Municipality of [Buje], Buje, 3 June 1982, HR-43.

1690 Minutes of the Meeting of Representatives of the Assembly of the Municipality of Buje and the Assembly of the Municipality of Piran on the Occasion of Determining the Border of the Fishing Reserve at the Confluence of the River Dragonja in the Bay of Portorož, Buje, 10 December 1975, Annex HR-350).

1691 *See* Decision on Sea Fisheries, *Official Gazette of the municipality of Buje*, No. 8/1976, Annex HR-351, confirmed by Decision on Sea Fisheries, Assembly of the Municipality of [Buje], Buje, 3 June 1982, HR-43.

1692 *See* The Sea Fisheries Decree of 28 July 1978, Article 16, Annex SI-199; Letter from the Assembly of the Municipality of Piran to the Municipality of Buje Asking for Consent to the Draft Decision on Sea Fisheries, Piran, 18 April 1978, Annex HR-353; Letter from the Assembly of the Municipality of Buje to the Municipality of Piran Providing Consent to the Draft Decision on Sea Fisheries, Buje, 8 June 1978, Annex HR-354.

898. The Tribunal however is bound to observe that the limits of the reserve were fixed by Slovenia as early as 1962 and that those limits were endorsed by Croatia in 1976 without any discussion.

899. It further notes that the Slovenian authorities organised the management of the reserve in detail during the whole period from 1962 to 1991. As early as 1969, the Municipality of Piran entrusted that management to an association, the Agricultural Association Lucija, under a ten-year contract for farming and protecting fish.[1693] Then the 1978 decree subordinated fishing in the reserve to authorization (except for mullet)[1694] and in 1981 a shellfish farming area was created within the reserve.[1695] A new contract relating to the management of the reserve was signed in 1982 with an entity called "Riba Izola".[1696] This contract was annulled in 1990 when the Municipality of Piran decided to organise public tenders limited to mullet fishing.[1697]

900. By contrast, there is no evidence that any specific regulation of that type was enacted by Croatia during the whole period from 1962 to 1991, in particular under the 1980 Law on Sea Fishing.[1698]

901. One inevitably draws from that situation the conclusion that the fishing reserve was of limited interest for Croatia, which only established such a reserve fourteen years after Slovenia. Croatia did not adopt any regulation concerning the reserve and did not organise its management.

902. The Parties further discuss their respective roles regarding police patrols in the Bay. Croatia submits that it exercised such control south-west of the median line. Slovenia contends that it did so over the whole bay, with the exception of a narrow strip of water along the Croatian coast.

903. The Tribunal notes that the coastal sea of Yugoslavia was under the jurisdiction of the Federation and that the part of the coast under consideration in this Award was controlled by the Yugoslav Navy stationed in Pula. An observatory of the federal armed forces, equipped with radar, was installed for that purpose on the Savudrija promontory. However, police authorities of the Republics also exercised some control in the sector in order, in particular, to enforce safety

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1693 Department for Economic Affairs of the Assembly of the Piran Municipality, Contract on the management of the fisheries reserve, 6 June 1969, Annex SI-532.

1694 The Sea Fisheries Decree of 28 July 1978, Article 16, Annex SI-199.

1695 Decision of the Assembly of the Piran Municipality on the Location of the Shellfish Farms in the Fisheries Reserve, No. 323-28/80-81, 29 June 1981, Annex SI-590.

1696 Committee for Social Planning and Socio-Economic Development of the Piran Municipality, Contract on the Management of the Fisheries Reserve, No. 323-4/69-82, 3 January 1982, Annex SI-597.

1697 Executive Council of the Assembly of the Municipality of Piran, Decision to Conclude the Contract on the Award of the Fishing Rights in Portorož Fisheries Reserve, No. 325-63/90, 30 October 1990, Annex SI-688.

1698 Law on Sea Fishing, *Official Gazette of the Socialist Republic of Croatia*, No. 44, 4 November 1980, Article 51(2), Annex HRLA-94, confining fishing reserves to an area of "up to one mile of the coast."

regulations and to fight against smuggling and illegal fishing. The Koper police station in Slovenia and the Umag police station in Croatia were in charge of those controls along the coasts of the respective Republics.

904. In the opinion of the Tribunal, it is established that the Bay was patrolled by the Koper police station with two vessels.[1699] To that effect a permanent radio link was established between the Savudrija Army observatory and the Slovenian authorities.[1700] Moreover, on two occasions at least, the Slovenian authorities drew the attention of the Croatian authorities to the risks of illegal immigration or smuggling originating from their coast and requested action in this respect.[1701]

905. It remains for the Tribunal to determine the nature and extent of the activities of the Umag police station in the Bay. In support of its allegations on that point, Croatia first mentions an incident which happened on 8 March 1973 to the Italian tanker, *Nonno Ugo*, which grounded on the Croatian coast of the Bay near the Savudrija lighthouse. Croatia recalls that the vessel was immediately inspected by a Croatian safety of navigation inspector, that the order to the ship owner to commence rescue operations within 48 hours in order to avoid pollution was given by Croatian Authorities and that they then approved on 16 March a proposal made for the removal of oil from the ship.

906. There is no doubt that the accident happened in a part of the Bay over which Croatia claims jurisdiction and that the Croatian authorities took the decisions thus mentioned. However, the Tribunal notes that the accident was first detected by the Slovenian authorities and that a patrol boat of the Koper station arrived on the spot in the middle of the night, one hour and ten minutes after the accident. For nearly three weeks nothing was done to eliminate the danger of pollution and it was on the initiative of Slovenia that a meeting was held on 29 March 1973 in Koper with representatives of all the interested parties (including Croatia) to consider the measures to be

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1699 *See e.g.*, Koper Border Police Station: Report regarding Operation Avala 82, 25 August 1982, Annex SI-916, and Koper Border Police Station: Report for Operation Sečuan, 19 May 1983, Annex SI-919.

1700 *Cf.* Documents on the Observatory of the Yugoslav Navy at the Savudrija Peninsula, 1989, Annex SI-222; Act on Settlements, *Official Gazette of the Socialist Republic of Croatia*, No. 54/ 1988, Annex SI-665; Fixed Assets Register of Koper Public Safety Administration, 1969, Annex SI-885; and Koper Public Safety Administration: Report on the protection measures regarding Operation Borovik, 29 August 1979, Annex SI-910.

1701 *Cf.* Koper Border Police Station, Situation Report, 1989, Annex SI-221; Letter from Mirko Slukan, Commander of the Border Police Station Koper to the Police Station in Umag regarding the surveillance of State Border at sea and of the coast – notification, 8 April 1991, Annex SI-231.

taken. Immediately after that meeting, the oil and sediments were removed from the tanker by one of the Koper police station vessels.[1702]

907. The Tribunal observes that the accident thus described happened in the immediate vicinity of the Croatian coast and that the necessary measures were taken by agreement of both Parties. No conclusion can thus be drawn from those events with respect to Slovenian *effectivités* in the immediate vicinity of the Croatian coast or to Croatian *effectivités* in the rest of the Bay. It shows, however, that at the time the Slovenian police were more active in the Bay than the Croatian police and that Slovenia was more immediately involved than Croatia in addressing the risk of pollution.

908. Croatia further submits that in a number of cases it exercised jurisdiction in the Bay south-west of the median line in respect of fishing activities, search and rescue operations and safety of navigation. However, a careful examination of the relevant cases shows that, in most of them, police activities occurred less than 100 m from the shore. In two cases, controls were exercised at 200 m and 500 m from the shore.[1703] These cases concern activities in the Bay before independence. The Tribunal does not consider as relevant the instances of police activity that occurred in the territorial sea, outside the Bay, or after independence.

909. Slovenia contends that Croatia recognized that its own control over the Bay was limited to a very narrow strip of waters along the coast. In this respect Slovenia refers to an agreement achieved between the police authorities of both countries at meetings held in Pula on 29 January and 26 February 1991 on the eve of independence.[1704] Croatia denies that any such agreement was concluded.[1705] There are no agreed records of the Pula meetings, and the Tribunal is unable in these circumstances to draw any conclusion from those meetings.

1702 Slovenian reports relating to the case of *Nonno Ugo*, April-June 1973, Annex SI-545.

1703 *Cf.* Croatia's Counter-Memorial, p. 329 and Slovenia's Reply, p. 136.

1704 *Cf.* Official Note from Mirko Slukan, Commander of the Border Police Station Koper regarding the surveillance area of the Koper Border Police Station, 20 October 1992, Annex SI-263. *See also* Letter from Mirko Slukan, Commander of the Border Police Station Koper to the Police Station in Umag regarding the surveillance of State Border at sea and of the coast – notification, 8 April 1991, Annex SI-231; Official Note from Mirko Slukan, Commander of the Border Police Station Koper regarding the surveillance area of the Koper Border Police Station, 20 October 1992, Annex SI-263; Letter of the Ministry of the Interior of the Republic of Slovenia: The Issues of Conducting Surveillance in the Bay of Piran and Border Incidents at Sea Provoked by the Croatian Security and Defence Authorities, 17 January 1992, Annex SI-252.

1705 *Cf.* Note No. 521-0502/93-140-1 from the Ministry of Foreign Affairs of the Republic of Croatia Embassy to the Embassy of the Republic of Slovenia, Zagreb, 25 January 1993, Annex HR-288.

910. One may conclude from the preceding analysis that at the time of the SFRY, the Slovenian Koper police station exercised effective police control in most of the Bay. However, Croatia also exercised some control in the south-west part of the Bay, generally close to the coast.

911. Slovenia finally submits that the Marine Biology Station of Piran was engaged in marine research and monitoring the quality of waters of the Bay. This is undisputed, and Croatia has not established that the Croatian research centres engaged in comparable activities in the Bay at the time. However one must observe that such activities do not necessarily imply a claim by one State to the possession of rights to the exclusion of all other States and that, in most cases, the Slovenian research activities cannot be considered as having been pursued *à titre de souverain*.

912. In conclusion, the Tribunal notes that, on the occasion of the creation of a fishing reserve by Croatia, Slovenia recognized that it had no exclusive jurisdiction over the whole Bay. The Tribunal is also convinced that Croatia did not exercise jurisdiction over the whole area south of the median line. Taking into account the various *effectivités* previously analysed, the Tribunal is of the opinion that the delimitation is to follow a line situated between the lines advanced by the Parties. It notes that in the agreement contemplated by them in 2001, that line was drawn to join the end of the land boundary in the mouth of the Dragonja River to a point on the closing line of the Bay, which is at a distance from Cape Madona that is three times the distance from that same point to Cape Savudrija.[1706] The Tribunal considers that that line corresponds to the *effectivités* it has been able to determine and will adopt it.

913. The boundary between Croatia and Slovenia in the Bay shall thus be a straight line joining a point in the middle of the channel of the St Odoric Canal with the coordinates 45°28′42.3″N, 13°35′08.2″E, to point A with the coordinates 45°30′41.7″N, 13°31′25.7″E. It is illustrated on the following map:

[Intentionally left blank]

[1706] Treaty between the Republic of Slovenia and the Republic of Croatia on Common State Border, signed on 20 July 2001, Annex SI-316.

MOUTH OF THE DRAGONJA AND THE BAY

Nautical Miles

1 0 1 2 3

Kilometers

1 0 1 2 3

Nominal Scale at Latitude 45°30'N - 1:85,000

Map II

Projection / Datum:
Mercator / ETRS89

Base map: © OpenStreetMap contributors.
This map is for illustrative purposes only.

3. Regime for the Use of the Bay

914. As a result of the Tribunal's decisions set out above, the Tribunal considers that there is no need for it to define any particular usage regime in the Bay, different from what applies under international law.

VI. DETERMINATIONS IN RESPECT OF OTHER MARITIME AREAS

915. Having delimited the border between Croatia and Slovenia on the land as well as within the Bay, the Tribunal now turns to the remaining maritime aspects of its task. It bears recalling that Articles 3(1) and 4 of the Arbitration Agreement provide:

> *Article 3: Task of the Arbitral Tribunal*
>
> (1) The Arbitral Tribunal shall determine
>
> (a) the course of the maritime and land boundary between the Republic of Slovenia and the Republic of Croatia;
>
> (b) Slovenia's junction to the High Sea;
>
> (c) the regime for the use of the relevant maritime areas.
>
> *Article 4: Applicable Law*
>
> The Arbitral Tribunal shall apply
>
> (a) the rules and principles of international law for the determinations referred to in Article 3 (1)(a);
>
> (b) international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result by taking into account all relevant circumstances for the determinations referred to in Article 3 (1)(b) and (c).

A. TASK OF THE TRIBUNAL AND APPLICABLE LAW

916. The Parties differ in their interpretations of Articles 3 and 4 of the Arbitration Agreement concerning the Tribunal's task and the applicable law.

1. The Parties' Positions

917. The Parties disagree on the relationship between Articles 3(1) and 4, the relevance of the concept of "vital interests", and the applicable law.

(a) Relationship between Article 3(1) and Article 4

918. With reference to the different subparagraphs of Article 3(1) of the Arbitration Agreement, Croatia asserts that Article 4 establishes distinct and different subsets of applicable law.[1707] Article 4 thus "distinguishes expressly between issue (a) on the one hand and issues (b) and (c) on the other."[1708] As such, the determination of the course of the maritime boundary under Article

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1707 Transcript, Day 1, p. 26:15-17.

1708 *Ibid*.

3(1)(a) must be undertaken separately and independently from the determinations of the "junction to the High Sea" and the usage regime under Articles 3(1)(b) and (c).[1709] This is because Article 4(a) requires that the Tribunal determine the course of the maritime boundary solely on the basis of the narrower set of "rules and principles of international law,"[1710] whereas the mandate contained in Article 4(b) requires that the Tribunal determine the other maritime aspects on the basis of a broader set of rules[1711]—"international law, equity and the principle of good neighbourly relation"—and in a manner that achieves the objective of a fair and just result.[1712]

919. Croatia argues that, consequently, the Tribunal must first definitively determine the course of the maritime boundary under Article 3(1)(a) before turning to the other maritime aspects of its task under Article 3(1)(b) and (c).[1713] In Croatia's view, the issues of a high seas junction and usage regime are "supplemental to and consequential upon" the determination of the maritime boundary.[1714] Croatia argues that the Tribunal must therefore not only determine the maritime boundary first, but must also refrain from later revising this boundary in order to effect a high seas junction or usage regime.[1715]

920. Croatia takes issue with Slovenia's presentation of the Tribunal's maritime tasks as "maritime issues"[1716] that "compris[e] indiscriminately 'the course of the maritime boundary between the Parties, Slovenia's junction to the High Sea and the regime for the use of the relevant maritime areas'."[1717] Moreover, Croatia observes that Slovenia "chooses to lump together" the applicable law provisions of Article 4(a) and (b),[1718] thus engaging in a "complete rewriting of the Arbitration Agreement."[1719] In doing so, Croatia contends, Slovenia fails to acknowledge "the most obvious and important aspect of the care that obviously went into the drafting," namely, the distinction as to the applicable law in respect of Article 3(1)(a) on the one hand, and Article 3(1)(b) and (c) on the other.[1720] According to Croatia, Slovenia's "obvious aim of seeking

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1709 Croatia's Memorial, para. 8.6; Transcript, Day 1, pp. 26:15-25, 47:8-10.

1710 Transcript, Day 1, p. 27:4-6.

1711 Transcript, Day 1, p. 27:13-18.

1712 Croatia's Memorial, para. 8.4; Transcript, Day 1, p. 27:1-2.

1713 Croatia's Memorial, para. 8.7; Transcript, Day 1, p. 27:9-12.

1714 Croatia's Memorial, para. 8.7; Transcript, Day 1, p. 48:4-11.

1715 Croatia's Memorial, para. 8.7; Croatia's Counter-Memorial, para. 9.2; Transcript, Day 1, p. 46:7-12, and 46:21-25.

1716 Croatia's Counter-Memorial, paras 7.4, 7.7, 7.9, *referring to* Slovenia's Memorial, para. 1.31.

1717 Croatia's Counter-Memorial, paras 7.4, 7.9.

1718 Croatia's Counter-Memorial, para. 7.9.

1719 Transcript, Day 1, p. 36:8-10.

1720 Croatia's Counter-Memorial, para. 7.13.

an acceptable result" has caused it to advance an interpretation that "inverts" Articles 3 and 4 of the Arbitration Agreement [1721] and "cuts up the Arbitration Agreement and completely restructures it."[1722]

921. Croatia alleges that Slovenia's approach seeks to incorporate the "junction" in the maritime delimitation and is motivated by Slovenia's wish to have a "*junction to* the high seas understood as a *territorial (direct geographical) contact* of its territorial sea with the high seas."[1723] However, Croatia emphasises that "a claim to territorial contact is a territorial issue by definition" to be decided by the Tribunal "exclusively" in accordance with Article 3(1)(a) and Article 4(a),[1724] which do not contemplate "Slovenia's junction to the High Sea."[1725] The determination of the course of the maritime boundary is accordingly not "subordinate—and even adjusted or 'tailored' to—the determination of Slovenia's 'junction to' the high seas."[1726] Croatia argues that the negotiating history of the Arbitration Agreement "confirms beyond doubt that the interpretation advanced by Slovenia"—"territorial contact with the High Seas"—"was decisively rejected."[1727] Furthermore, Croatia submits that "Slovenia knew exactly what it was agreeing to in the final text,"[1728] and "is attempting . . . to resurrect a proposal made and resoundingly rejected during the negotiations."[1729]

922. Croatia rejects Slovenia's argument that the Arbitration Agreement gives discretion to the Tribunal to make determinations under Article 3(1) "separately or together".[1730] It argues that there is "no open clause in the Arbitration Agreement that would allow the tasks under Article 3(1) to be decided *all together*"—an exercise that would "invariably meld and mix up distinct applicable laws, that the drafters took care to keep apart."[1731] Instead, Croatia argues that "[t]he Agreement is clear as to what task the Tribunal is to decide upon 'separately,' and what tasks it can decide 'together'."[1732] In this regard, Croatia notes that the matters to be determined

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1721 Croatia's Counter-Memorial, paras 7.11, 7.14-16.
1722 Transcript, Day 1, pp. 28:20-29:4.
1723 Croatia's Counter-Memorial, para. 7.14.
1724 Transcript, Day 1, p. 37:1-4.
1725 Croatia's Counter-Memorial, para. 7.14.
1726 Croatia's Counter-Memorial, para. 7.16.
1727 Transcript, Day 1, pp. 30:21-34:7.
1728 Transcript, Day 1, pp. 34:7-35: 21.
1729 Transcript, Day 1, p. 36:12-14.
1730 Croatia's Counter-Memorial, para. 7.19.
1731 Croatia's Counter-Memorial, para. 7.20.
1732 Croatia's Counter-Memorial, para. 7.19.

under Article 3(1)(b) and (c) are "clearly joined" by virtue of their being subject to the same applicable law.[1733]

923. Slovenia argues that the Arbitration Agreement confers discretion upon the Tribunal to decide the three issues under Article 3(1) "separately or together."[1734] Accordingly, Slovenia contends that the Tribunal must initially determine the course of the maritime boundary under Article 3(1)(a) of the Agreement in tandem with its determination of Slovenia's junction to the High Sea under Article 3(1)(b), to achieve a coherent and workable result.[1735] Only thereafter should the Tribunal address the remaining issue under Article 3(1)(c).[1736] In Slovenia's view, the Tribunal's mandate to reach a "fair and just result" in its determination of the junction to the High Sea requires that it address this issue in the manner Slovenia proposes,[1737] as the maritime boundary "cannot be divorced from" the question of the junction,[1738] as the two are "inextricably linked."[1739]

924. Slovenia characterizes Croatia's proposed successive approach as an unsupported "attempt to impose a two-step process," which "distorts" the text of the Arbitration Agreement and does not accord with the overall aim of the Agreement to lead to a comprehensive resolution.[1740] Slovenia notes that the reference to "task" in the title of Article 3 is in the singular, implying that the Tribunal has one task that consists of three interrelated and interdependent elements.[1741] Slovenia further notes that "[n]o order is imposed on the Tribunal as to how it should make these determinations" under Article 3(1).[1742] However, Slovenia accepts that "as far as the territorial sea is concerned at least, we proceed—and suggest that the Tribunal should proceed—in the order advocated by Croatia."[1743]

925. As to the relationship between Article 3(1) and Article 4, Slovenia asserts that the fact that there are different applicable law provisions in Article 4 has no impact on the task to be performed under Article 3(1) or the sequence in which the Tribunal must decide.[1744] Slovenia argues that the

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1733 Croatia's Counter-Memorial, para. 7.20; Transcript, Day 1, p. 27:13-18.

1734 Slovenia's Memorial, para. 4.17; Transcript, Day 4, p. 50:2-21.

1735 Slovenia's Memorial, para. 8.15.

1736 *Ibid*.

1737 Slovenia's Memorial, para. 10.04.

1738 Slovenia's Memorial, para. 8.06.

1739 Slovenia's Memorial, para. 8.15.

1740 Slovenia's Counter-Memorial, paras 8.04-05.

1741 Slovenia's Counter-Memorial, para. 8.05; Transcript, Day 4, p. 49:15-17.

1742 Slovenia's Counter-Memorial, para. 8.06.

1743 Transcript, Day 4, pp. 50:23-51:1.

1744 Slovenia's Counter-Memorial, para. 8.07.

Arbitration Agreement was "a package deal", or "a series of *quid pro quo*s"[1745] which "applies particularly to the task of the Tribunal and the applicable law" and calls for these provisions to be "read together as a whole."[1746]

926. Slovenia also criticizes Croatia's treatment of subparagraphs (b) and (c) of Article 3(1) as "essentially one and the same" and as "consequential and supplemental upon" Article 3(1)(a). Such treatment is "inconsistent with the text of Article 3, at odds with the negotiating history of the Arbitration Agreement",[1747] and cannot be reconciled with the object and purpose of the Arbitration Agreement.[1748] According to Slovenia, Croatia's argument is also contrary to the principle of *effet utile* as it fails to give Article 3(1)(b) any independent meaning from Article 3(1)(c).[1749]

927. Slovenia asserts that Article 3(1) is cast in mandatory terms such that the Tribunal has an "obligation" to make findings in respect of each and every enumerated element.[1750] Slovenia recalls that it had rejected Croatia's prior attempt to subsume the "junction" into a component of the "regime" during the negotiating process.[1751] In any event, Croatia's treatment is inconsistent with the use of the plural form ("determinations") in Article 4(b).[1752]

928. Countering Croatia's assertion that the Tribunal is not "required" or "authorized" to "revisit" the maritime boundary determined under Article 3(1)(a), Slovenia asserts that the argument "raises a false problem."[1753] According to Slovenia, there is no need for the Tribunal to "revisit" any of the issues provided that they are considered and dealt with as part of an overall resolution of the maritime dispute.[1754] There are no practical reasons why the Tribunal must delimit the maritime boundary before it turns to the determination of the junction and the question of the regime.[1755]

929. Slovenia also contests Croatia's argument that the maritime boundary "once determined in accordance with international law under Article 3(1)(a) is final and binding on the Parties," noting

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1745 Transcript, Day 4, p. 41:20-23.
1746 Slovenia's Counter-Memorial, para. 8.07.
1747 Slovenia's Counter-Memorial, para. 8.08; Transcript, Day 4, p. 60:4-12.
1748 Transcript, Day 3, p. 54:8-17.
1749 Slovenia's Counter-Memorial, para. 8.12.
1750 Slovenia's Counter-Memorial, para. 8.09, 8.96, 10.03.
1751 Slovenia's Counter-Memorial, para. 8.10.
1752 Slovenia's Counter-Memorial, para. 8.09.
1753 Slovenia's Counter-Memorial, para. 8.16.
1754 Slovenia's Counter-Memorial, para. 8.16.
1755 Slovenia's Counter-Memorial, para. 8.17.

that it is the Award of the Tribunal "in its totality" that will become final and binding on the Parties pursuant to Article 7(2) of the Arbitration Agreement.[1756]

(b) Relevance of the Concept of "Vital Interests"

930. Croatia asserts that the concept of "vital interests" is irrelevant for considering the task of the Tribunal. According to Croatia, the reference to "vital interests" in the Preamble to the Arbitration Agreement, when read together with the phrase "the spirit of good neighbourly relations," clearly expresses "the overall commitment of the Parties to the peaceful settlement of disputes."[1757] However, there is no ground for attributing a "different, substantive and far-reaching meaning of the general reference to 'vital interests' in the Preamble."[1758]

931. In Croatia's view, Slovenia's claim that the Arbitration Agreement "reflects the vital interests of both parties, which in Slovenia's case is its junction to the High Sea," rests on two erroneous steps: first, seeking to relate the general reference to 'vital interests' in the Preamble specifically to Article 4(b); and second, taking that reference further to relate specifically to Article 3(1)(b).[1759] Croatia distinguishes between the reference to the "spirit" of good neighbourly relations in the Preamble and the reference to the "principle" of good neighbourly relations in Article 4(b).[1760]

932. Croatia argues that Slovenia had proposed during the negotiation of the Arbitration Agreement to include a reference to "vital interests" in Article 4(b), which Croatia "repeatedly declined."[1761]

933. Moreover, Croatia criticizes Slovenia's attempts to determine what are Croatia's "vital interests" in circumstances where it is for Croatia to articulate its own "vital interests".[1762] Croatia asserts that its vital interest was not limited to obtaining EU membership but included "preserv[ing] its territorial integrity" as "delimited in accordance with international law."[1763]

934. Slovenia attaches significance to the concept of "vital interests", arguing that "the Arbitration Agreement was the result of a negotiation process based on a series of *quid pro quo*s that took

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1756 Slovenia's Counter-Memorial, para. 8.18.

1757 Croatia's Counter-Memorial, para. 7.26.

1758 Croatia's Counter-Memorial, para. 7.27; Transcript, Day 2, pp. 168:21-169:17.

1759 Croatia's Counter-Memorial, para. 7.27.

1760 Croatia's Counter-Memorial, para. 7.29; Transcript, Day 2, p. 169:2-17.

1761 Croatia's Counter-Memorial, paras 7.33-39; Transcript, Day 2, p. 171:1-10.

1762 Croatia's Counter-Memorial, para. 7.47.

1763 *Ibid.*; Transcript, Day 2, p. 171:20-23.

each party's vital interests into account."[1764] For Slovenia, the junction represents a *quid pro quo* for Slovenia's removal of obstacles to Croatia's EU accession,[1765] and thus a "*sine qua non* condition for any settlement of the maritime boundary dispute" and Slovenia's acceptance of the Arbitration Agreement.[1766]

935. Slovenia says that the fact that the notion of "vital interest" was ultimately included in the Preamble does not, contrary to Croatia's account, "negate the idea that . . . Slovenia has any vital interests, particularly in having a junction to the high sea."[1767] Rather, Slovenia argues that it was "content to have the reference to 'vital interests' placed in the preamble because it informs the overall object and purpose of the agreement."[1768]

936. What is clear, according to Slovenia, is that "the terms of the Arbitration Agreement that follow [the Preamble] had been carefully tailored to take into account both parties' interests"[1769] including, as Croatia now says, "having its land and maritime boundary with Slovenia delimited in accordance with international law."[1770] Thus, "the Arbitration Agreement fully takes into account Croatia's vital interests"[1771] and in Slovenia's view, it "cannot be right" to respect Croatia's vital interests whilst ignoring Slovenia's corresponding interests.[1772]

(c) Applicable Law

937. There is no disagreement between the Parties that Article 4(b) of the Arbitration Agreement prescribes the applicable law in respect of determinations under Article (3)(1)(b) and (c). However, the Parties interpret the phrase "international law, equity and the principle of good neighbourly relations" in Article 4(b) differently.[1773]

1764 Transcript, Day 3, p. 41:20-23.

1765 Arbitration Agreement, Preamble ("Affirming their commitment to a peaceful settlement of disputes, in the spirit of good neighbourly relations, reflecting their vital interests . . . Have agreed as follows . . .").

1766 Slovenia's Memorial, paras 1.13, 10.61, 10.64; Slovenia's Counter-Memorial, para. 80.10.

1767 Transcript, Day 3, p. 45:15-20.

1768 Transcript, Day 3, p. 48:6-8. *See also* Slovenia's Counter-Memorial, para. 8.95.

1769 Transcript, Day 3, p. 46:4-6.

1770 Transcript, Day 3, p. 46:11-13, *referring to* Croatia's Memorial, para. 2.78 and Croatia's Counter-Memorial, para. 7.47.

1771 Transcript, Day 3, p. 46:20-22, and p. 48:9-10.

1772 Transcript, Day 3, p. 48:14-17.

1773 Croatia's Memorial, para. 10.6; Slovenia's Memorial, para. 8.46.

938. Croatia notes that the factors of "equity" and "good neighbourly relations" do not appear "in isolation" in Article 4 but follow a reference to "international law."[1774] Accordingly, Croatia contends that Tribunal's determinations cannot be "contrary to international law."[1775] In respect of equity, Croatia argues that equity "is to be applied *infra legem*"[1776] and cannot "chang[e] geography" or otherwise "[adjust] the consequences under international law in order to expand territorial sovereignty."[1777] Finally, Croatia contends that the "principle of good neighbourly relations" is one that "obligates states to try to reconcile their interests with the interests of neighbouring states."[1778] Croatia submits that the principle, when used in Article 4(b), is "closely associated with territorial stability and mutual respect"[1779] but cannot extend to "depriving one State party of its sovereignty over its land or maritime territory for the benefit of another."[1780]

939. Croatia considers that "the appropriate way" to perform the tasks in Article 3(1)(b) and (c) is "to ask what result the application of international law would produce," and then "to ask whether equity and/or the principle of good neighbourly relations support some variation, modification or reinforcement of that result."[1781]

940. Slovenia highlights that Article 4(b) contains "an express and separate mention of 'equity' and 'the principle of good neighbourly relations' alongside 'international law'."[1782] Accordingly, the Tribunal is "required" to apply[1783] these concepts as a *lex specialis*[1784] "in addition to international law."[1785] Otherwise, their inclusion in the Arbitration Agreement would be superfluous.[1786]

941. Slovenia contests the view that the notion of "equity" is "constrained by principles of either customary or conventional law."[1787] In Slovenia's view, the reference to equity and good

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1774 Croatia's Counter-Memorial, para. 9.13.

1775 Croatia's Memorial, para. 10.60; Transcript, Day 2, p. 165:4-6.

1776 Croatia's Counter-Memorial, para. 9.13.

1777 Croatia's Memorial, para. 10.62.

1778 Transcript, Day 2, p. 167:8-10, *referring to* Note, "New perspectives on international environmental law" *Yale Law Journal*, Vol. 82, No. 8, p. 165 (1973) at n.22.

1779 Croatia's Counter-Memorial, para. 9.17.

1780 Croatia's Memorial, para. 10.65; Croatia's Counter-Memorial, para. 9.17.

1781 Croatia's Counter-Memorial, para. 9.13; Transcript, Day 2, p. 165:100-16.

1782 Slovenia's Memorial, para. 8.47.

1783 Slovenia's Counter-Memorial, para. 10.09.

1784 Slovenia's Counter-Memorial, para. 10.10.

1785 Slovenia's Memorial, para. 8.47.

1786 *Ibid.*; Slovenia's Counter-Memorial, para. 10.12; Transcript, Day 3, p. 56:5-9.

1787 Slovenia's Memorial, para. 8.52; Slovenia's Counter-Memorial, para. 10.12, *referring to* Croatia's Memorial, para. 10.62.

neighbourly relations emphasises that "the Tribunal can and must move beyond the strict application of law"[1788] and "supplement the application of the strict legal rules,"[1789] which at the very least means "equity *praeter legem.*"[1790]

942. Equity, according to Slovenia, comprises "notions of fairness" and "recourse to principles of justice."[1791] Slovenia asks that the Tribunal "apply equity insofar as it does not contradict the law; with a view to obtaining not only an equitable solution, but 'a fair and just result',"[1792] "by taking into account all relevant circumstances."[1793] According to Slovenia, "the ICJ has noted the clear distinction between applying equitable principles *infra legem* as opposed to applying equity *per se*."[1794]

943. The meaning of the principle of good neighbourly relations, in Slovenia's view, depends on the context.[1795] It is of particular importance when States share "legitimate interests in common resources" and "where they have previously enjoyed maritime rights in the area of concern on a basis of equality."[1796] Slovenia asserts that the principle of good neighbourly relations "requires that, whenever possible, a solution to a dispute should be found that upholds the legitimate interests of the parties to the dispute."[1797]

2. The Tribunal's Analysis

944. As noted above, Article 3(1) of the Arbitration Agreement stipulates:

> The Arbitral Tribunal shall determine
>
> (a) the course of the maritime and land boundary between the Republic of Slovenia and the Republic of Croatia;
>
> (b) Slovenia's junction to the High Sea;
>
> (c) the regime for the use of the relevant maritime areas.

1788 Slovenia's Counter-Memorial, para. 10.13.

1789 Slovenia's Counter-Memorial, para. 10.14.

1790 Slovenia's Counter-Memorial, para. 10.15

1791 Slovenia's Memorial, para. 8.52.

1792 Slovenia's Memorial, paras 8.48, 8.56.

1793 Slovenia's Counter-Memorial, para. 8.75.

1794 Slovenia's Counter-Memorial, para. 8.81, *citing North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3 at pp. 46-47, para. 85; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18 at p. 60, para. 71.

1795 *See* Slovenia's Memorial, para. 8.58.

1796 Slovenia's Memorial, para. 8.62.

1797 Slovenia's Memorial, para. 8.64.

945. Under Article 3(4) of the Arbitration Agreement, "[t]he Arbitral Tribunal has the power to interpret the present Agreement."

946. Article 4 of the Arbitration Agreement stipulates:

> The Arbitral Tribunal shall apply
>
> (a) the rules and principles of international law for the determinations referred to in Article 3(1)(a);
>
> (b) international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result by taking into account all relevant circumstances for the determinations referred to in Articles 3(1)(b) and (c).

947. The Tribunal considers that the Arbitration Agreement requires it to conduct a sequential analysis of the tasks set out in Article 3(1) of the Arbitration Agreement. Such an approach follows from the structure of Article 3, which describes each task in a separate subparagraph, thus implying distinct steps of analysis. The immediate context of Article 3—the "applicable law" clause of Article 4—confirms this interpretation. It would be difficult to implement the deliberate distinction between determinations to be made in accordance with international law, on the one hand, and those to be made in accordance with international law, equity, and the principle of good neighbourly relations, on the other hand, if all tasks were to be performed in a combined fashion. In the Tribunal's view, a sequential analysis does not preclude the achievement of a "coherent and workable result,"[1798] which Slovenia rightly demands.

948. Accordingly, the Tribunal will address, in turn, the delimitation of the territorial sea between Croatia and Slovenia, the determination of "Slovenia's junction to the High Sea," Slovenia's continental shelf claim, and the regime for the use of the relevant maritime areas.

B. DELIMITATION OF THE TERRITORIAL SEA

949. In a first step, the Tribunal is instructed to determine "the maritime . . . boundary" between Croatia and Slovenia in applying "the rules and principles of international law". The Tribunal accordingly turns to the delimitation of the territorial sea.

1798 *See e.g.*, Slovenia's Memorial, para. 8.15.

1. The Parties' Positions

(a) Applicable Law with respect to the Delimitation of the Territorial Sea

950. The Parties recognize that the delimitation of the territorial sea must be made in accordance with the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, and the 1982 UNCLOS[1799]. The 1958 Geneva Convention was ratified by the SFRY on 28 January 1966, and Croatia and Slovenia deposited instruments of succession to the 1958 Geneva Convention on 3 August 1992 and 6 July 1992, respectively. The SFRY signed UNCLOS on 10 December 1982 and ratified it on 5 May 1986. UNCLOS entered into force on 16 November 1994. Croatia and Slovenia filed declarations of succession to UNCLOS, respectively on 5 April 1995 and 16 June 1995 .[1800] The territorial sea delimitation rules in the 1958 Geneva Convention and in UNCLOS are found in Article 12 and Article 15, respectively.[1801] As the ICJ has acknowledged, UNCLOS Article 15 is virtually identical to Article 12(1), of the 1958 Geneva Convention, and is to be regarded as having the character of customary international law.[1802]

951. UNCLOS Article 15 provides:

> 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.[1803]

952. Croatia submits that the basic principle underlying Article 15 is the "primacy of the median line as the delimitation line between the territorial seas of opposite or adjacent States."[1804] Croatia asserts that none of the exceptions contemplated by Article 15—agreement by the Parties to a

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1799 *See e.g.*, Croatia's Memorial, para. 9.4; Slovenia's Memorial, para. 8.25.

1800 *See* United Nations Treaty Collection, Status of the United Nations Convention on the Law of the Sea, Volume XXI-6, *available at* <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-6.en.pdf>.

1801 Transcript, Day 2, p. 99:14-21.

1802 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Judgment, I.C.J. Reports 2001, p. 40 at p. 94, para. 176.

1803 UNCLOS, Article 15.

1804 Croatia's Memorial, para. 9.7; Transcript, Day 2, pp. 99:22-100:2, *citing Delimitation of Maritime Boundary between Guyana and Suriname*, P.C.A. Case No. 2004-04, Award of 17 September 2007, para. 296.

different means of delimitation, historic title, or the presence of "special circumstances"[1805]—is applicable in the present dispute.

953. In response to Croatia's argument that "[f]rom the earliest days of Slovenia's emergence as an independent State there was an understanding that the maritime boundary with Croatia would be delimited in accordance with the equidistance principle,"[1806] Slovenia asserts that the Parties "have never reached an agreement or 'understanding' that their maritime boundary would be delimited based on equidistance."[1807] Rather, according to Slovenia, they have been unable to reach any agreement as to how their maritime boundary should be delimited.[1808]

954. Furthermore, Slovenia contends that "while equidistance is considered to be the general rule, or starting point, for the delimitation of the territorial seas of adjacent States . . . it is not an absolute principle."[1809] According to Slovenia, the second sentence of Article 15 makes clear that Article 15 creates no general presumption in favour of equidistance delimitation,[1810] nor does it articulate a *per se* rule of delimitation.[1811] Slovenia argues that the Tribunal should first have regard to historic title and "special circumstances".[1812] According to Slovenia, "the first sentence of Article 15, referring to the median line, does not apply where under the second sentence it is necessary by reason of historic title or other special circumstances to delimit the territorial sea in a manner which is at variance therewith."[1813] In Slovenia's view, "taken both individually and collectively, these factors justify delimiting the territorial sea boundary using a method tailored to the particular circumstances of the maritime areas lying off the Parties' coasts."[1814]

1805 Croatia's Memorial, paras 9.8, 9.22; Slovenia's Memorial para. 8.28; Transcript, Day 2, p. 101:16-20.

1806 Croatia's Memorial, para. 9.14; Transcript, Day 2, pp. 90:3-91:1, 102:26-103:8.

1807 Slovenia's Counter-Memorial, para. 9.49. *See generally* Slovenia's Counter-Memorial, paras 9.48-78; Slovenia's Reply, paras 4.03-05.

1808 Slovenia's Counter-Memorial, para. 9.49.

1809 Slovenia's Memorial, para. 10.08.

1810 Slovenia's Memorial, para. 8.27; Slovenia's Counter-Memorial, para. 8.30; Transcript, Day 4, p. 35:16-23.

1811 Slovenia's Memorial, paras 8.27-28.

1812 Slovenia's Memorial, para. 10.10; Slovenia's Counter-Memorial, paras 8.25-28, 8.30. In support of this approach, Slovenia cites *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, ITLOS Case No. 16, Judgment of 14 March 2012, para. 129; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 659 at p. 743, para. 280.

1813 Slovenia's Counter-Memorial, para. 8.25.

1814 Slovenia's Memorial, para. 10.10.

(b) Existence of Historic Title

955. Slovenia notes that UNCLOS Article 15 refers to "historic title" as "a factor that justifies delimiting the territorial sea in a manner at variance with equidistance."[1815] It claims that, as part of the SFRY, Slovenia and Slovenian entities were entitled to exercise the same territorial sea and other maritime rights that the SFRY possessed.[1816] According to Slovenia, this exercise was long-standing and well known to the other republics of the SFRY,[1817] and the SFRY did not impose any territorial sea boundary between the republics.[1818]

956. While Slovenia recognizes that the territorial sea rights it exercised were not exclusive, it asserts that UNCLOS Article 15 does not require a "historic title" to be exclusive in order for it to be relevant.[1819] Slovenia argues that the ICJ's continental shelf delimitation in *Tunisia/Libya* is relevant to the present territorial sea dispute insofar as the ICJ affirmed the principle that "[h]istoric titles must enjoy respect and be preserved as they have always been by long usage."[1820] Slovenia further argues that "[i]nternational courts and tribunals have frequently found that the traditional rights enjoyed by non-State entities over a prolonged period of time are not extinguished by the creation or delimitation of new international boundaries."[1821] Slovenia submits that the principle should apply in the present dispute, as "the historic entitlements that Slovenia exercised as part of the SFRY before independence extended throughout the SFRY's territorial sea, including in the northern Adriatic."[1822] Slovenia further submits that "[t]he existence and the effect of 'historic waters' must be determined *in concreto* on the basis of the

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1815 Slovenia's Memorial, para. 10.42.

1816 *Ibid*.

1817 *Ibid*.

1818 Slovenia's Reply, paras 4.46-51.

1819 Slovenia's Memorial, para. 10.43.

1820 Slovenia's Memorial, paras 10.44-46, *citing Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18 at p. 73, para. 100.

1821 Slovenia's Counter-Memorial, para. 8.38, *citing Abyei Arbitration (Government of Sudan v. Sudan People's Liberation Movement/Army)*, Final Award, 22 July 2009, p. 260; *Western Sahara, Advisory Opinion*, I.C.J. Reports 1975, p. 12 at pp. 64-5, para. 152; *Eritrea/Yemen*, Award of the Arbitral Tribunal in the First Stage – Territorial Sovereignty and Scope of the Dispute, 9 October 1998, p. 146, para. 526; *The Grisbådarna Case (Norway v. Sweden)*, Award, 23 October 1909, R.I.A.A., Vol. XI, p. 155 at p. 161; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, I.C.J. Reports 1992, p. 351 at p. 598, para. 400.

1822 Slovenia's Memorial, paras 10.45-46, *citing Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18 at pp. 76-7, para. 105. *See also* Slovenia's Counter-Memorial, para. 8.49.

particular combination of rights and interests which form the 'historical links' between a State and a particular maritime area."[1823]

957. Slovenia submits that it was "largely because of Slovenia's long-standing rights in the territorial sea of the former Yugoslavia, that access to fishing within the territorial sea lying well south of Croatia's equidistance line was critical to it."[1824] According to Slovenia, this premise was the basis for the Parties' conclusion of various fisheries agreements following their independence.[1825] By way of example, Slovenia submits the SOPS/LBTA, which it asserts to have granted Slovenia "rights in an undelimited territorial sea down to the 45°10′N parallel of latitude."[1826] Croatia's proposed maritime boundary in the present dispute would leave "only about 12 per cent of the SOPS area falling within Slovenia's territorial sea."[1827] Other fisheries agreements which Slovenia sees as codifying its "traditional fishing rights" include the 1994 and 1995 Fisheries Agreements,[1828] the area of application of which exceeded the geographic boundaries of the SOPS/LBTA.[1829]

958. Slovenia highlights its fishing activities far south of the equidistance line,[1830] as reflected in the 1983 Fisheries Agreement between the SFRY and Italy.[1831] In particular, Slovenia notes the Croatian authorities' issuance of certificates permitting Slovenian vessels to fish on behalf of Slovenian entities in waters now claimed by Croatia.[1832] According to Slovenia, "Croatian authorities continued to tolerate Slovenian fishing activities in the waters of the coast of Croatia" after the Parties gained independence.[1833]

1823 Slovenia's Counter-Memorial, para. 8.44, *citing Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18 at p. 74, para. 100.

1824 Slovenia's Counter-Memorial, para. 9.16.

1825 *Ibid*.

1826 *Ibid.*; Transcript, Day 4, p. 33:9-15.

1827 Slovenia's Counter-Memorial, para. 9.17.

1828 Treaty between the Government of the Republic of Slovenia and the Government of the Republic of Croatia on Marine Fisheries, 7 February 1994; Treaty on Marine Fisheries between the Government of the Republic of Slovenia and the Government of the Republic of Croatia, 5 June 1995.

1829 Slovenia's Counter-Memorial, para. 9.27.

1830 Agreement between the Socialist Federative Republic of Yugoslavia and the Italian Republic on the fishing activities in the Gulf of Trieste within the Scope of Border Economic Cooperation and Trade with Italy, done in Rome on 18 February 1983.

1831 Slovenia's Reply, paras 4.52-56.

1832 Slovenia's Counter-Memorial, para. 9.29.

1833 Slovenia's Counter-Memorial, para. 9.30.

959. Slovenia also asserts its historic exercise of police jurisdiction over maritime areas lying south of Croatia's proposed boundary.[1834] According to Slovenia, "for a significant period of time prior to independence, Slovenian authorities exercised jurisdiction off the west-facing coast of the Istrian Peninsula," covering a "significant part of the area within which Slovenia's traditional fishing rights were focused."[1835] In this regard, Slovenia cites examples of its maritime police activities "[f]ollowing the Second World War . . . as far south as Novigrad."[1836] In Slovenia's view, it is significant that their the jurisdiction of Slovenian police and judicial authorities "over this area was acknowledged by federal Yugoslav authorities responsible for maritime security in general."[1837] Furthermore, Slovenia argues that "Slovenian police continued to control a maritime area extending well south and west of Croatia's equidistance line following independence."[1838]

960. In respect of Slovenia's claim to historic fishing rights in the SOPS/LBTA, Croatia argues that the Parties' relevant fishing rights derive only from the Croatian Accession Treaty amending the EU Fisheries Regulation for the Mediterranean.[1839] Croatia also asserts that the 1994 and 1995 Fisheries Agreements do not evidence historic fishing rights, as they were commercial agreements that were, in each case, concluded for one year only.[1840]

961. Croatia also disputes the suggestion that Slovenia could have legally established an historic title before gaining independence as a subject of international law.[1841] Even if this were possible in principle, Croatia asserts the impossibility of reconciling Slovenia's claim with "Croatia's historic title over the same maritime area."[1842] On both points, Croatia argues that Slovenia has failed to produce substantial evidence of its alleged historic title.[1843]

1834 Slovenia's Counter-Memorial, para. 9.33.

1835 Slovenia's Counter-Memorial, para. 9.34.

1836 Slovenia's Counter-Memorial, paras 9.36-41.

1837 Slovenia's Counter-Memorial, para. 9.44.

1838 Slovenian Reply, paras 4.33, 4.35-36, *citing* Note of the Ministry of Foreign Affairs of the Republic of Slovenia No. 111-93/SD-481 with the Pro Memoria, Record of Border Preservation on Sea with enclosed Map sent to Embassy of the Republic of Croatia in Ljubljana, 14 January 1993, SR, Annex SI-962; Ministry of Internal Affairs of the Republic of Slovenia: Report regarding Violation of the Territorial Sea and the Air Space of the Republic of Slovenia, 9 February 1993, SR, Annex SI-963.

1839 Croatia's Reply, para. 6.35; Transcript, Day 2, p. 145:13-17.

1840 Croatia's Reply, para. 6.36.

1841 Croatia's Counter-Memorial, para. 8.229.

1842 *Ibid*, *citing* Slovenia's Memorial, para. 10.43.

1843 Croatia's Counter-Memorial, para. 8.229.

(c) Existence of Special Circumstances

962. Croatia frames the concept of "special circumstances" narrowly and cautions against transposing case law and State practice concerning "special" or "relevant" circumstances in the delimitation of the exclusive economic zone ("EEZ") or the continental shelf to the different context of the delimitation of the territorial sea.[1844] Hence, it is "only in the most exceptional cases that equidistance will not form the basis of the boundary between overlapping claims to territorial sea."[1845]

963. Slovenia on the other hand notes that there are "a number of geographic factors as well as the economic and security interests of Slovenia" that should be taken into account as "special circumstances."[1846] Moreover, Slovenia contends that "taken both individually and collectively, these factors [including also historic title] justify delimiting the territorial sea boundary using a method tailored to the particular circumstances."[1847]

964. The Parties disagree as to whether certain geographic factors qualify as "special circumstances" under UNCLOS Article 15. Slovenia asserts that its coast is "squeezed between those of its neighbours";[1848] that its coast includes two distinct concave areas, in the proximity of Piran and in the proximity of Koper, and that it is situated along a part of the Adriatic coastline which is itself concave;[1849] and that the use of an equidistance line to delimit the Parties' territorial seas "would produce a major cut-off effect on Slovenia's maritime entitlement, and would not achieve an equitable result."[1850] In addition, Slovenia argues that its security interests constitute a separate "special circumstance" within the meaning of UNCLOS Article 15.

i. The "Squeezing Effect"

965. In addressing the overall geographic context of the Tribunal's delimitation,[1851] Slovenia argues that the Adriatic Sea constitutes an "enclosed or semi-enclosed sea" within the meaning of

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1844 Croatia's Memorial, para. 9.66; Transcript, Day 2, p. 140:4-10, *citing Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, ITLOS Case No. 16, Judgment of 14 March 2012, para. 150.

1845 Croatia's Memorial, para. 9.66; Transcript, Day 2, p. 140:10-13.

1846 Slovenia's Memorial, para. 10.10; Transcript, Day 4, p. 40:7-11.

1847 Slovenia's Memorial, para. 10.10.

1848 Slovenia's Memorial, para. 10.13.

1849 Slovenia's Memorial, para. 10.13; Slovenia's Counter-Memorial, para. 9.10; Transcript, Day 4, p. 32:5-11.

1850 Slovenia's Memorial, para. 10.13; Transcript, Day 4, p. 39:12-15.

1851 Slovenia's Memorial, para. 10.14; Transcript, Day 4, p. 29:17-20.

UNCLOS Article 122.[1852] Slovenia points to the judgment of the ICJ in *Libya/Malta*, in which the Court stated that "[i]n a semi-enclosed sea like the Mediterranean, that reference to neighbouring States is particularly apposite, for, as will be shown below, it is the coastal relationships in the whole geographical context that are to be taken account of and respected."[1853] The ICJ went on to note that it "has also to look beyond the area concerned in the case, and consider the general geographical context in which the delimitation will have to be effected."[1854]

966. Slovenia asserts that it possesses "a very limited coastal front . . . circumscribed by an extremely concave coastline comprising the coasts of Croatia and Italy lying on either side of Slovenia's coast as well as by Italy's coast lying opposite."[1855] In particular, Slovenia cites the length of its neighbours' Adriatic coastal fronts (approximately 1,700 km and 1,200 km, for Croatia and Italy respectively), the widening of the Adriatic to the south of Slovenia (enlarging the distance between the coasts of Croatia and Italy to up to 55 NM), and the presence of many Croatian islands capable of generating additional maritime entitlements.[1856] As such, Slovenia claims that "unlike Slovenia, Croatia enjoys substantial maritime areas over which it can exercise sovereignty and sovereign rights south of the area to be delimited with Slovenia."[1857]

967. Slovenia notes that, conversely, it has "no opportunity to enjoy the full maritime entitlements generated by its coast" due to the presence of Italy's maritime entitlements, as delimited in the 1975 Treaty of Osimo.[1858] Italy's coast lying opposite to that of Slovenia is only about 11 NM away, and the part of the Treaty of Osimo boundary line that lies between those coasts is for the most part less than five miles from Slovenia's coast.[1859] By contrast, Croatia—also a successor to the Treaty of Osimo—suffers no such "squeezing effect", as the west coast of Istria lies on average more than 50 NM from the opposite Italian coast.[1860] These overall geographic factors, Slovenia

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1852 Slovenia's Memorial, para. 10.14, *citing* UNCLOS Article 122.

1853 Slovenia's Memorial, para. 10.15; Transcript, Day 4, pp. 29:21-30-1, *citing Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p.13 at p. 40, para. 47.

1854 Slovenia's Memorial, para. 10.15, *citing Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 13 at p. 50, para. 69.

1855 Slovenia's Memorial, para. 10.16.

1856 Slovenia's Memorial, para. 10.17.

1857 *Ibid.*; Transcript, Day 4, p. 31:10-13.

1858 Slovenia's Memorial, para. 10.20.

1859 *Ibid*.

1860 Slovenia's Memorial, para. 10.21.

urges, must be borne in mind by the Tribunal in determining a "maritime boundary between the Parties that produces an equitable result."[1861]

968. Croatia rejects the notion that geographic factors "squeezing" Slovenia's maritime space between those of Croatia and Italy justify a departure from equidistance delimitation under UNCLOS Article 15.[1862] Croatia regards as fundamentally flawed and "of no legal significance" Slovenia's assertion that its maritime boundary with Italy under the Treaty of Osimo deprives it of "the full maritime entitlements generated by its coast" to the north and west.[1863] Rather, Croatia argues that "[a] State's entitlement to a territorial sea is not absolute; it is conditioned by the entitlement of another State with an opposite or adjacent coastline."[1864] Croatia therefore rejects the principle of "full maritime entitlements" as articulated by Slovenia.[1865]

969. Croatia moreover criticizes what it perceives to be Slovenia's inequitable application of this principle[1866] in such a way as "to respect Italy's maritime entitlements but deprive Croatia's [*sic*] of its entitlements in the southern sector."[1867] Croatia characterizes Slovenia's position as an attempt to compensate a State's respect for one neighbour's maritime entitlement by reducing another neighbour's maritime entitlement, and argues that such an approach has no legal basis within UNCLOS Article 15.[1868]

ii. Coastal Concavity

970. Slovenia argues that the "concave nature of the coast at the northern end of the Adriatic along which Slovenia's coast is situated" constitutes a special circumstance within the meaning of UNCLOS Article 15.[1869] Slovenia relies on the case law of the ICJ for the premise that "special circumstances are those circumstances which might modify the result produced by the unqualified

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1861 Slovenia's Memorial, para. 10.22.

1862 Croatia's Counter-Memorial, para. 8.215, *citing* Slovenia's Memorial, paras 10.20, 10.21.

1863 Croatia's Counter-Memorial, para. 8.216; Transcript, Day 2, p. 141:5-7.

1864 Croatia's Counter-Memorial, para. 8.216; Transcript, Day 2, p. 141:1-4.

1865 Croatia's Counter-Memorial, para. 8.216, *citing* Slovenia's Memorial, para. 10.20; Transcript, Day 2, pp. 140:19-141:1.

1866 Croatia's Counter-Memorial, para. 8.216.

1867 Croatia's Counter-Memorial, para. 8.216; Transcript, Day 2, p. 141:11-16.

1868 Croatia's Counter-Memorial, para. 8.216; Transcript, Day 2, p. 141:16-18. *Cf.* Croatia's Counter-Memorial, para. 8.217, *referring to* Slovenia's Memorial para. 8.15.

1869 Slovenia's Memorial, paras 10.23-24.

application of the equidistance principle,"[1870] as well as for the particular need to account for concave coasts in order to avoid unreasonable results.[1871]

971. Slovenia additionally relies upon the arbitral decision in the *Guinea/Guinea-Bissau Maritime Delimitation Case* for the premise that a concave coastline shared by three adjacent States renders the middle country "enclaved" by its neighbours when the equidistance method is applied, resulting in the middle country being "prevented from extending its maritime territory as far seaward as international law permits."[1872] By way of illustration, Slovenia also provides a comparison of Slovenia's geographical position with other instances of delimitation where the existence of concave coasts has been considered a relevant circumstance.[1873]

972. Slovenia asserts that while Croatia's written submissions acknowledge the concavity of the Slovenian coast, Croatia's maps proposing delimitation by application of the equidistance line "carefully truncate the maritime area" depicted,[1874] eliminating from view the extent to which equidistance delimitation would leave Slovenia "enclaved".[1875] Slovenia rejects Croatia's description of the coastline within the Bay as "unexceptional"[1876] and asserts that "Croatia's equidistance claim line . . . takes no account of the geographical setting in the relevant area, which lies outside [the Bay]."[1877]

973. Slovenia therefore argues that this Tribunal should arrive at an equitable solution in the present case either by rejecting the application of the equidistance method altogether[1878] or by significantly adjusting an equidistance line to abate the effect of concave coasts.[1879] While

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1870 Slovenia's Memorial, para. 10.23, *citing Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, p. 38 at p. 62, para. 55.

1871 Slovenia's Memorial, para. 10.24, *citing North Sea Continental Shelf (Federal Republic of Germany/Denmark)*, Judgment, I.C.J. Reports 1969, p. 3 at p. 49, para. 89(a) (noting that the Court in this case observed that "it has been seen in the case of concave or convex coastlines that if the equidistance method is employed, then the greater the irregularity and the further from the coastline the area to be delimited, the more unreasonable are the results produced.").

1872 Slovenia's Memorial, paras 10.25-26, *citing Guinea/Guinea-Bissau Maritime Delimitation Case, International Law Reports*, Vol. 77, p. 682, para. 104.

1873 Transcript, Day 4, pp. 37:25-38:7.

1874 Slovenia's Counter-Memorial, paras 9.06-07.

1875 Slovenia's Counter-Memorial, para. 9.07; Slovenia's Memorial, para. 10.25.

1876 Slovenia's Counter-Memorial, para. 9.08; Transcript, Day 4, p. 37:3-9.

1877 Slovenia's Counter-Memorial, para. 9.08.

1878 Slovenia's Memorial, para. 10.27, *citing North Sea Continental Shelf (Federal Republic of Germany/Denmark)*, Judgment, I.C.J. Reports 1969, p. 3 at p. 53, para. 101(A). *See also* Slovenia's Counter-Memorial, para. 8.34.

1879 Slovenia's Memorial, para. 10.27, *citing Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, ITLOS Case No. 16, Judgment of 14 March 2012, paras 297 and 325.

Slovenia recognizes that the case law concerning the "squeezing effect" of equidistance delimitation lines emanating from concave coastlines has thus far involved the delimitation of areas beyond the territorial sea, it argues that "the reasons for taking this circumstance into account are even more compelling in the present case given that what is at stake for Slovenia is its entitlement to a territorial sea area over which it has sovereignty, not simply sovereign rights."[1880]

974. Croatia refers to the case law of the International Tribunal for the Law of the Sea ("ITLOS") to support its argument that concavity is "only a relevant circumstance in relation to the delimitation of the exclusive economic zone and the continental shelf,"[1881] given the "juridical character of the delimitation exercise."[1882] By contrast, Croatia asserts that concavity has no legal significance in the delimitation of territorial seas under UNCLOS Article 15, which reflects the "primacy of the median line as the delimitation line between the territorial seas of opposite or adjacent States."[1883] Croatia also cites scholarly commentary to the effect that the "presumption of equidistance [is] justified by the comparatively small distances involved" in territorial sea delimitation.[1884] For these reasons, Croatia concludes that "[t]he threshold—and the criteria—for departure from the equidistance line in delimiting the territorial sea by reference to a 'special circumstance' in Article 15 of [UNCLOS] is clearly much higher" than for departure from equidistance in other maritime zones.[1885]

975. Croatia emphasises that any such concavity is legally irrelevant to the Tribunal's task in delimiting the territorial sea.[1886] Moreover, Croatia notes that, under the case law of the ICJ, any alleged concavity must be "within the area to be delimited" in order to bear on the delimitation.[1887]

1880 Slovenia's Memorial, para. 10.28; Transcript, Day 4, p. 39:2-15.

1881 Transcript, Day 2, p. 142:11-14.

1882 Croatia's Counter-Memorial, para. 8.219, *citing Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, ITLOS Case No. 16, Judgment of 14 March 2013.

1883 Croatia's Counter-Memorial, para. 8.220, *citing Delimitation of Maritime Boundary between Guyana and Suriname*, P.C.A. Case No. 2004-04, Award of 17 September 2007, para. 296.

1884 Croatia's Counter-Memorial, para. 8.220; Transcript, Day 2, pp. 142:18-143:2, *citing* James Crawford, *Brownlie's Principles of Public International Law*, p. 283 (2012).

1885 Croatia's Counter-Memorial, para. 8.220.

1886 Croatia's Counter-Memorial, para. 8.222.

1887 Croatia's Counter-Memorial, para. 8.223, *citing Land and Maritime Boundary (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 303 at pp. 445-46, para. 297.

On this basis, Croatia asks the Tribunal to disregard Slovenia's discussion of geographic factors such as concavity, which exist outside of the area to be delimited.[1888]

iii. The "Cut-Off Effect"

976. Slovenia asserts that variance from the equidistance method is essential to avoid a "cut-off effect" on Slovenia's maritime entitlements.[1889] Slovenia argues that "when an equidistance line drawn between two States produces a cut-off effect . . . as a result of the concavity of the coast, then an adjustment of that line may be necessary in order to reach an equitable result."[1890]

977. However, Slovenia distinguishes the cut-off effect in the present case from the general circumstance of concave coasts.[1891] Slovenia argues that an instance such as the present may require a "significant adjustment or shifting of the provisional equidistance line in order to produce an equitable result."[1892]

978. In the present case, Slovenia notes that an equidistance line drawn seaward of the Bay, controlled by basepoints situated at Cape Savudrija on the Croatian side of the Bay, would produce a "manifestly inequitable" result.[1893] According to Slovenia, Croatia's proposal to place basepoints at "the tip of Cape Savudrija where the Istrian peninsula extends furthest into the sea" creates a "severe cut-off effect" and fails to take account of the differences between the Parties' respective coastlines.[1894]

979. Slovenia submits that the concave nature of the coasts and the presence of the Savudrija promontory, when coupled with an equidistance delimitation, would leave Slovenia "no more than a minuscule area of territorial sea," which would at no point extend to 12 NM.[1895] Slovenia asserts that the potential cut-off effect on its territorial sea—in contrast with the resulting Croatian territorial sea of 12 NM from its west-facing Istrian coast—is considerably more severe than the

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1888 Croatia's Counter-Memorial, para. 8.224; Transcript, Day 2, p. 143:3-9.

1889 Slovenia's Memorial, para. 10.29.

1890 Slovenia's Memorial, para. 10.30, *citing Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, ITLOS Case No. 16, Judgment of 14 March 2012, paras 297 and 325.

1891 Slovenia's Memorial, para. 10.31.

1892 Slovenia's Memorial, para. 10.31, *citing Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p, 61 at p. 127, para. 201 (observing that "the line of delimitation should allow the coasts of the Parties to produce their effects in terms of maritime entitlements in a reasonable and mutually balanced way").

1893 Slovenia's Memorial, paras 10.32-33.

1894 Slovenia's Counter-Memorial, para. 9.10.

1895 Slovenia's Memorial, para. 10.33.

situation in the *North Sea* cases, in which the ICJ rejected the application of equidistance methodology as a mandatory principle of delimitation.[1896]

980. Slovenia also directs the Tribunal's attention to State practice in the delimitation of the maritime boundary between Malaysia and Brunei.[1897] Slovenia likens the Croatian promontory of Cape Savudrija to the Malaysian promontory of Tanjong Baram, and characterizes the abandonment of equidistance in the agreement between Malaysia and Brunei as a measure to remedy the cut-off effect of an equidistance boundary.[1898] Slovenia thus asks this Tribunal to prevent what it characterizes as "an acute amputation of Slovenia's territorial sea" through equidistance methodology.[1899]

981. Finally, Slovenia rejects Croatia's contention that "concave coasts and the cut-off effect produced by coastal anomalies have no role to play as special circumstances in territorial sea delimitation" as inconsistent with the dominant role that geography plays in delimitation jurisprudence.[1900]

982. In addressing the question of whether coastal geography disproportionately affects any equidistance boundary between the Parties' territorial seas, Croatia rejects as irrelevant Slovenia's reliance upon case law concerning continental shelf and EEZ delimitation.[1901] Croatia also states that Slovenia's submissions inequitably give effect to Slovenia's sovereignty over Cape Madona without granting similar effect to Croatia's sovereignty over Cape Savudrija.[1902]

983. As regards the alleged "cut-off effect" of equidistance delimitation, Croatia echoes arguments it has raised elsewhere, notably that Slovenia's reference to "the concave nature of the overall coastline in the region" is irrelevant to the delimitation of territorial seas,[1903] and that Slovenia fundamentally misinterprets UNCLOS Article 3 as guaranteeing States a "'right' to a territorial sea extending to 12 nautical miles."[1904] According to Croatia, Slovenia's latter argument—if taken to its logical conclusion—would lead to the application of the "cut-off" principle "every

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1896 Slovenia's Memorial, paras 10.33-34, *citing North Sea Continental Shelf* , Judgment, I.C.J. Reports 1969, p. 3.

1897 Slovenia's Counter-Memorial, para. 9.11.

1898 Slovenia's Counter-Memorial, para. 9.12.

1899 Slovenia's Memorial, para. 10.35.

1900 Transcript, Day 7, p. 69:5-14.

1901 Croatia's Counter-Memorial, para. 8.225; Transcript, Day 7, p. 143:16-20.

1902 Croatia's Counter-Memorial, para. 8.227; Transcript, Day 2, p. 144:11-14; Day 7, p. 143:20-24.

1903 Croatia's Counter-Memorial, para. 8.227; Transcript, Day 2, p. 144:7-11.

1904 Croatia's Counter-Memorial, para. 8.227; Transcript, Day 2, p. 144:16-20; Day 7, pp. 143:44-144:4. *See also* Croatia's Counter-Memorial, paras 8.212-13, 8.233.

time there was an overlap in the 12-nautical mile territorial sea projections from the coasts of States with opposite coasts," rendering UNCLOS Article 15 "meaningless".[1905]

iv. Security and Navigational Interests

984. In addition to the geographic circumstances outlined above, the Parties disagree as to whether security interests may constitute a separate "special circumstance" within the meaning of UNCLOS Article 15.

985. Slovenia refers to UNCLOS Articles 19 and 25(2) in asserting that territorial sea sovereignty is closely linked with coastal State security interests, "particularly when the delimitation is effected near to the coast."[1906] Slovenia also argues that the judgments of the ICJ in *Libya/Malta* and *Greenland-Jan Mayen*[1907] recognized security interests as a potentially relevant circumstance for delimitation. Such interests did not influence the ultimate course of the delimitation line in those cases "because the area being delimited was situated beyond the territorial sea at a considerable distance from the parties' coasts."[1908] Slovenia cites the judgment in *Nicaragua v. Colombia*, in which the ICJ stated that "legitimate security concerns might be a relevant consideration if a maritime delimitation was effected particularly near to the coast of a State."[1909] Slovenia also cites arbitral awards for the premise that "factors such as convenience and the ability for each Party so far as possible to navigate in its own water are to be taken into account" as additional circumstances justifying the extension of territorial seas to 12 NM.[1910]

986. Slovenia asserts that it has "an overriding interest in ensuring its security given its geographic situation" in light of "the restrictive nature of Croatia's territorial sea legislation."[1911] Slovenia also emphasises "its economic dependency on the sea" and "the importance of its commercial

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1905 Croatia's Counter-Memorial, para. 8.227.

1906 Slovenia's Memorial, para. 10.36-37, *referencing* UNCLOS Articles 19 and 25(2) and *citing Guinea/Guinea-Bissau Maritime Delimitation Case, International Law Reports*, Vol. 77, p. 689, para. 124, in which the tribunal noted that "[i]ts prime objective has been to avoid that either Party, for one reason or another, should see rights exercised opposite its coasts . . . which could prevent the exercise of its own right to development or compromise its security"; Transcript, Day 7, p. 68:8-15.

1907 Transcript, Day 4, p. 40:15-17.

1908 Slovenia's Memorial, paras 10.38-39; Transcript, Day 4, p. 17-20, *citing Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 13 at p. 42, para. 51; *Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judgment, I.C.J. Reports 1993, p. 38 at p. 75, para. 81.

1909 Slovenia's Memorial, para. 10.40; Transcript, Day 4, p. 41:2-8, *citing Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment of 19 November 2012, para. 222.

1910 Slovenia's Counter-Memorial, para. 9.14, *citing Delimitation of Maritime Boundary between Guyana and Suriname*, P.C.A. Case No. 2004-04, Award of 17 September 2007, para. 305; *Beagle Channel*, *ILM*, Vol. 17, p. 673, para. 110 (1978).

1911 Slovenia's Memorial, para. 10.41.

activities associated with the port of Koper."[1912] On this basis, Slovenia argues that it "has a heightened interest in the security of maritime traffic proceeding to and from Koper and the safety of its coast."[1913] Slovenia thus asks this Tribunal to find that its "very serious security concerns off its coast" serve as an additional circumstance justifying its entitlement to a 12 NM reach of territorial sea.[1914]

987. In response to Slovenia's reliance on security considerations, Croatia disputes Slovenia's assertion of its "overriding interest in ensuring its security given its geographic situation," as unsupported by the facts.[1915]

988. Croatia also reiterates that Slovenia's reliance on case law concerning other maritime zones "to assert that 'security interests' are capable of being a 'special circumstance' under Article 15" is irrelevant to the Tribunal's delimitation of the Parties' territorial seas.[1916]

(d) Course of the Maritime Boundary

989. Croatia asserts that the area of delimitation includes the sea and submarine area inside the Bay, extending from its mouth to the boundary with Italy.[1917] According to Croatia, the delimitation of this area is straightforward "by virtue of the unexceptional geographical features of the adjacent and opposite coasts within the Bay, which become adjacent outside the Bay."[1918] In particular, there are no islands, coastline indentions, elevations or established sea lanes in the area.[1919] As such, Croatia requests an equidistance line drawn from the land boundary terminus as identified by Croatia and illustrated in its Memorial in Figure 9.5.[1920] According to Croatia, "international jurisprudence confirms that four steps are to be followed" when delimitating the territorial sea: (i) "the relevant coasts of the parties are determined"; (ii) "the location of the baselines is

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1912 Slovenia's Memorial, para. 8.29; Slovenia's Counter-Memorial, para. 9.13. *See also* Slovenia's Memorial, para. 9.22.

1913 Slovenia's Counter-Memorial, para. 9.13.

1914 Slovenia's Memorial, para. 10.41; Slovenia's Counter-Memorial, para. 9.13; Transcript, Day 4, p. 41:10-16.

1915 Croatia's Counter-Memorial, para. 8.228, *citing* Slovenia's Memorial, para. 10.41; Transcript, Day 2, p. 144:5-18.

1916 Croatia's Counter-Memorial, para. 8.228; Transcript, Day 2, p. 144:21-24.

1917 Croatia's Memorial, para. 9.12.

1918 Croatia's Memorial, para. 9.13; Transcript, Day 2, pp. 75:17-76:2.

1919 Croatia's Memorial, para. 9.13.

1920 Croatia's Memorial, para. 9.15.

established"; (iii) "basepoints are identified to enable an equidistance line to be plotted"; and (iv) "an equidistance line is then plotted, on a provisional basis."[1921]

990. In Croatia's view, "Slovenia's submissions [on the delimitation of the territorial sea beyond the Bay] are premised upon an extraordinary and novel claim to the entire waters of the Bay of Savudrija/Piran."[1922] Since Croatia does not consider the Bay to constitute internal waters but territorial sea, Croatia marks the baseline of its territorial sea delimitation at the mouth of the Bay from the point at which the land boundary touches the sea (45°28′42.3″N - 13°35′08.5″E).[1923] According to Croatia, there are no straight baselines within the Bay which should be taken into account for the construction of an equidistance line.[1924] Plotting an equidistance line based on the most seaward points on the respective coasts of the Parties, Croatia proposes an equidistance line stretching from the mouth of the St Odoric Canal over the course of 27 turning points—based on 15 Croatian coastal basepoints, and 13 Slovenian basepoints—until reaching the Treaty of Osimo delimitation line established between Italy and the SFRY, as indicated in Figure 9.6A of Croatia's Memorial.[1925]

991. Croatia alternatively proposes a simplification of this line, in light of the Bay's various uses and the practical enforcement of such a precise delimitation.[1926] Under this simplification, as depicted in Figure 9.7 of Croatia's Memorial (reproduced below), Slovenia gains maritime territory within the Bay, which is offset by a corresponding gain of territory for Croatia beyond the Bay.[1927] The result is an equidistance line with only one turning point.[1928]

1921 Croatia's Memorial, para. 9.10.

1922 Croatia's Counter-Memorial, para. 8.206.

1923 Croatia's Memorial, para. 9.18.

1924 Croatia's Memorial, para. 9.18; Transcript, Day 2, p. 110:13-16.

1925 Croatia's Memorial, paras 9.19-20; Transcript, Day 2, pp. 110:23-111:6.

1926 Croatia's Memorial, para. 9.21; Transcript, Day 2, p. 112:6-11.

1927 Croatia's Memorial, para. 9.21; Transcript, Day 2, p. 112:13-16.

1928 Croatia's Memorial, para. 9.21; Transcript, Day 2, p. 112:16-19.

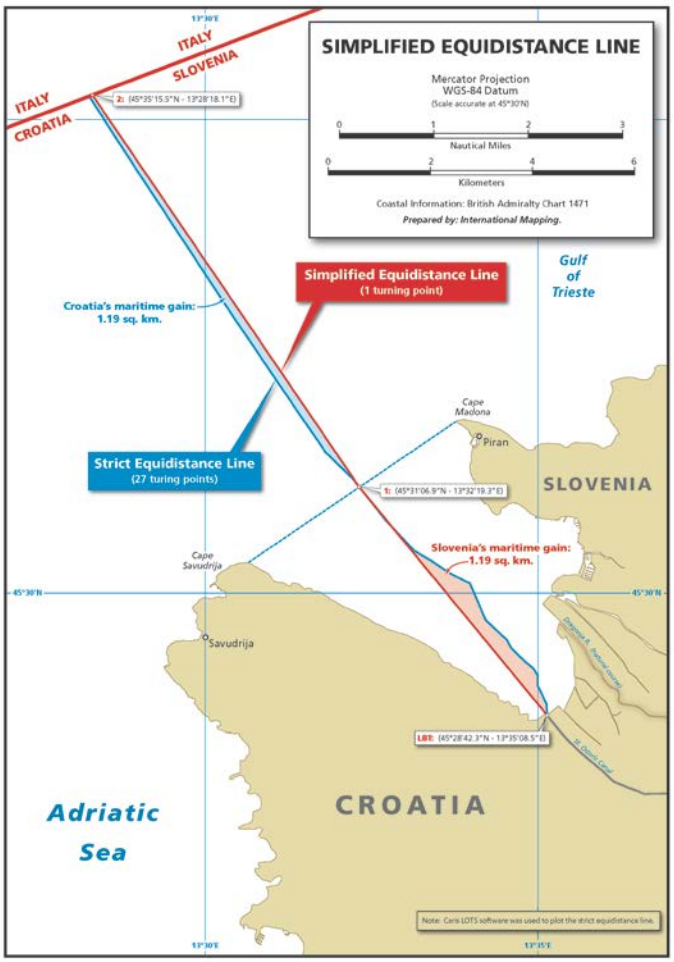

Figure 9.7

(Croatia's Memorial, Figure 9.7)

992. On the grounds that the Bay constitutes Slovenian internal waters, Slovenia asserts that the delimitation of the Parties' territorial seas starts from the point of intersection between the Bay's closing line and the low-water line at Cape Savudrija, as indicated in Figure 10.3 from Slovenia's Memorial (reproduced below).[1929]

1929 Slovenia's Memorial, para. 10.48.

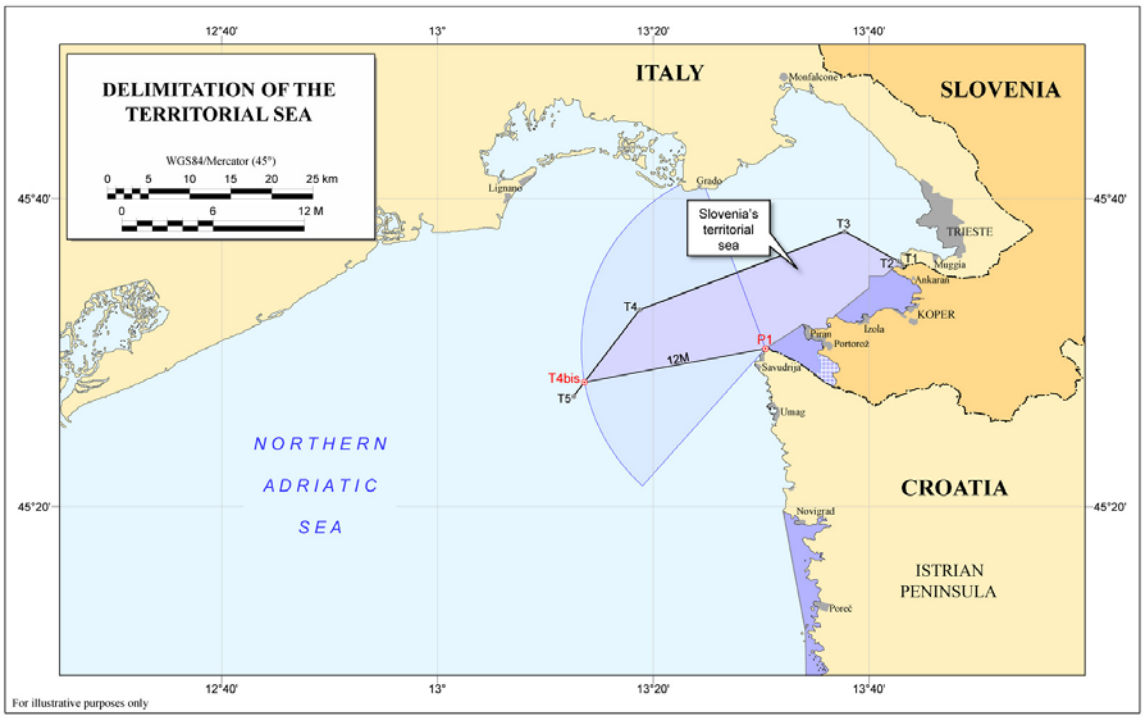

Figure 10.3

(Slovenia's Memorial, Figure 10.3)

993. On the basis of its interpretation of UNCLOS Articles 3 and 15, Slovenia asserts that the next step in the delimitation process is to draw a circle centred on this basepoint, P1, with a radius of 12 NM, which cuts the existing line of delimitation under the Treaty of Osimo at a point, T4bis, 12 NM from P1. Slovenia's approach is illustrated in Figure 10.3.[1930] According to Slovenia, this is because "[t]he only area where, because of the concavity of the coast, Slovenia can enjoy a full 12-mile territorial sea is to the west-south-west."[1931]

994. Slovenia considers that such an approach accommodates its historic title, as well as special circumstances such as the mitigation of a cut-off effect and the recognition of the concavity of the coastline.[1932] Slovenia asserts that this approach preserves its security interests and "takes at least some account of Slovenia's historic enjoyment of much more extensive territorial sea rights under

1930 Slovenia's Memorial, paras 10.49-50; Transcript, Day 4, p. 43:1-10.

1931 Transcript, Day 4, p. 43:2-5.

1932 Slovenia's Memorial, paras 10.51-52; Transcript, Day 4, p. 43:11-16.

the former Yugoslavia."[1933] Moreover, it "allocates to each Party territorial sea areas that lie off their coasts in a reasonable and mutually balanced manner."[1934] Slovenia also submits that this territorial sea boundary is "consistent with the conduct of the parties before the 1991 critical date," such as Slovenia's assertion of jurisdiction over a joint fishing zone pursuant to an agreement which entered into force in 1987 and Slovenia's exercise of police jurisdiction "well south of the equidistance line."[1935]

995. Slovenia notes that its proposed solution, which permits each Party a territorial sea reaching 12 NM, finds precedent in State practice such as the delimitation agreement between France and Monaco.[1936] Slovenia notes that the application of equidistance methodology would have cut off Monaco's territorial sea well before reaching the 12 NM limit.[1937] To avoid this result, Monaco and France negotiated a corridor of territorial sea corresponding to the width of Monaco's coastal front, providing "ships navigating to and from Monaco with direct access to the high seas without passing through the territorial sea of other States."[1938]

996. Slovenia thus submits that its proposed territorial sea delimitation—in conjunction with its proposed corridor to the high seas—produces an equitable result in keeping with UNCLOS Article 15, which reflects State practice concerning special circumstances.[1939] Slovenia emphasises the equitable nature of its proposed boundary on grounds that it: (i) "accords to each Party a territorial sea that extends out to the 12-nautical mile limit provided under international law";[1940] (ii) "abates the effect of the concave nature of the coast, which squeezes Slovenia";[1941] (iii) "allows [Slovenia] to retain sovereignty over the maritime area that is situated off its coast to the west";[1942] (iv) "reflects the long-standing territorial sea rights that it enjoyed under the former Yugoslavia in a reasonable and balanced way";[1943] (v) "fully satisfies the 'disproportionality' test based on the length of each Party's relevant coastal front";[1944] and (vi) "provides a solid and

1933 Transcript, Day 4, p. 43:17-23.
1934 Slovenia's Memorial, para. 10.53.
1935 Transcript, Day 4, pp. 43:24-46:5.
1936 Slovenia's Memorial, para. 10.55.
1937 Slovenia's Memorial, paras 10.56-57.
1938 Slovenia's Memorial, para. 10.57.
1939 Slovenia's Memorial, paras 10.131-33.
1940 Slovenia's Counter-Memorial, para. 9.80.
1941 Slovenia's Counter-Memorial, para. 9.81.
1942 Slovenia's Counter-Memorial, para. 9.82.
1943 Slovenia's Counter-Memorial, para. 9.83.
1944 Slovenia's Counter-Memorial, para. 9.84.

principled foundation for determining Slovenia's junction to the High Sea,"[1945] which it argues is "inextricably connected" to the territorial sea boundary.[1946]

2. The Tribunal's Analysis

997. The rule applicable to the delimitation of the territorial sea between Croatia and Slovenia, which reflects well-established international law,[1947] is set out in UNCLOS Article 15. It states that:

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

998. The rule applicable under UNCLOS to delimitation of maritime zones beyond the territorial sea is set out in Articles 74(1) and 83(1), which are materially identical to one another and provide that:

> 1. The delimitation of the [exclusive economic zone / continental shelf] 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.

999. The ICJ has developed a settled jurisprudence relating to the interpretation of those provisions. In a recent decision it said:

> The methodology which the Court usually employs in seeking an equitable solution involves three stages. In the first, it constructs a provisional equidistance line unless there are compelling reasons preventing that. At the second stage, it considers whether there are relevant circumstances which may call for an adjustment of that line to achieve an equitable result. At the third stage, the Court conducts a disproportionality test in which it assesses whether the effect of the line, as adjusted, is such that the Parties' respective shares of the relevant area are markedly disproportionate to the lengths of their relevant coasts.[1948]

1000. In relation to the delimitation both of the territorial sea and of the maritime zones beyond the territorial sea, international law thus calls for the application of an equidistance line, unless

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1945 Slovenia's Counter-Memorial, para. 9.85.

1946 Slovenia's Counter-Memorial, para. 9.87.

1947 *See e.g.*, the Commentary to Article 15 in S.N. Nandan and S. Rosenne (eds), *United Nations Convention on the Law of the Sea 1982. A Commentary*, Vol. II, pp. 132–43 (1993); D.P. O'Connell, *The International Law of the Sea*, Vol. II, (I.A. Shearer, ed., 1984), ch. 17.

1948 *Maritime Dispute (Peru* v. *Chile)*, Judgment, I.C.J. Reports 2014, p. 3 at p. 66, para. 180, *citing Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61 at pp. 101-03, paras 115-22; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012, p. 624 at pp. 695-96, paras 190-93.

another line is required by special circumstances. That is reflected in the practice of the ICJ, which has applied the 'equidistance / special circumstances' approach in the drawing of single maritime boundaries without distinguishing between its application to the territorial sea and its application beyond the territorial sea.[1949] Similarly, scholars have observed in relation to the territorial sea, the exclusive economic zone, and the continental shelf that "they all seem to be delimited by common principles regardless of their differing legal nature and legal regime."[1950] This convergence of the principles applicable to the territorial sea and to other maritime zones is further evidenced by the fact that a maritime boundary may separate adjacent maritime zones of different juridical character, such as the territorial sea of State A and the exclusive economic zone of State B.[1951]

1001. The "equidistance line" is the line every point of which is equidistant from the nearest point on the baselines of the States between which the boundary is to be drawn in accordance with international law. UNCLOS Article 18 obliges States Parties to publicise charts depicting the baseline or lists specifying the geographical coordinates of basepoints used in the construction of straight baselines.

1002. Consistently with the practice of the ICJ, the Tribunal will accordingly begin the task of maritime delimitation by considering the equidistance line between Croatia and Slovenia. In this regard, the Tribunal recalls that it has determined that the Bay consists of internal waters, and that there is a closing line across the mouth of the Bay, drawn in accordance with what was formerly the law of the SFRY. That closing line is the seaward limit of the boundary between Croatia and Slovenia within the Bay. The boundary intersects the closing line at Point A, whose coordinates are 45°30′41.7″N, 13°31′25.7″E. Because Point A marks the boundary between the Parties on the closing line in the Bay, Point A is also the starting point of the maritime boundary between them.

1003. Both Croatia and Slovenia submitted charts of a scale adequate for ascertaining the position of the baselines, and the Tribunal has referred to these charts in determining the position of the maritime boundary. Map III depicts the equidistance line drawn using all available basepoints on the coasts of Croatia and Slovenia, extending from Point A out to the intersection of that

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1949 *See e.g.*, *Maritime Dispute (Peru v. Chile)*, Judgment, I.C.J. Reports 2014, p. 3 at pp. 65-67, paras 178-83; *Land and Maritime Boundary (Cameroon v Nigeria)*, Judgment, I.C.J. Reports 2002, p. 303 at p. 441, para. 288.

1950 C. Yacouba & D. McRae, "The Legal Regime of Maritime Boundary Agreements," in *International Maritime Boundaries*, Vol. V, p. 3281 at p. 3920 (D.A. Colson & R.W. Smith eds., 2005).

1951 *See Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61 at p. 73, para. 26. *Cf.*, D. Colson, "The Legal Regime of Maritime Boundary Agreements", *in International Maritime Boundaries*, Vol. I, p. 41 at pp. 43-44 (J.I. Charney and L.M. Alexander eds., 1993).

equidistance line with the maritime boundary between Italy and Yugoslavia established by the Treaty of Osimo, 1975, at Point O.[1952]

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[1952] In the Treaty of Osimo, there are two sets of coordinates for the Osimo boundary line, each based upon different geodetic datums. They yield two different sets of coordinates even after being transformed into European Terrestrial Reference System 1989 (ETRS89). For its purposes only, the Tribunal has used the transformed Yugoslav coordinate system for its computations. In that coordinate system, the coordinates of Point O are: 45°35′05.5″N, 13°27′16.8″E.

EQUIDISTANCE LINE

Nautical Miles

5 0 5 10

Kilometers

5 0 5 10

Nominal Scale at Latitude 45°30'N - 1:400,000

Map III

Projection / Datum:
Mercator / ETRS89

Base map: © OpenStreetMap contributors.
This map is for illustrative purposes only.

1004. The question is whether this equidistance line should be adopted as the definitive maritime boundary, or whether, in the words of UNCLOS Article 15, "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" and to adjust the equidistance line accordingly.[1953]

1005. The Tribunal therefore continues its analysis by considering whether any special circumstance renders the equidistance line inapposite for the definitive maritime boundary. Slovenia considers that its position at the head of the Adriatic Sea and on the concave coast of the Gulf of Trieste, and the confinement of its territorial sea by the territorial seas of its neighbours, among other factors,[1954] constitute special circumstances such as to justify a departure from the equidistance principle. Slovenia also referred to the difference between the respective coastal lengths of Slovenia and Croatia.[1955]

1006. Slovenia argues that "[i]t is only towards the south and southwest that Slovenia has the possibility of enjoying any semblance of the traditional maritime entitlements it possessed as part of the SFRY."[1956] The Tribunal does not agree with that analysis. The "entitlements" towards the south and southwest to which Slovenia refers are entitlements that it had as a matter of the SFRY law to share and participate in the uses of the maritime zones of the SFRY:[1957] they were not entitlements of Slovenia in its own right to its own maritime zones, under international law. As a sovereign coastal State, Slovenia's entitlement is to the maritime zones generated by its own coastline alone, limited as that might be. It is very well established that international law cannot refashion nature by allocating to a State a maritime entitlement other than that generated by its own coastline.[1958]

1007. The proposals of the Parties concerning maritime boundaries are far apart. Croatia proposes the adoption of a strict equidistance line, drawn from the mouth of the Dragonja River, through the Bay, and out into the Gulf of Trieste.[1959] Slovenia proposes a line drawn from what it says is the furthest point of its territory, just off Cape Savudrija, to the point, west of the Cape, where a

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1953 *See Maritime Delimitation and Territorial Questions Between Qatar and Bahrain, Merits*, Judgment, I.C.J. Reports 2001, p. 40 at p. 104, para. 217; *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, ITLOS Case No. 16, Judgment of 14 March 2012, para. 129.

1954 Slovenia's Memorial, para. 8.29 and Chapter 10.

1955 Slovenia's Memorial, para. 10.19.

1956 Slovenia's Memorial, para. 10.21.

1957 As Slovenia recognizes: Slovenia's Memorial, para. 10.43.

1958 *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3 at p. 49, para. 91.

1959 Croatia's Memorial, para. 2.25.

12 NM arc would intersect the Treaty of Osimo line. Such a line would accord to Slovenia a full 12 NM territorial sea in that direction (but only in that direction). These lines are depicted on Map IV.

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CLAIMS OF THE PARTIES

Nautical Miles
5 0 5 10
Kilometers
5 0 5 10
Nominal Scale at Latitude 45°30'N - 1:400,000

Map IV

Projection / Datum:
Mercator / ETRS89

Base map: © OpenStreetMap contributors.
This map is for illustrative purposes only.

1008. In a delimitation of the territorial sea, it is necessary to accommodate two fundamental principles. The first is the principle of natural prolongation. As the ICJ said in the *North Sea Continental Shelf* cases, delimitations are to be effected "in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other [Party]."[1960] Though the Court spoke there in relation to the continental shelf, the principle is equally applicable to the territorial sea.[1961] Indeed, given that the outer edge of the territorial sea is, as a matter of law, the inner edge of the continental shelf, the principle of natural prolongation could not be secured in respect of the continental shelf unless it is also applied to the territorial sea.

1009. The second principle is, again in the words of the ICJ, that "the effects of an incidental special feature from which an unjustifiable difference of treatment could result"[1962] should be abated when effecting a maritime delimitation. The essential notion is that, in circumstances where particular local geographic features or configurations have a greatly exaggerated or magnified effect upon a delimitation, the delimitation should seek to mitigate that effect,[1963] though without violating the natural prolongation principle. A small or isolated feature should not have a greatly disproportionate adverse effect by swinging the delimitation line to the very substantial disadvantage of one State and advantage of the other State.

1010. These two principles are commonly reconciled without great difficulty. There is generally a margin of discretion within which a boundary line may be drawn without violating either principle. A boundary that follows a course that diverges slightly to one side or the other of an equidistance line, for example, is unlikely to violate the natural prolongation principle but may significantly mitigate adverse effects arising from strict adherence to the equidistance line.

1011. The Tribunal does not consider that the great difference between the lengths of the coastal fronts of Croatia and Slovenia is a special circumstance that calls for a departure from the equidistance line. Nor does it consider that the existence of historic titles that would warrant a departure from the equidistance line has been established. The Tribunal does, however, consider that certain features of the coastal configuration in the present case produce an exaggeratedly adverse effect

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1960 *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3 at p. 53, para. 101; *cf.* pp. 47-48, para. 85.

1961 The Court itself made clear that the principle applied to the maritime zones, such as the contiguous zone: *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3 at p. 51, para. 96.

1962 *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3 at p. 49, para. 91; *cf.* pp. 48-50, paras 88-89.

1963 *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3 at p. 49, para. 89.

if the strict equidistance line is used, and do constitute a special circumstance. That special circumstance is the fact that very close to Point A the coastline of Croatia turns sharply southwards around Cape Savudrija, so that the Croatian basepoints that control the equidistance line are located on a very small stretch of coast whose general (north-facing) direction is markedly different from the general (southwest-facing) direction of much the greater part of the Croatian coastline (as illustrated on the following map), and deflect the equidistance line very significantly towards the north, greatly exaggerating the "boxed-in" nature of Slovenia's maritime zone.

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GENERAL COASTAL PROJECTIONS

Nautical Miles
10 0 10 20
Kilometers
10 0 10 20
Nominal Scale at Latitude 45°00'N - 1:1,025,000

Map V

Projection / Datum:
Mercator / ETRS89

Base map: © OpenStreetMap contributors.
This map is for illustrative purposes only.

1012. While the Tribunal is not empowered to 'refashion nature', it considers that this factor does constitute a special circumstance that makes it necessary, within the framework of the provisions of UNCLOS regarding maritime delimitation, to have a maritime boundary that departs from the strict equidistance line. More specifically, the Tribunal considers that in circumstances such as these international law calls for the attenuation of the exaggerated 'boxing-in' or 'cut-off' effect that the strict application of the equidistance principle would produce in relation to Slovenia's waters. This approach is supported by the practice of international tribunals.[1964]

1013. The Tribunal does not consider the lines proposed by either of the Parties to be wholly consistent with the applicable rules and principles of international law. Croatia's proposed line does not take account of the special circumstances arising from the closed-in geographical configuration of the area. Slovenia's proposed line projects the Slovenian territorial sea at such an angle that it cannot properly be regarded as a part of the territorial sea generated by the Slovenian coast, rather than by the Croatian coastline in front of which it runs.

1014. The Tribunal has therefore decided that the equidistance line must be modified in order to attenuate the "boxing in" effect that results from the geographic configuration. There is no question of "compensating" Slovenia for that "boxed-in" condition: the Tribunal seeks only to ensure that in the drawing of the maritime boundary the particular configuration of Cape Savudrija in relation to the Slovenian coast does not disproportionately exacerbate Slovenia's boxed-in condition. The Tribunal has accordingly decided that the maritime boundary shall proceed northwest from Point A in a direction approximately parallel to the Treaty of Osimo line T2-T3,[1965] so as not to increase the "boxing-in" of Slovenia's maritime zone by narrowing Slovenia's territorial sea as it projects out into the Gulf of Trieste. Specifically, the maritime boundary is a geodetic line from Point A on the closing line across the mouth of the Bay, located at 45°30′41.7″N, 13°31′25.7″E, with an initial geodetic azimuth of 299°04′45.2″, to Point B on the

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1964 *See, e.g.*, *North Sea Continental Shelf cases*, I.C.J. Reports 1969, p. 3 at p. 51, paras 89-90; *Delimitation of the Maritime Boundary between Guinea and Guinea Bissau*, Decision of 14 February 1985, R.I.A.A. Vol. XIX pp. 149-96, p. 187 at paras 103-04; *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, (2012) ITLOS Case No. 16, Judgment of 14 March 2012, paras 292-97.

1965 For its own purposes only, the Tribunal considers the coordinates of T2 and T3 to be 45°35′56.01″N, 13°42′43.42″E and 45°37′53.58″N, 13°37′43.46″E, respectively, in the Yugoslav coordinate system. The azimuth from T2 to T3 is 299°12′49.1″ and the convergence of meridians between the longitudes of T2 and Point A is 0°08′03.9″ resulting in an azimuth of the parallel line at Point A of 299°04′45.2″. Azimuths in the present Award are clockwise from North.

line between T3 and T4 established by the Treaty of Osimo, located at 45°33′57.4″N, 13°23′04.0″E.[1966] The line is illustrated on Map VI.

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[1966] Similarly to the coordinates of T2 and T3, set out in note 1965, the coordinates of Point B, located on the Treaty of Osimo line, are calculated for the Tribunal's own purposes only in accordance with the Yugoslav coordinate system.

MARITIME BOUNDARY

Nautical Miles
2 0 2 4 6
Kilometers
2 0 2 4 6
Nominal Scale at Latitude 45°30'N - 1:250,000

Map VI

Projection / Datum:
Mercator / ETRS89

Base map: © OpenStreetMap contributors.
This map is for illustrative purposes only.

C. DETERMINATION OF "SLOVENIA'S JUNCTION TO THE HIGH SEA"

1015. Turning to the Tribunal's task under Article 3(1)(b), the determination of Slovenia's junction to the high seas, the Tribunal notes at the outset that both Croatia and Slovenia agree that for the purposes of these proceedings there are no proclaimed exclusive economic zones in the Adriatic Sea. The Parties therefore have in effect invited the Tribunal to treat sea areas lying beyond territorial seas as high seas for the purposes of this case.[1967] The Tribunal observes that in other respects, however, the Parties' views as to the Tribunal's task differ significantly.

1. The Parties' Positions

(a) Meaning of "Junction to the High Sea"

1016. The Tribunal observes that the Parties are deeply divided as to the meaning of the phrase "junction to the High Sea." While there is agreement that the meaning of "junction" is to be interpreted in accordance with the Vienna Convention on the Law of Treaties, they emphasise different aspects of the "ordinary meaning" and of the *travaux préparatoires* of the Arbitration Agreement.

i. Croatia's Position

1017. Croatia approaches the meaning of "junction" by placing it in the context of two other terms within Article 3(1)(b): namely, "High Sea" and "Slovenia".[1968] In Croatia's view, "'Slovenia's junction to the High Sea' cannot be determined until . . . know[ing] where both 'Slovenia' and the 'High Sea' are located."[1969]

1018. As to the term "High Sea", Croatia argues that it is "clearly a reference to the High Seas."[1970] It is Croatia's position that "*[w]hat* the High Seas are and *where* the High Seas are located is determined exclusively on the basis of international law" and not on the basis of equity or in accordance with the principle of good neighbourly relations.[1971]

1019. Croatia refers to the 1958 Geneva Convention, pursuant to which the "high seas" are "all parts of the sea that are not included in the territorial sea or in the internal waters of a State"; and to UNCLOS, which states that the UNCLOS provisions regarding "High Seas" apply to "all parts

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1967 Slovenia's Memorial, para. 8.19; Croatia's Memorial, paras 8.18-19.

1968 Transcript, Day 2, pp. 153:23-154:2.

1969 Transcript, Day 2, p. 153:23-25.

1970 Croatia's Memorial, para. 10.15; Transcript, Day 2, p. 154:17-20.

1971 Croatia's Memorial, paras 10.15-16; Transcript, Day 2, p. 154:21-23.

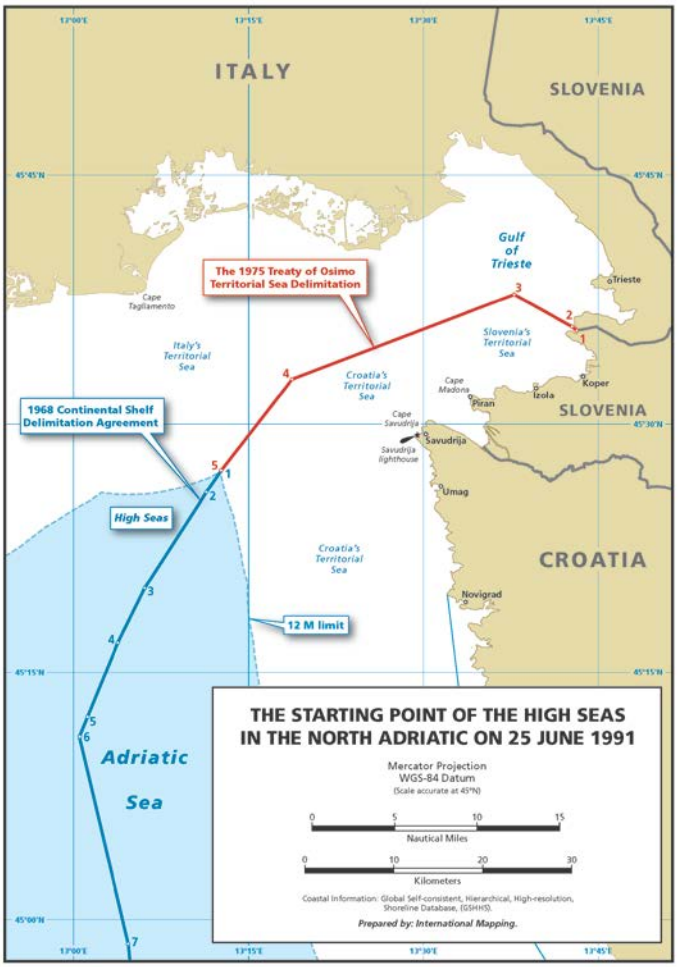
of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State."[1972] Noting the irrelevance of unilateral conduct after 25 June 1991, in accordance with Article 5 of the Arbitration Agreement, Croatia further contends that for the purposes of these proceedings the Tribunal should proceed on the basis that no coastal State in the Adriatic Sea has proclaimed an exclusive economic zone or similar zone of extended jurisdiction beyond the outer limit of the territorial sea.[1973] As such, Croatia submits that, on 25 June 1991, "the northernmost point of the High Seas in the Adriatic Sea, and thus the one nearest to Slovenia," was situated at Point [T]5 under the 1975 Treaty of Osimo,[1974] which corresponds to Point 1 of the 1968 Treaty.[1975] Figure 10.1 of Croatia's Memorial, depicting Croatia's submission in relation to agreed maritime boundaries as at 25 June 1991 is reproduced below.

1972 Croatia's Memorial, para. 10.17, *citing* the 1958 Convention, Article 1; UNCLOS Article 87.

1973 Croatia's Memorial, paras 9.9, 10.18; Transcript, Day 2, p. 155:1-3.

1974 Croatia's Memorial, paras 10.19, 10.21; Transcript, Day 2, p. 155:8-11.

1975 Croatia's Memorial, paras 10.19-20, *referring to* Figure 10.1 following page 210 of its Memorial.



(Croatia's Memorial, Figure 10.1)

1020. As to the term "Slovenia", Croatia argues that this term is "determined as a consequence of determination by the Tribunal of 'the course of the maritime boundary'," in accordance with rules and principles of international law.[1976] Croatia submits that "[u]nder no circumstances can the breadth of the territorial sea of a coastal State exceed 12 [NM], measured from baselines determined in accordance with the 1982 Law of the Sea Convention."[1977]

1021. Moreover, Croatia argues that even without the determination of the maritime boundary, it is possible to determine "where Slovenia *is not*."[1978] Specifically Croatia states that regardless of

1976 Croatia's Memorial, para. 10.22.

1977 *Ibid.*

1978 Croatia's Memorial, para. 10.23.

how the Tribunal determines the land and maritime boundary in the Bay, "the resulting Slovenian baselines will remain more than 12 [NM] away from the nearest High Seas" located at Point [T]5.[1979] This is because, according to Croatia, the closest point on the coast located at a distance of 12 NM from Point [T]5 (Cape Savudrija) lies "well beyond the relevant area of the delimitation dispute."[1980] Consequently, Croatia argues that the only effect the Tribunal's determination of the land and maritime boundary will have, is to decide by "*how much*" the distance between Slovenia's baselines and the high seas will exceed 12 NM.[1981]

1022. Turning to the meaning of "junction", Croatia notes that the term is not defined in international treaties or in customary international law;[1982] that the Parties have not agreed on any particular meaning;[1983] and that legal dictionaries provide no definitions.[1984] However, Croatia submits that it publicly stated its view as to what "is *not* the meaning of *any* term in the Arbitration Agreement" on 9 November 2009, when it declared that "[n]othing in the Arbitration Agreement . . . shall be understood as Croatia's consent to Slovenia's claim of its territorial contact with the High Seas."[1985] According to Croatia, its submission of this Interpretative Declaration, shortly after the conclusion of the Agreement, was agreed upon by the Parties, and the declaration is representative of Croatia's "longstanding and consistent position throughout the negotiation of the Arbitration Agreement."

1023. Croatia also argues that the preposition "to" in English is usually "used to indicate destination (*in the direction of*), thus that something is 'in a direction towards' (*e.g., the road to London*)."[1986] The combination of the noun "junction" with the preposition "to" in Article 3(1)(b), Croatia submits, "suggests destination: junction *towards* the High Seas."[1987] Croatia submits that the use of the phrase "junction with" might have suggested a rather different meaning than "junction to."[1988]

1979 Croatia's Memorial, paras 10.24-26, *referring to* Figure 10.3 following page 212 of its Memorial; Transcript, Day 2, p. 156:5-9.

1980 Croatia's Memorial, para. 10.26; Transcript, Day 2, 157:3-7.

1981 Croatia's Memorial, para. 10.26.

1982 Croatia's Memorial, para. 10.31, *citing* G.K. Walker, *Definitions for the Law of the Sea: Terms Not Defined by the 1982 Convention* (2012).

1983 Croatia's Memorial, para. 10.32.

1984 Croatia's Memorial, para. 10.33, *citing Parry & Grant Encyclopaedic Dictionary of International Law* (J.P. Grant & J. Craig Parker eds., 2009); B.A. Boczek, *International Law: A Dictionary* (2005).

1985 Croatia's Memorial, para. 10.32, *referring to* Croatia's Declaration.

1986 Croatia's Memorial, para. 10.35.

1987 Croatia's Memorial, para. 10.36; Transcript, Day 2, p. 163:19-24.

1988 Croatia's Memorial, paras 10.34-35.

1024. Croatia concedes that it is for the Tribunal to determine whether the phrase "junction to" is a concept of law (a right, an entitlement, or a claim) or a physical concept (the distance to, direction to, or access to the high seas).[1989] However, Croatia emphasises that under Article 4(b), the determination "cannot be made contrary to, or in violation of, international law – although it can be based on, in addition to international law, equity and the principle of good neighbourly relations."[1990]

1025. Croatia does not accept that the ordinary meaning of the term "junction" implies a line at which Slovenia's territorial waters meet the high seas. It says that "the high seas and Slovenia are in any event *separated* from each other by a certain maritime area lying in-between and belonging to one or other of two third States."[1991] According to Croatia, a "junction" of the kind sought by Slovenia would be incompatible with the applicable law, as it could be achieved in one of only two ways: either the territorial sea of Slovenia would extend beyond 12 NM from its nearest basepoint (in contravention of UNCLOS Article 3); or Croatia's territorial sea would be withdrawn to a distance less than 12 NM from its coastline (contrary to Croatia's entitlement under UNCLOS).[1992] As regards the latter method, Croatia argues that "there is nothing in the Arbitration Agreement or in international law that justifies or authorizes [the Tribunal] to deprive Croatia of a portion of its sovereign territory."[1993]

1026. Croatia also refers to the *travaux préparatoires* of the Arbitration Agreement, asserting that "[i]f the parties had intended something more than a right of usage, in the context of the use of an indeterminate phrase such as 'junction', they would have used the words 'territorial contact', which Slovenia had proposed; and they did not."[1994]

1027. Croatia concludes that the "term 'junction' and the emphasis on the high seas can only mean that the purpose is to give secure maritime access—not suspendable by any other State—between the High Seas and Slovenian waters."[1995] Croatia adds that "[i]f – *quod non* – there were a continuous band of Slovenian territorial sea between its coast and the high seas . . . [t]here would *already* be

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1989 Croatia's Memorial, para. 10.37.

1990 *Ibid*.

1991 Croatia's Memorial, para. 10.38.

1992 Croatia's Counter-Memorial, para. 9.3; Transcript, Day 2, pp. 157:8-158:11.

1993 Transcript, Day 2, p. 159:3-5.

1994 Croatia's Counter-Memorial, para. 9.5; Transcript, Day 2, pp. 161:16-162-18; Day 5, p. 115:12-24.

1995 Croatia's Memorial, para. 10.46.

a junction and there would *already* be a regime [for use],"[1996] in which case "there would be nothing to determine under article 3(1)."[1997]

ii. Slovenia's Position

1028. Invoking the rules of interpretation reflected in the Vienna Convention on the Law of Treaties,[1998] Slovenia submits that the ordinary meaning of the word "junction" "necessarily and always implies a link, a connection, between two (or more) different things; in our case, between two maritime areas."[1999] Slovenia submits that "[t]here is no disagreement between the parties as to the definition of 'Slovenia'. . . includ[ing] Slovenia's territorial sea."[2000] Accordingly, junction of "Slovenia . . . to the High Sea" means "a direct junction without having to pass through the territorial sea of another State."[2001] For Slovenia, the concept of junction denotes a "straight line between . . . Slovenia's territorial sea and the high seas."[2002] Slovenia notes, moreover, that there "has to be a corridor – of high seas" leading to "a junction of Slovenia's territorial sea to the high seas."[2003]

1029. According to Slovenia, the determination of a junction "cannot be confused with, or assimilated to, 'the regime for the use of the relevant areas'."[2004] In this regard, Slovenia asserts that a mere right of innocent passage through the territorial sea of Croatia "has never been acceptable to Slovenia"[2005] as, under such a regime, Croatia could "temporarily suspend" innocent passage and "obstruct maritime traffic proceeding . . . on the grounds of verifying compliance with Croatian laws and for inspection purposes."[2006]

1030. According to Slovenia, Croatia advocates a right of Slovenian "access" to the high seas which is insufficiently specific and not necessarily unimpeded.[2007] For example, Slovenia notes that it

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1996 Croatia's Memorial, para. 10.46.

1997 Croatia's Counter-Memorial, para. 9.6; Transcript, Day 2, p. 162:17-25.

1998 Slovenia's Counter-Memorial, para. 10.22.

1999 Slovenia's Counter-Memorial, para. 10.23; Transcript, Day 4, p.52:11-13.

2000 Transcript, Day 4, p.53:5-10, *referring to* Croatia's Memorial, paras 10.22-30 and Croatia's Counter-Memorial, paras 9.13-14.

2001 Slovenia's Memorial, para. 10.70.

2002 Transcript, Day 8, p. 37:5-19.

2003 Transcript, Day 8, p. 34:15-24.

2004 Transcript, Day 4, pp. 56:23-57:19; Day 8, p. 19:13-22.

2005 Slovenia's Memorial, para. 10.66.

2006 Slovenia's Memorial, para. 10.67, *citing* Article 16(3) of the Geneva Convention, UNCLOS Article 25(3), Article 30 of Croatia's Maritime Code, Annex SI-351.

2007 Transcript, Day 4, p. 88:9-21.

would have limited rights in Croatia's territorial sea in respect of overflight, laying of submarine pipelines or cables, hot pursuit, and the passage of warships.[2008] Slovenia concludes that a "direct junction" is necessary for its "economic, security and safety interests" so that it can ensure that maritime traffic using its Port of Koper is subject to no restrictions, impediments or delays."[2009]

1031. Slovenia relies on several documents in the negotiating history to support its interpretation of the term "junction".[2010] In particular, Slovenia refers to the unratified Drnovšek-Račan Agreement as a "source of inspiration and an indication of the way the Parties themselves had interpreted the notion of junction even before the Arbitration Agreement was signed," as well as Slovenia's rejection of the Rehn Draft I "because it reunited 'contact' and 'regime'."[2011] Slovenia also contests Croatia's claim that the term "'junction' came out of the blue."[2012] Moreover, Slovenia notes that the 2002 Protocol between Croatia and Serbia-Montenegro in relation to the Prevlaka peninsula uses the word "junction" five times and that its meaning in that context is that of "direct geographical contact."[2013]

1032. Slovenia characterizes Croatia's interpretative Declaration (*see* paragraph 1022) as "an attempt to reduce to nothing the provision of Article 3(1)(b) of the Arbitration Agreement." Moreover, Slovenia emphasises that it has never accepted or consented to Croatia's Interpretative Declaration, citing a note it sent on 19 November 2009,[2014] and submits that the Tribunal must disregard the Declaration pursuant to Article 5 of the Agreement as a "document or action undertaken unilaterally by either side after 25 June 1991" and that the Declaration "cannot and does not modify the Arbitration Agreement" and "has no bearing on [its] interpretation."[2015] In any case, Slovenia contends that Croatia's Declaration of 2009 lends additional support to Slovenia's argument because in "denying the clear meaning of the work as envisaged during negotiations . . . in a context where no declaration of Slovene authorities called for such a statement," it is "in fact *a contrario* indicative of the understanding of the concept of 'junction'

2008 Slovenia's Memorial, para. 10.68, *citing* UNCLOS Article 111.

2009 Slovenia's Memorial, para. 10.69.

2010 Slovenia's Memorial, para. 10.71.

2011 Slovenia's Memorial, para. 10.78; Transcript, Day 8, pp. 22:19-23:8.

2012 Slovenia's Counter-Memorial, para. 10.50.

2013 Transcript, Day 4, p. 60:8-12,

2014 *See* Slovenia's Memorial, para. 4.45; Slovenia's Counter-Memorial, para. 8.20. *See also* Slovenia's Reply, paras 1.17-21.

2015 Slovenia's Counter-Memorial, para. 8.21.

the Parties had during negotiations" and "can only strengthen the understanding of 'junction' as concerning 'Slovenia's . . . territorial contact with the high seas'."[2016]

1033. Finally, Slovenia argues that such a meaning is necessary in order to respect the *effet utile* principle of treaty interpretation,[2017] as the determination of the junction is to be distinguished from the determination of the maritime boundary and the regime for the use of the relevant maritime areas.[2018] Slovenia criticizes Croatia's attempts to "deprive sub-paragraph (b) of Article 3(1) of any *effet utile*,"[2019] by suggesting that: (i) the high seas, having already been determined on the basis of international law, "cannot be modulated in order to establish the junction";[2020] and (ii) the junction "only covers a regime of innocent passage through [Croatia's] territorial sea, which Slovenia already enjoys."[2021]

(b) Circumstances to Be Taken into Account under Article 4(b) of the Arbitration Agreement

1034. The Parties acknowledge that the Tribunal, in establishing Slovenia's "junction to the High Sea," must be guided by the objective of "achieving a fair and just result."[2022] However, the Parties commend different circumstances to the Tribunal's attention.

i. Croatia's Position

1035. Croatia notes that a number of circumstances are pertinent to the Tribunal's determination under Article 3(1)(b),[2023] particularly the "key 'relevant circumstance'" of "the existing IMO traffic regulation and established navigation practice in the area"[2024] and a series of legal regimes,

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2016 Slovenia's Memorial, para. 10.72; Slovenia's Counter-Memorial, para. 10.49.

2017 Slovenia's Memorial, para. 10.74, *citing Territorial Dispute (Libyan Arab Jamahiriya/Chad*, Judgment, I.C.J. Reports 1994, p. 6 at p. 25, para. 51; *Lighthouses Case between France and Greece*, Judgment, P.C.I.J., Series A/B/ No. 62, p. 4 at p. 27; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16 at p. 35, para. 66; *Aegean Sea Continental Shelf (Greece/Turkey)*, Judgment, I.C.J. Reports 1978, p. 3 at p. 22, para. 52; *Corfu Channel (United Kingdom v. Albania)*, Judgment of 9 April 1949: I.C.J. Reports 1949, p. 4 at p. 24; Carlos Calvo, *Dictionnaire manuel de diplomatie et de droit international public et privé*, p. 223 (1885, republished 2009); *Acquisition of Polish Nationality*, Advisory Opinion, P.C.I.J., Series B, No. 7, p. 7 at p. 20.

2018 Slovenia's Memorial, para. 10.75; Transcript, Day 3, p. 60/3-11.

2019 Slovenia's Counter-Memorial, para. 10.29.

2020 Slovenia's Counter-Memorial, para. 10.31, *referring to* Croatia's Memorial, paras 10.28, 10.15-16.

2021 Slovenia's Counter-Memorial, para. 10.36, *referring to* Croatia's Memorial, paras 10.69-79 and 10.81.

2022 Croatia's Memorial, para. 10.68, Slovenia's Memorial, paras 8.56 and 10.03.

2023 Croatia's Memorial, para. 10.68.

2024 Croatia's Memorial, para. 10.79.

including the EU regime, the International Maritime Organization ("IMO") regime and the UNCLOS regime, which, taken together "fully protect Slovenia's right of access."[2025]

1036. First, Croatia submits that Slovenia has always enjoyed uninterrupted access to the high seas,[2026] meaning that Slovenia's right of innocent passage through Croatian waters has never been suspended even in the context of the 1991-1995 war.[2027] Croatia argues that the facts and figures do not support Slovenia's assertions that it requires a "territorial exit to the high seas" in order to exercise its "right of communication" or ensure its economic development.[2028]

1037. Moreover, Croatia notes that Slovenia's Memorial presents "a litany of complaints as to the disadvantages of its geographical location and of the need to . . . transit Croatia's territorial sea."[2029] However, Croatia asserts that "none of these calamities has actually occurred, or even been threatened."[2030] In Croatia's view, "[t]here is simply no evidence that the *status quo* presents any problem or impediment to regular passage by sea or air."[2031]

1038. In contrast, according to Croatia, the "actual situation" reflects the EU's regime of the four freedoms[2032] and the availability of jurisdiction of the "Court of Justice of the European Communities" to uphold these freedoms;[2033] the EU's legally enforceable "open skies" policy;[2034] the well-functioning IMO traffic separation scheme;[2035] the pledge to cooperate as North Atlantic

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2025 Transcript, Day 2, p. 181:13-16.

2026 Transcript, Day 2, p. 175:23-24.

2027 Croatia's Memorial, paras 10.69-70.

2028 *Ibid.*

2029 Croatia's Counter-Memorial, para. 9.8, *referring to* Slovenia's Memorial 10.67-69; Transcript, Day 2, pp. 175:24-176:5.

2030 Croatia's Counter-Memorial, para. 9.9.

2031 *Ibid.*

2032 Free Movement of Goods, Articles 28-37 of the Treaty for the Functoning of Europe, done in Lisbon on the 13 December 2007 (TFEU), Freedom of Establishment and to Provide Services, Articles 49-56 TFEU, Free Movement of Persons and Workers, 21, 45-48 TFEU, Free Movement of Capital, Articles 63-66 TFEU.

2033 Croatia's Counter-Memorial, para. 9.10; Transcript, Day 2, p. 176:14-18.

2034 Croatia's Counter-Memorial, para. 9.10; Transcript, Day 2, p. 177:1.

2035 Croatia's Memorial, paras 10.73-76, *citing* the Memorandum of Understanding Between the Government of the Republic of Croatia, the Government of the Italian Republic and the Government of the Republic of Slovenia on the Establishment of a Common Routing System and Traffic Separation Scheme in North Part of the North Adriatic, done in Ancona, Italy on 19 May 2000, Annex HRLA-66; Routeing of Ships, Ship Reporting and Related Matters, Establishment of new recommended Traffic Separation Schemes and other new Routeing Measures in the Adriatic Sea Submitted by Albania, Croatia, Italy, Slovenia and Serbia and Montenegro, IMO Doc. NAV 49/3/7 (23 March 2003), Annex HR-89; Report of the Maritime Safety Committee on its Seventy-Eighth Session, IMO Doc. MSC 78/26 (28 May 2004), p. 86 and Annex 21; New and Amended Traffic Separation Schemes, IMO Doc. COLREG.2/Circ. 54 (28 May 2004), Annex HRLA-70; New and Amended Traffic Separation Schemes, IMO Doc. COLREG.2/Circ. 54 (28 May 2004), Annex 3 and pp. 2-3, Annex HRLA-70. The reference chart referred to in that IMO document is No. 435 of the

Treaty Organization ("NATO") Members;[2036] and the overall increase in annual throughput of the Port of Koper.[2037] In light of these, Croatia does not accept Slovenia's suggestion that Croatia can "directly affect Slovenia's economic, security and safety interests."[2038]

1039. According to Croatia, "safety of navigation . . . constitutes the crucial 'relevant circumstance'," as the "relevant maritime areas" in this case—being "those located in the maritime space between the high seas, point 5 and areas to the south-west, and the outer limit of Slovenia's territorial sea"[2039]—"are among the maritime areas with the highest density of Adriatic Sea commercial traffic."[2040] Croatia notes that Slovenia also has access through Italian waters and airspace,[2041] and "air, road, river and rail access to Italy and its other neighbours,"[2042] and it would be inaccurate to suggest that Slovenia "is or could be . . . completely enclaved."[2043] In Croatia's view, any residual issues "can best be resolved by building on the existing regulations of navigation and their implementation."[2044] One such scheme, the IMO traffic separation scheme, is of "particular pertinence" as it recalls the collaboration between Croatia, Slovenia and Italy in "lay[ing] the foundation for the scheme in a memorandum of understanding signed in 2000, and a routing system jointly proposed in 2003, based on long-standing navigation practice in this area."[2045]

1040. Moreover, Croatia notes that Slovenia's requested "direct territorial exit" would be contradictory to the 2004 IMO Traffic Separation Scheme[2046] that was proposed and agreed upon by Slovenia, as the same area along the Croatia coast of Istria is the "entrance" (the direct entry for incoming

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Italian Hydrographical Institute, Edition 1993, Datum ED-50 and No. 101 of the Hydrographical Institute of the Republic of Croatia, Edition 1998, Datum Hermanskögel, Bessel Elipsoid.

2036 Croatia's Counter-Memorial, para. 9.10; Transcript, Day 2, p. 177:1-5.

2037 Croatia's Memorial, para. 10.70, *citing* statistics on the website of the Port of Koper, *available at* <www.luka-kp.si/slo/terminali-in-tovor> (last visited 4 February 2013).

2038 Croatia's Counter-Memorial, para. 9.10.

2039 Transcript, Day 2, p. 164:9-11.

2040 Croatia's Memorial, para. 10.72, *referring to* the fact that "[o]ver 40 million tons of oil are transported on tankers every year in this small area, as well as various other forms of hazardous cargo."

2041 Croatia's Counter-Memorial, para. 9.10; Transcript, Day 2, p. 177:6-10.

2042 Croatia's Counter-Memorial, para. 9.11.

2043 *Ibid.*

2044 Croatia's Memorial, para. 10.71.

2045 Transcript, Day 2, pp. 177:18-178:4.

2046 IMO, Maritime Safety Committee, 28 May 2004, 78th session (12-21 May 2004), COLREG.2/Circ.54, Annex 3, Annex SI-343.

traffic) under the IMO regulation and common navigational practice.[2047] Croatia exhibits Figure 10.4 (reproduced below) that depicts the 2004 IMO Traffic Separation Scheme.

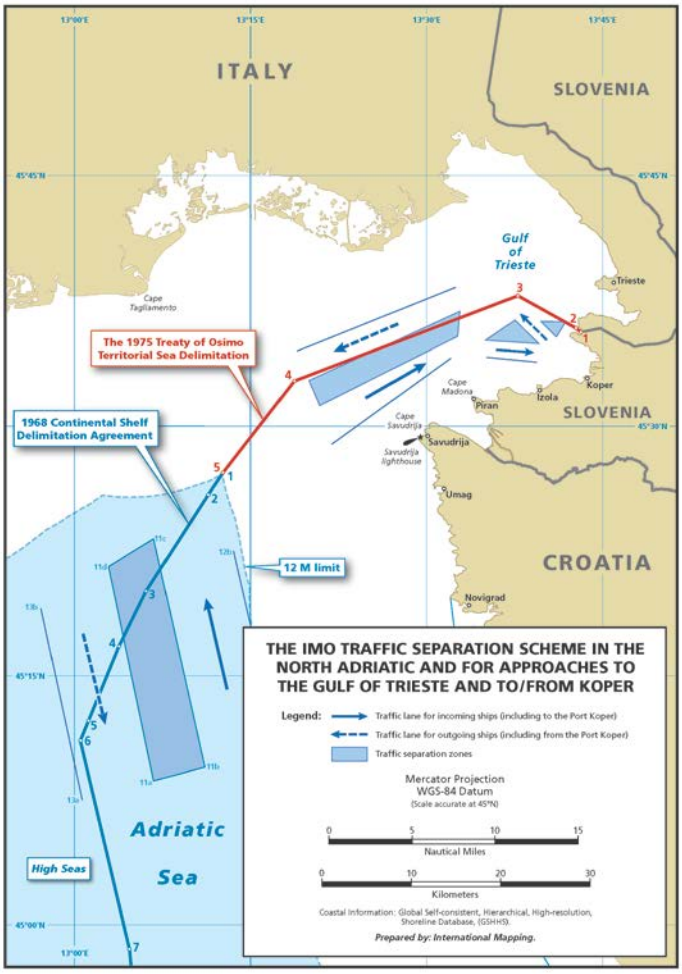

Figure 10.4

(Croatia's Memorial, Figure 10.4)

1041. According to Croatia, the IMO scheme is "bolstered by the range of general maritime transit rights recognised" in UNCLOS and, in particular, the right of innocent passage.[2048] As regards UNCLOS Article 25(3), under which a coastal State may "suspend temporarily . . . the innocent passage of foreign ships," Croatia argues that this is a "limited qualification".[2049] Croatia further

2047 Croatia's Memorial, para. 10.78, Transcript, Day 2, pp. 178:4-179:10, *citing* Figure 10.4 following page 228 of Croatia's Memorial.

2048 Transcript, Day 2, p. 179:20-23. *See also* Croatia's Memorial, para. 10.89(1).

2049 Transcript, Day 2, p. 180:1-5.

argues that such an exception would have no relevance in its relationship with Slovenia as "Slovenia cannot point to a single instance in which Croatia has suspended innocent passage to its detriment."[2050]

1042. Croatia therefore reaches the following "simple conclusion":

> Slovenia's concerns about access and communications are already met, both as a matter of law and of firmly established practice. That is what the right of innocent passage under UNCLOS and the IMO scheme are designed to do, and in fact do. But even if there were some residual problems, they could be met by a junction defined as safe and uninterrupted access from Slovenia to the high seas.[2051]

ii. Slovenia's Position

1043. According to Slovenia, "three traits are of exceptional importance when discussing the maritime elements of the present dispute," namely, (i) "the contrast between the respective maritime façades of Croatia and Slovenia"; (ii) "Slovenia's vital interest in maintaining its access to the high seas, given the importance and growth of its maritime commerce"; and (iii) "Slovenia's traditional presence in the whole of the disputed area when it was part of Yugoslavia."[2052]

1044. In response to Croatia's "simple conclusion" ostensibly dispelling Slovenia's need for any junction to the high seas, Slovenia gives "two different kinds of answer[s]: a legal and a factual one."[2053] Legally, Slovenia reiterates that Croatia's proposal "ignores . . . subparagraph (1)(b) [of Article 3 of the Arbitration Agreement] concerning the junction which must be determined by the Tribunal separately from the regime for the use of the relevant maritime areas."[2054] Slovenia warns that "not to determine Slovenia's junction to the High Sea would amount to a decision *infra petita* whereby the Tribunal would not have fully exercised its jurisdiction."[2055] Slovenia says that Croatia's interpretation ignores the reality of relations between the parties and "does not give Slovenia the *res judicata* guarantee of access to the high sea which is required from this Tribunal."[2056] Slovenia cautions that the "*status quo* is not immune to threats from the future."[2057]

2050 Transcript, Day 2, p. 180:8-10.
2051 Transcript, Day 2, p. 184:1-8.
2052 Slovenia's Memorial, para. 10.02.
2053 Transcript, Day 4, p. 65:8-19.
2054 Transcript, Day 4, pp. 65:20-66:2.
2055 Slovenia's Memorial, para. 8.08.
2056 Transcript, Day 4, p. 66:3-14.
2057 Transcript, Day 4, p. 67:20-22.

1045. Moreover, Slovenia contends that Croatia's emphasis on the IMO Traffic Separation Schemes in the Adriatic "cannot change the picture"[2058] as they have "no bearing upon the status of the maritime areas concerned,"[2059] as confirmed by the resolution adopted by the IMO Assembly on 20 November 1985.[2060] Furthermore, Slovenia argues that "the traffic separation schemes are subject to periodic changes."[2061] Slovenia also rejects the EU's "open skies" policy as unsuitable for Slovenia's aerial access needs, as this policy concerns only commercial traffic and related landing rights.[2062]

1046. Finally, Slovenia contends, by reference to a number of other cases in arbitral practice and State practice, that the "establishment of an area of High Sea in order to avoid . . . being cut off from the high seas is not exceptional."[2063]

(c) Determination of "Slovenia's Junction to the High Sea"

i. Croatia's Position

1047. On the basis of the arguments set out above, Croatia submits "that 'Slovenia's junction to the High Sea', if understood as a claim to a territorial contact with the High Seas, must be denied."[2064]

1048. Croatia argues that Slovenia cannot have a "territorial contact" with the high seas, since under international law "such a contact is enabled exclusively by the territorial sea, the breadth of which cannot exceed 12 [NM] as measured from the baselines."[2065] In view of what it regards as the successive nature of the Tribunal's tasks, Croatia submits that the maritime boundary between the Parties will already have been delimited by the Tribunal in accordance with international law,[2066] and under that determination Slovenia's territorial sea "does not, and cannot stretch as far as to reach the High Seas." [2067]

2058 Slovenia's Counter-Memorial, para. 10.52.
2059 *Ibid*.
2060 *Ibid*.
2061 Slovenia's Counter-Memorial, para. 10.55.
2062 Slovenia's Reply, para. 5.09, *referring to* Croatia's Counter-Memorial, para. 9.10.
2063 Slovenia's Counter-Memorial, para. 10.56.
2064 Croatia's Memorial, paras 10.81, 10.92.
2065 Croatia's Memorial, para. 10.30.
2066 Croatia's Memorial, para. 10.80(1).
2067 Croatia's Memorial, para. 10.30.

1049. Croatia further argues that Slovenia made a new unilateral claim in 1993 to a territorial (direct geographical) contact of its territorial sea with the high seas.[2068] According to Croatia, this claim is "inconsistent with the legal and factual situation as it was on 25 June 1991"[2069] and, furthermore, "[t]here is no basis in the Arbitration Agreement for interpreting 'Slovenia's junction to the High Sea' as corresponding to Slovenia's unilateral claim of a 'territorial (direct geographical) contact of Slovenia's territorial sea with the high seas'."[2070]

1050. Croatia notes that UNCLOS "does not grant a coastal State a 'direct' or 'territorial' access to and from the sea."[2071] Rather, Croatia argues that any "'[t]erritorial connection' with the High Seas depends on the extent of the territorial sea, which in turn depends on the placement and geographical configuration of the relevant coast."[2072]

1051. Croatia submits further that Slovenia has recognized that it cannot claim an EEZ of its own.[2073]

1052. As such, Croatia submits that "irrespective of where exactly that boundary will be located, it will not change the main situation *de lege lata*: the territorial seas of both Italy and Croatia have enclosed the territorial sea of Slovenia since the moment of its emergence as an independent state."[2074]

1053. Croatia therefore argues that "Slovenia's junction to the High Sea," understood as "safe and uninterrupted access to the High Seas," should be secured by the Tribunal by endorsing a suitable navigational regime.[2075]

ii. Slovenia's Position

1054. Slovenia submits that its "junction to the High Sea" should be delimited in accordance with Figure 10.9 on page 585 of its Memorial, reproduced below.

2068 Croatia's Counter-Memorial, para. 7.49.

2069 Croatia's Counter-Memorial, para. 7.65.

2070 Croatia's Counter-Memorial, para. 7.67.

2071 Croatia's Memorial, para. 10.52.

2072 *Ibid*.

2073 Croatia's Memorial, para. 10.30, *citing* the Memorandum on the Bay of Piran.

2074 Croatia's Memorial, para. 10.80(2).

2075 Croatia's Memorial, paras 10.25-30, 10.80(3)-81.

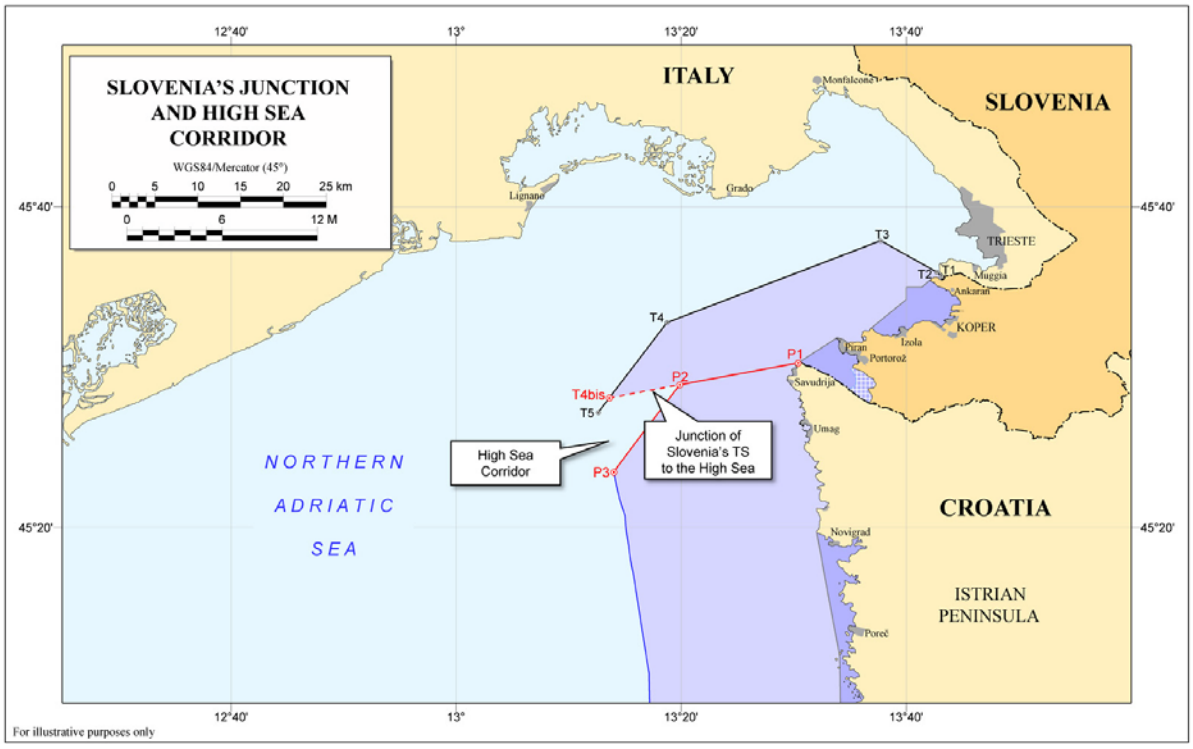

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Figure 10.9

(Slovenia's Memorial, Figure 10.9)

1055. Slovenia notes that according to UNCLOS Article 86, the high seas include "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State."[2076] Slovenia submits that under the Arbitration Agreement Croatia's actions relating to EEZ rights cannot be accorded legal significance as they occurred after 25 June 1991.[2077]

1056. As such, Slovenia concludes, "the Tribunal is left with the territorial sea" from which to make its determination of Slovenia's "junction to the High Sea."[2078] In this regard, Slovenia notes that coastal States are entitled to a territorial sea up to a maximum breadth of 12 NM from its coast or

2076 Slovenia's Memorial, para. 10.79.

2077 Slovenia's Memorial, para. 10.80, *citing* Ecological Protection Zone and Continental Shelf of the Republic of Slovenia Act, 22 October 2005, *Law of the Sea Bulletin*, No. 60/2006, p. 56, Annex SI-357; Article 1042 of the Croatian Maritime Code 1994, Annex SI-281; Decision on the Extension of the Jurisdiction of the Republic of Croatia in the Adriatic Sea (2003), *Official Gazette of the Republic of Croatia*, No. 157/2003, Annex SI-333 (claiming an Ecological and Fisheries Protection Zone).

2078 Slovenia's Memorial, para. 10.82.

baselines, but "cannot claim the maximum entitlement if special circumstances exist."[2079] Slovenia asserts that in this case "special circumstances do exist – this is the very *raison d'être* of both the reference to the junction in Article 3(1)(b) of the Arbitration Agreement, and the inclusion of equity and the principle of good neighbourly relations, in addition to international law, to deal with the junction in Article 4."[2080]

1057. Slovenia contends that it is feasible for the Tribunal to determine Slovenia's junction to the High Sea "without infringing the rights of any third State" by establishing a high seas corridor along the Croatian territorial sea, modelled on what the Parties had negotiated in the 2001 Drnovšek-Račan Agreement.[2081] Noting that the territorial sea which results from Slovenia's proposed territorial sea delimitation is narrow, and much smaller than the area that was under the control of the Republic of Slovenia within the former Yugoslavia,[2082] Slovenia argues that "there is no legal obstacle to partly limiting the extent of *Croatia's* territorial sea in order to take the very special circumstances of the case into consideration."[2083]

1058. That the 12 NM limit is "a maximum, not an imperative, nor even a default line" was an underlying principle accepted by Parties in the initialled Drnovšek-Račan Agreement, Slovenia submits.[2084] Moreover, Slovenia argues, limiting a State's territorial sea below the maximum breadth does not jeopardize the rights of third States as "they have more rights in the high seas than in the territorial sea of other States."[2085] According to Slovenia, "State practice contains examples of the limitation of territorial sea claims of a State in order to meet the vital interest of a neighbouring State and to ensure access to remote or otherwise isolated ports," including the example of France/Monaco, the example of Japan in limiting its territorial sea claim in five straits, and the example of Finland in the Gulf of Finland.[2086]

1059. Slovenia submits that:

> equity and the principle of good neighbourly relations, as confirmed with common sense, imply that the limitation of Croatia's entitlement to a 12-nautical mile territorial sea should be limited but should remain compatible with the circumstances of the case; and the width of the high sea corridor should be sufficient to accommodate military, economic and touristic

2079 *Ibid*.

2080 Slovenia's Memorial, para. 10.82.

2081 Slovenia's Memorial, para. 10.83; Transcript, Day 4, p. 69:8-13.

2082 Slovenia's Memorial, para. 10.85.

2083 Slovenia's Memorial, paras 10.85-86.

2084 Slovenia's Memorial, para. 10.86.

2085 *Ibid*.

2086 Slovenia's Memorial, paras 10.87-88, *citing* the delimitation agreement between France and Monaco and Japan's delimitation in the Ōsumi Kaiyō strait and four other straits.

needs, taking into consideration the continuing development of the Port of Koper in the future.[2087]

1060. A 3 NM wide corridor would meet the aforementioned requirements.[2088] Although it does not exclude a narrower corridor, such as the 2.3 NM wide corridor set up by the Drnovšek-Račan Agreement, Slovenia notes that the placement of that 2.3 NM corridor was a result of negotiation and argues that it "complicates things more than it facilitates maritime traffic, without clear justification."[2089]

1061. As such, Slovenia argues for a more conveniently placed corridor of high seas "at the western extremity of the line from P1 to T4 bis."[2090] The specific junction line Slovenia requests is represented by the segment of line between P2 and T4 bis.[2091] The 3 NM corridor requested by Slovenia would "come down until it meets the point, P3," at which point Croatia's sea extends 12 NM.[2092] Beyond this point, Slovenia notes, the corridor reaches an area which, absent any territorial sea or EEZ, constitutes high seas.[2093] These points are depicted on Figure 10.9 from Slovenia's Memorial, reproduced after paragraph 1054 above. Slovenia states that it is not necessary for the Tribunal to extend the corridor any further, reserving, however, its position that any proclamation of sovereign rights over part of this area by Croatia should not be detrimental to Slovenia's "junction to the High Sea."[2094]

2. The Tribunal's Analysis

1062. Having determined the course of the maritime boundary between Croatia and Slovenia, the Tribunal turns to the question of what the Arbitration Agreement calls "Slovenia's junction to the High Sea."

(a) "High Sea"

1063. The term "High Sea" is not defined in the Arbitration Agreement. The Tribunal notes that the term was used by both Parties throughout the proceedings as a synonym for "high seas". There is no area in the Mediterranean Sea that lies more than 200 NM from the coasts of one or more of

2087 Slovenia's Memorial, para. 10.89.

2088 Slovenia's Memorial, para. 10.90; Transcript, Day 4, p. 69:20-22.

2089 Slovenia's Memorial, para. 10.91.

2090 *Ibid*.

2091 *Ibid.*; Transcript, Day 4, p. 69:23-24.

2092 Slovenia's Memorial, para. 10.92.

2093 Slovenia's Memorial, para. 10.93.

2094 Slovenia's Memorial, para. 10.93.

the littoral States; and under UNCLOS every coastal State may establish a 200 NM exclusive economic zone. UNCLOS Part VII ("High Seas") sets out the legal framework governing the high seas, and according to Article 86 it applies to "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State." There is, accordingly, no area anywhere in the Mediterranean Sea (let alone in the Adriatic Sea) to which the UNCLOS high seas regime *stricto sensu* would be applicable if every Mediterranean State claimed the EEZ to which it is entitled under UNCLOS.[2095]

1064. That point does not deprive the notion of "junction to the High Sea" of meaning, for two reasons.

1065. First, Croatia has not yet established an EEZ. There is currently lying beyond and adjacent to Croatia's territorial sea an area which has the status of high seas.

1066. Second, as has been noted,[2096] the Parties have in effect invited the Tribunal to treat all sea areas lying beyond territorial seas as high seas for the purposes of this case. It was made very clear in the written and the oral submissions of both Parties that the main concern in this context is with rights of access from the high seas to Slovenia, and from Slovenia to the high seas, for ships and aircraft.

1067. The characteristic of the high seas on which the Parties focused is the freedom of the high seas, and in particular the freedoms of navigation and overflight. UNCLOS Article 87 sets out these freedoms.

1068. The high seas freedoms of navigation and overflight extend under UNCLOS not only to the high seas proper (*i.e.* the waters beyond the exclusive economic zone, the territorial sea or the internal waters of any State), but also to the EEZs of coastal States. Thus, UNCLOS Article 58(1) provides:

> In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

1069. The effect of Article 58(1) is to assimilate the EEZ and the high seas in so far as concerns "the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms."

2095 UNCLOS, Article 86.

2096 *See supra*, para. 1015.

Those high seas freedoms established in the EEZ by Article 58 are particularly relevant in this case.

1070. The phrase "High Sea" can accordingly be understood to mean that area in which those freedoms are established by law—that is, the area lying beyond the territorial sea. That remains the case whether or not an EEZ in accordance with UNCLOS is established in respect of those waters.

(b) "Junction"

1071. The Parties are deeply divided over the question of whether the reference to a "junction" in the Arbitration Agreement signifies that Slovenia's maritime zones must abut and have a boundary with an area of high seas (as Slovenia maintains) or whether a "junction" requires, not physical contiguity, but only that there should be secure and uninterrupted access between the high seas and Slovenia's maritime zones (as Croatia maintains).

1072. The Tribunal recalls that Article 3 of the Arbitration Agreement stipulates that "[t]he Arbitral Tribunal shall determine . . . (b) Slovenia's junction to the High Sea; (c) the regime for the use of the relevant maritime areas." It is thus for the Tribunal to determine both (i) what is Slovenia's "junction" to the high seas, and (ii) what is the regime for the use of the maritime area relevant to that junction.

1073. The Arbitration Agreement was made in the English language, and in the absence of any indication that the Parties intended that the term "junction" should have some special meaning, it is the ordinary meaning of the term in English that is material. After lengthy and detailed consideration of the matter, the Tribunal considers that the term "junction" has an essentially spatial meaning and connotation. In the standard dictionaries of the English language,[2097] the core meaning of "junction" is a place where two or more things come together or join. Railway junctions, road junctions, and river or canal junctions are common instances.[2098] Perhaps more

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2097 The Tribunal has consulted, *inter alia*, the Oxford English Dictionary, Webster's Dictionary, Collins English Dictionary, Cambridge Dictionaries Online, and Chamber's 21st Century Dictionary.

2098 The Tribunal notes that the term "junction" has been used in this sense in legal instruments. *See e.g.*, the Convention between the Government of Egypt and the Suez Canal Company for the Construction of a Fresh Water Canal between Cairo and Ouady of 18 March 1863, where notably Article 2 refers to the establishment of "la jonction au Nil du Canal d'eau douce", in the French authentic language, as well as the related Convention of 22 February 1866 (Article 5). Both Conventions are referred to in Article II of the Constantinople Convention of 29 October 1888 Respecting the Free Navigation of the Suez Maritime Canal. These instruments are reprinted in British and Foreign State Papers, Vol. 55, p. 999 (1864-1865) and Vol. 56, pp. 274, 277 (1865-1866). Similarly, a Report on the Suez Canal by Captain Richards, Hydrographer to the Admiralty, and Lieut. Colonel Clarke, Director of Engineering and Architectural Works of the Admiralty, reprinted from the official report in Proceedings of the Royal Geographic Society of London, Vol. 14, No. 3 (1869-1870), speaks of "a short junction to the north end of Lake Timsah."

importantly, dictionaries offer no substantial support to the contention that there is an agreed ordinary meaning of the term "junction" that signifies a destination or direction (as is suggested by Croatia), rather than the location of a physical connection.[2099] The use in the Agreement of the term "junction to" rather than "junction with" the high seas does not alter that conclusion.[2100] The preposition "to" is commonly used to indicate physical adjacency, as in a phrase such as "fixed to".

1074. The Tribunal reaches that conclusion on the basis of the ordinary meaning of the term, in accordance with the general rule of treaty interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties. It has, however, also fully considered the submissions of the Parties relating to the *travaux préparatoires* of the Arbitration Agreement, attending in particular to the changes in the wording of successive drafts of the Arbitration Agreement.[2101] If it had been necessary to have recourse to those supplementary means of interpretation in accordance with Article 32 of the Vienna Convention, the Tribunal would have come to the same conclusion.

1075. The Tribunal is aware that each Party had insisted on language in the Agreement that did not in its view overtly contradict the position that it took. Moreover, there is no evidence that either Party gave the other cause to believe that it had abandoned its position, even when the word "contact" was omitted from the drafts and the word "junction" was included. The Tribunal also notes the exchange between the Parties concerning Croatia's interpretative declaration made after the conclusion of the Agreement (*see* paragraph 1022), which sets out Croatia's position regarding the interpretation of the Agreement, and to which Slovenia objected (*see* paragraph 1032). Yet, while each Party may consider that it would not have concluded the Agreement if the text had not carried the meaning on which that Party insisted, it cannot be the case that both Parties are correct in their interpretation of the text. The Tribunal must interpret the Arbitration Agreement in accordance with the rules of international law on treaty interpretation, and it must arrive at a single interpretation of the Agreement; and that it has done.

2099 The loosest meaning appears to be the technical usage of the term in electronics, where the Oxford English Dictionary states that "junction" can mean "a transition zone in a semiconductor between two regions of different conductivity type (usually *n*-type and *p*-type)."

2100 An example is contained in the official Admiralty "Report on the Suez Canal", making reference to a "short junction to" the north end of Lake Timsah, *see* Report on the Suez Canal by Captain Richards, Hydrographer to the Admiralty, and Lieut. Colonel Clarke, Director of Engineering and Architectural Works of the Admiralty, reprinted from the official report in Proceedings of the Royal Geographic Society of London, Vol. 14, No. 3 (1869-1870).

2101 The subject was given very detailed treatment both by Croatia in its oral submissions (*see e.g.*, Transcript, Day 1, pp. 24-45; Day 2, pp. 160-164, 182-183, 189; Day 5, pp. 22-29, 96-134 *passim*), and similarly by Slovenia (*see e.g.*, Transcript, Day 3, pp. 3-12, 25-31, 36-38, 44-47, 51-64; Day 4, pp. 47-69, 87-93; Day 7, pp. 6-9; Day 8, pp. 6-12, 19-23, 32-35, 37-38).

1076. In conclusion, the Tribunal determines that the term "junction" signifies the physical location of a connection between two or more areas. In the present case, the Tribunal defines the term "junction" as the connection between the territorial sea of Slovenia and an area beyond the territorial seas of Croatia and Italy.

1077. The Tribunal adds that the term "junction" may be understood literally to mean either a geographical point or line, without spatial extension, or an area. The junction between the Atlantic Ocean and the Mediterranean Sea, for example, occurs at the Straits of Gibraltar; but one might think either of a precise line across those straits, or a certain area of coastline and sea in the strait as "the junction".

(c) The Location of "Slovenia's Junction to the High Sea"

1078. The next question is, what is the geographical location of that connection between Slovenia (*i.e.* Slovenia's territorial sea) and the "High Sea"? No part of the boundary of Slovenia's territorial sea, as determined by the Tribunal,[2102] directly abuts upon an area of high seas or of exclusive economic zone. The whole of Slovenia's territorial sea boundary is adjacent to the territorial sea of either Italy or Croatia. There is thus no place where at present Slovenia's territorial sea is immediately adjacent to an area in which the applicable legal regime preserves the freedoms referred to in UNCLOS Article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms.

1079. The Tribunal recalls once more the provision of the Arbitration Agreement that it must apply to this question. Under Article 4 of the Agreement, the Tribunal has the duty to determine both "Slovenia's junction to the High Sea" and "the regime for the use of the relevant maritime areas,"[2103] and must do so applying "international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result by taking into account all relevant circumstances."[2104] The power and duty of the Tribunal to determine the "regime for the use of the relevant maritime areas" implies that the Tribunal is not to regard itself as confined to an indication that the "regime" in any particular location is whatever it would be if each Party were to assert to the fullest extent its rights under UNCLOS at the relevant distance from the coast. The duty to "achieve a fair and just result by taking into account all relevant circumstances," which includes consideration of the vital interests of the Parties, requires the Tribunal to consider what

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2102 *See supra*, para. 1014.

2103 Arbitration Agreement, Article 3.

2104 Arbitration Agreement, Article 4.

modifications might be necessary in order to achieve that fair and just result. This is underlined by the very broad terms in which the principles that the Tribunal is directed to apply are framed.

1080. The Tribunal has taken into account all the "relevant circumstances" submitted by the Parties, and has noted in particular the importance attached by both Parties to the question of rights of access to and from Slovenia by sea and by air, and of the exercise of jurisdiction over ships and aircraft exercising that right, viewed in the context of the geography of the northern Adriatic Sea.

1081. The Tribunal determines that the junction between the Slovenian territorial sea and the "High Sea" is an area in which ships and aircraft enjoy essentially the same rights of access to and from Slovenia as they enjoy on the high seas. That area connects the Slovenian territorial sea with the area that is beyond the 12 NM territorial sea limits of Croatia and Italy. Such a connection results from the identification of an area of Croatia's territorial sea adjacent to the boundary with Italy established by the Treaty of Osimo within which a special legal regime applies, as is set out below. The Tribunal will refer to this area as the "Junction Area."

1082. The Tribunal has already determined that the boundary between the waters of Croatia and Slovenia is a geodetic line from Point A on the closing line across the mouth of the Bay with an initial geodetic azimuth of 299°04′45.2″ to Point B on the line between T3 and T4 established by the Treaty of Osimo, proceeding northwest from Point A on the Bay closing line and parallel to the Treaty of Osimo line T2-T3.[2105]

1083. The Junction Area shall be approximately 2.5 NM wide, and be immediately adjacent to the boundary laid down by the Treaty of Osimo in Croatia's territorial sea. The limits of the Junction Area consist of the five geodetic lines joining the following six points in the order given:

Point T5, being a point on the boundary established by the Treaty of Osimo;[2106]

Point T4, being a point on the boundary established by the Treaty of Osimo;[2107]

Point B, being the tripoint on the boundary between the maritime zones of Croatia and Slovenia, and the boundary established by the Treaty of Osimo, at 45°33′57.4″N, 13°23′04.0″E ;

2105 *See supra*, para. 1014.

2106 For its own purposes only, the Tribunal considers the coordinates of T5 to be 45°27′11.02″N, 13°12′ 37.68″E in the Yugoslav coordinate system.

2107 For its own purposes only, the Tribunal considers the coordinates of T4 to be 45°32′46.99″N, 13°18′ 43.62″E in the Yugoslav coordinate system.

Point C, being a point on the boundary between the maritime zones of Croatia and Slovenia, at 45°32′22.5″N, 13°27′07.7″E;

Point D, being a point landward of the turning point T4 on the Treaty of Osimo boundary, at 45°30′42.2″N, 13°20′56.3″E;

Point E, being a point on the outer limit of Croatia's territorial sea, lying 12 NM from the coast of Croatia, at 45°23′56.6″N, 13°13′34.6″E;

and the line from Point E along the outer limit of Croatia's territorial sea to Point T5. The Junction Area is illustrated on Map VII.

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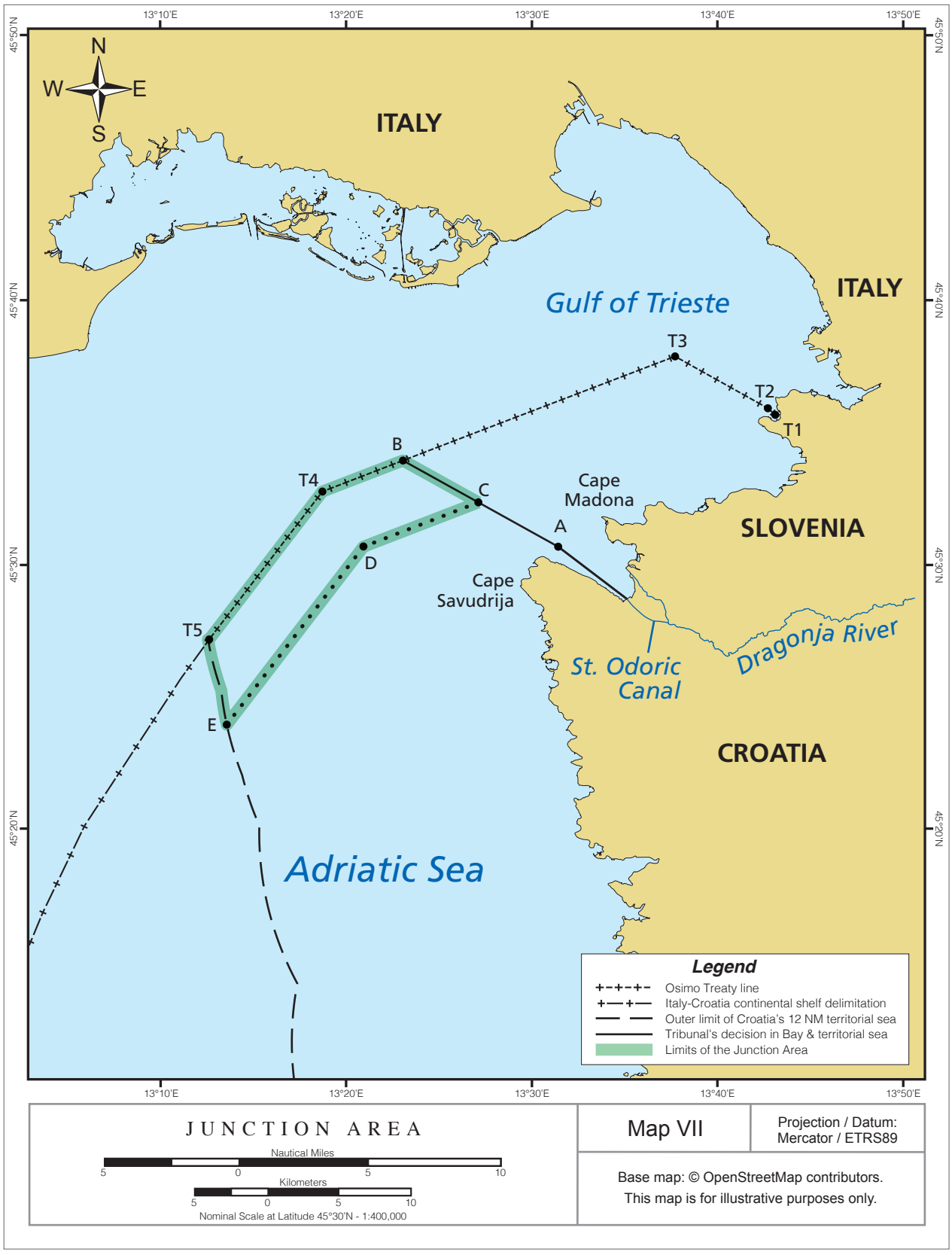

JUNCTION AREA

Nautical Miles
5 0 5 10

Kilometers
5 0 5 10

Nominal Scale at Latitude 45°30'N - 1:400,000

Map VII

Projection / Datum:
Mercator / ETRS89

Base map: © OpenStreetMap contributors.
This map is for illustrative purposes only.

D. DELIMITATION OF THE CONTINENTAL SHELF

1084. Slovenia makes a claim to a continental shelf in the area of the "corridor of high seas"[2108] in which Slovenia invites the Tribunal to restrict Croatia's right to establish a territorial sea. However, the Parties differ as to whether the question of continental shelf delimitation in fact arises.

1. The Parties' Positions

(a) Entitlement to a Continental Shelf

i. Slovenia's Position

1085. On the basis of its junction claim,[2109] Slovenia identifies "a corridor of high seas three miles in width"[2110] situated more than 12 NM from its territorial sea, which it argues "constitutes an area over which Slovenia possesses continental shelf rights"[2111] by virtue of UNCLOS Article 76(1) as well as customary international law.[2112]

1086. UNCLOS Article 76(1) provides:

> The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

1087. According to Slovenia, its "sovereign rights over the continental shelf exist *ipso facto* and *ab initio*, and do not depend on any occupation . . . or on any express proclamation, or actual exercise of the right."[2113] Slovenia acknowledges that the Parties have overlapping continental shelf entitlements beyond this 3 NM corridor, in the high seas areas beyond point T5 under the 1975 Treaty of Osimo, arising out of their "*ipso facto* rights" under UNCLOS and customary international law.[2114] In this regard, and noting that "neither Party has proclaimed an exclusive economic zone,"[2115] Slovenia contends that the fact that Croatia also has a continental shelf

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2108 Slovenia's Memorial, para. 10.96.

2109 Slovenia's Memorial, para. 8.20.

2110 Slovenia's Memorial, para. 10.96.

2111 *Ibid.*

2112 Slovenia's Memorial, paras 8.20, 10.94, *referring to North Sea Continental Shelf*, I.C.J. Reports 1969, p. 3.

2113 Slovenia's Counter-Memorial, para. 8.53.

2114 Slovenia's Memorial, para. 8.20; Transcript, Day 4, p. 74:12-15; p. 75:8-18.

2115 Slovenia's Memorial, para. 10.97.

entitlement "does not make Slovenia's entitlement evaporate,"[2116] rather the Parties' overlapping entitlements "fall to be delimited in accordance with principles and rules of international law as part of determining the course of the maritime boundary between the Parties."[2117] In Slovenia's view, "the fact that the Arbitral Tribunal is charged with determining Slovenia's junction to the High Sea presupposes that 'maritime spaces' beyond the territorial sea are also at issue."[2118] It also notes that the reference to "the relevant maritime areas" is in the plural in Article 3(1)(c) of the Arbitration Agreement.[2119]

1088. Slovenia submits that its entitlement to a continental shelf should not be blocked by the Cape Savudrija promontory[2120] and that Cape Savudrija is an example of "precisely the kind of relevant circumstances that should be abated in order for the coasts of the parties to produce their effects in terms of maritime entitlements," such as the continental shelf.[2121]

ii. Croatia's Position

1089. Croatia rejects outright Slovenia's claim to a continental shelf as "entirely spurious"[2122] and criticizes Slovenia's "resource grab under the guise of a maritime access corridor,"[2123] which "infringes the most elementary rules of maritime delimitation and all known principles of international law."[2124]

1090. While Croatia does not address in detail Slovenia's alleged entitlement to a continental shelf, it characterizes the Treaty of Osimo as an "untouchable" agreement that established a regime under which Slovenia has no right to a continental shelf.[2125] Croatia also points out that the draft

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2116 Transcript, Day 4, p. 75:19-21.

2117 Slovenia's Memorial, paras 8.20, 10.98; Transcript, Day 4, p. 75:21-23.

2118 Slovenia's Counter-Memorial, para. 8.55.

2119 Slovenia's Counter-Memorial, para. 8.56.

2120 Transcript, Day 4, pp. 78:22-79:2, *referring to Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (United Kingdom/France)*, Decision of 30 June 1977 and 14 March 1978, R.I.A.A. Vol. XVIII, pp. 3-413 and *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, ITLOS Case No. 16, Judgment of 14 March 2012. *See also* Slovenia's Counter-Memorial, paras 11.02-05.

2121 Transcript, Day 8, pp. 4:8-5:3.

2122 Croatia's Counter-Memorial, para. 9.14; Transcript, Day 2, p. 174:7-9.

2123 Croatia's Counter-Memorial, para. 9.14; Transcript, Day 2, p. 174:17-18.

2124 Croatia's Counter-Memorial, para. 9.14.

2125 Transcript, Day 5, pp. 94:19-95:12.

agreement that Slovenia proposed on 29 October 1991 did not present any "claim to an extended boundary off to the south, still less to a continental shelf."[2126]

1091. In any event, Croatia notes that the Government of Slovenia, in its Proposal of the Maritime Code of the Republic of Slovenia (adopted 23 March 2001), with Explanations of 25 May 2000, stated that Slovenia "has the characteristics of a so-called 'geographically disadvantaged State', thus a State without the continental shelf of its own or sovereign rights in this maritime area, and that, given its geographical location, Slovenia does not have the possibility to proclaim other maritime zones beyond the area under its sovereignty and in the direction towards the high seas (contiguous zone, Exclusive Economic Zone)."[emphasis added] [2127]

1092. As a consequence of its position that Slovenia is not entitled to a continental shelf, Croatia does not present any detailed argument regarding the applicable law with respect to the delimitation of the continental shelf or the delimitation of Slovenia's continental shelf.

(b) Applicable Law with respect to the Delimitation of the Continental Shelf

1093. Slovenia refers to UNCLOS Article 83(1) which governs the delimitation of the continental shelf between States with adjacent coasts,[2128] and provides as follows:

> The delimitation of the continental shelf 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 Statue of the International Court of Justice, in order to achieve an equitable solution.[2129]

1094. Slovenia stresses that UNCLOS Article 83(1) does not prioritize a particular method of delimitation, but refers instead to "international law, as referred to in Article 38 of the Statute of the International Court of Justice." [2130] Slovenia argues that Article 83(1) imposes as the "overriding objective" the achievement of "an equitable solution."[2131] Slovenia highlights the fact that the construction of Article 83(1) is "markedly different" from Article 6 of the 1958 Convention on the Continental Shelf, which did in fact ascribe a *prima facie* role to the equidistance method.[2132]

2126 Transcript, Day 1, pp. 51:17-52:2.

2127 Croatia's Memorial, para. 10.59, *citing* Memorandum on the Piran Bay (Ljubljana, 7 April 1993), Annex HR-69.

2128 Slovenia's Memorial, para. 8.17.

2129 Slovenia's Memorial, paras 8.30-31, *citing* UNCLOS, Article 83(1).

2130 Slovenia's Memorial, paras 8.32, 10.104; Slovenia's Counter-Memorial, para. 8.58.

2131 Slovenia's Memorial, paras 8.32 and 10.99-102.

2132 Slovenia's Memorial, paras 8.32 and 10.99.

1095. That the equidistance method is not a mandatory rule of international law and does not have *a priori* status over other methods, Slovenia submits, has been recognized by the ICJ in the *North Sea* cases and the *Tunisia/Libya* case.[2133] According to Slovenia, these precedents founded what came to be known as the "equitable principles/relevant circumstances" rule, whereby continental shelf delimitation is done by agreement in accordance with equitable principles and taking all relevant circumstances into account.[2134]

1096. According to Slovenia, more recent ICJ and arbitral decisions have indicated that the application of the "equitable principles/relevant circumstances" rule involves a three-step process: first, plotting a provisional equidistance line; second, assessing the relevant circumstances in order to determine whether they justify an adjustment being made to the provisional line in order to achieve an equitable result; and third, testing the result obtained by the first two steps to verify that it does not lead to a markedly disproportionate result.[2135]

1097. However, Slovenia contends that this three-step process is not mandatory and does not apply in all cases.[2136] Notably, Slovenia argues that it is not appropriate to apply the equidistance methodology in the present case.[2137] First, it does not adhere to the "need for the Tribunal to determine Slovenia's junction with the High Sea and to tailor the course of the maritime boundary to take into account that determination"[2138] and in any event, it is at variance with the territorial

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2133 Slovenia's Memorial, paras 8.33-35, 10.99; Slovenia's Counter-Memorial, para. 8.60; Transcript, Day 4, p. 79:3-18, *citing North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3 at pp. 46-47, paras 83, 85; p. 53, paras 101(B), 101(C)(1); *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18 at p. 59, para. 70; p. 79, para. 110; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 13 at p. 47, para. 63.

2134 Slovenia's Memorial, paras 8.33-35, 10.101, *citing North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3 at p. 46, para. 83; p. 53, paras 101(B), 101(C)(1), *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18 at pp. 59-60, para. 70; p. 79, para. 110; and *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 13 at pp. 38-39, para. 45; p. 47, para. 63.

2135 Slovenia's Memorial, paras 8.36, 10.103, *citing Territorial and Maritime Dispute (Nicaragua v. Columbia)*, Judgment, I.C.J. Reports 2012, p. 624 at pp. 695-98, paras 190-99; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p.3 at p. 86, para. 60; *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61 at p. 101, paras 115-16. *See also* Slovenia's Counter-Memorial, para. 8.61.

2136 Slovenia's Memorial, paras 8.36, 10.104; Slovenia's Counter-Memorial, paras 8.62, 11.06-08, *citing Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012, p. 624 at p. 696, para. 194; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Separate Opinion of Judge Abraham, I.C.J. Reports 2012, p. 730 at p. 735-36, paras 21, 23; *Delimitation of Maritime Boundary between Guyana and Suriname*, P.C.A. Case No. 2004-04, Award of 17 September 2007, para. 342, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 659 at p. 745, para. 283.

2137 Slovenia's Memorial, paras 8.40 and 10.106; Slovenia's Counter-Memorial, para. 8.62; Transcript, Day 4, pp. 79:19-80:1.

2138 Slovenia's Memorial, para. 8.40.

sea delimitation due to Slovenia's historic rights and other special circumstances.[2139] Second, this would entail a "radical result" with Slovenia having no continental shelf at all, cutting Slovenia off from areas of continental shelf to which it historically had access,[2140] which "cannot possibly be viewed as achieving an equitable solution."[2141] Third, a maritime delimitation that does not use the equidistance methodology would not produce a disproportionate result for Croatia.[2142]

1098. For all these reasons, Slovenia argues that the appropriate method of delimiting the Parties' respective continental shelves is one that takes into account the relevant geographic, historic and economic circumstances.[2143]

(c) Proposed Limits of the Continental Shelf

1099. On the basis of the foregoing, Slovenia contends that an equitable delimitation of its continental shelf entitlement would be to extend a 3 NM wide corridor from Slovenia's junction to the High Sea towards the south-southwest until it intersects the 45°10′N parallel of latitude, as shown on Figure 10.11 from Slovenia's Memorial, reproduced below.[2144]

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2139 Slovenia's Memorial, paras 8.40, 10.109-14.

2140 Slovenia's Memorial, paras 8.41, 10.106; Slovenia's Counter-Memorial, para. 8.62; Transcript, Day 4, p. 80:1-7.

2141 Slovenia's Memorial, paras 8.40, 10.106-07, *citing North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3 at p. 50, para. 91. *See also* Slovenia's Counter-Memorial, para. 8.62;

2142 Slovenia's Memorial, paras 8.42, 10.120, 10.137-46; Figures 10.1210.13, 10.14, 10.15.

2143 Slovenia's Memorial, para. 10.114.

2144 Slovenia's Memorial, para. 10.114; Slovenia's Counter-Memorial, para. 11.10; Transcript, Day 4, p. 80:11-25.

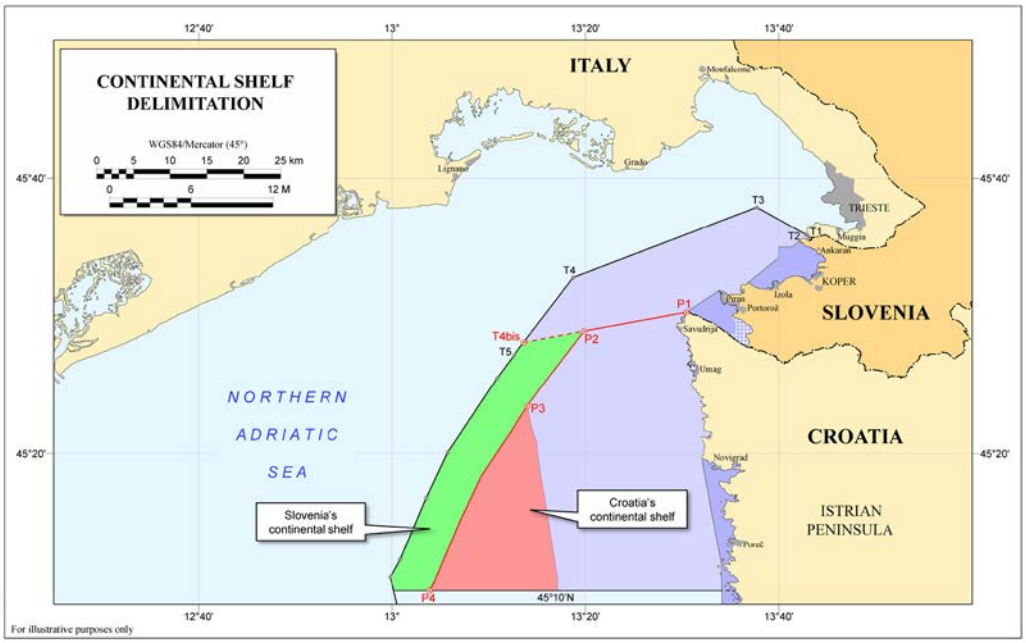

Figure 10.11

(Slovenia's Memorial, Figure 10.11)

1100. Slovenia contends that the proposed southern limit for Slovenia's continental shelf delimitation is appropriate for three reasons.[2145] First, it corresponds to the provisional limit of Slovenia's ecological protection zone.[2146] Second, it corresponds to the fishing limit area under the 1997 SOPS Agreement, which in turn reflects the historical rights and interests of both Parties.[2147] Third, the fact that Slovenia once shared continental shelf rights with Croatia under the SFRY "justifies the recognition of Slovenia's sovereign rights over a reasonable area of continental shelf lying seaward of the area covered by the SOPS Agreement."[2148]

1101. Finally, Slovenia asserts that its proposed delimitation "produces a result that leaves each Party with maritime areas that are not disproportionate when compared with the lengths of their relevant coasts."[2149] Slovenia submits that under its proposed delimitation, the ratio of Slovenia's maritime space (approximately 555 square km) to Croatia's maritime space (approximately 1040 square km) is 1 to 1.9 in favour of Croatia (the figures quoted by Slovenia here include internal

2145 Slovenia's Memorial, para. 10.117.

2146 Slovenia's Memorial, para. 10.117, *citing* the discussion contained in its Memorial, paras 9.75-77.

2147 Slovenia's Memorial, para. 10.117, *citing* the discussion contained in its Memorial, para. 9.137.

2148 Slovenia's Memorial, para. 10.117.

2149 Slovenia's Memorial, para. 10.120.

waters).[2150] This ratio, Slovenia avers, is not disproportionate as the ratio of the lengths of the Parties' relevant coastal fronts is 1:2.[2151]

1102. Slovenia also states that its continental shelf claim is not disproportionate when viewed in the context of the Adriatic Sea as a whole, where, regardless of whether one includes or excludes internal waters, the ratio of the area of Croatia's maritime entitlement to its coastal front length is far larger than that of Slovenia.[2152]

2. The Tribunal's Analysis

1103. The consequence of the Tribunal's determinations above, in respect of the maritime boundary between Slovenia and Croatia and Slovenia's Junction to the high seas, is that the maritime boundary between Slovenia and Croatia extending from Point A at the mouth of the Bay to Point B on the Treaty of Osimo line is the boundary for all purposes, and that Slovenia has no maritime zone extending west beyond that maritime boundary. Slovenia's claim to continental shelf rights is therefore incompatible with the Tribunal's determination of the entitlements of the two States in this area, and no question of continental shelf delimitation arises.

E. DETERMINATION OF THE REGIME FOR THE USE OF THE RELEVANT MARITIME AREAS

1104. Finally Article 3(1)(c) of the Arbitration Agreement calls upon the Tribunal to determine the regime for the use of the relevant maritime areas. The Parties have presented submissions on the usage regime for the relevant maritime areas. At the hearing, Slovenia also made a proposal for a special usage regime within the Bay on the assumption that the Bay in its entirety constituted Slovenian internal waters.

2150 Slovenia's Memorial, paras 10.143-44.

2151 *Ibid.*; Transcript, Day 4, p. 81:5-7.

2152 Slovenia's Memorial, paras 10.145-46, *citing* Figure 10.14, Figure 10.15.

1. The Parties' Positions

(a) Regime for the Use of the Territorial Sea

i. Slovenia's Position

1105. Slovenia agrees that no special adjustment of the usual legal regime applicable to the territorial sea—as described in UNCLOS Articles 2 and 17 to 32—is needed.[2153] As such, Slovenia affirms that ships of all States have a right of innocent passage and that the special rules applicable to merchant ships and commercial ships operated for commercial purposes, and warships or other government ships operated for non-commercial purposes, should operate in the usual way.[2154] Slovenia also notes that because the Adriatic Sea is semi-enclosed, the provisions of UNCLOS Article 123 on cooperation are "undoubtedly part of the legal background to the maritime aspects of the present case."[2155]

1106. Slovenia notes that fishing rights[2156] and maritime traffic routing are already regulated in the Parties' territorial seas,[2157] under the SOPS/LBTA and the Memorandum of Understanding between Italy, Slovenia and Croatia of 19 May 2000, which later became the 2004 IMO Traffic Separation Scheme.[2158] However, Slovenia contends that "a confirmation of existing special regimes is needed in order to protect Slovenia's historic fishing rights."[2159] In this regard, Slovenia requests the Tribunal to "adjudge and declare" its fishing rights under the SOPS/LBTA and the 2012 Croatian EU Accession Treaty to "constitute the regime of historic fishing rights of Slovenia in the territorial sea of Croatia."[2160] This is necessary in Slovenia's view due to the implementation difficulties and uncertainties in connection with these treaty-based regimes entered into with Croatia.[2161] According to Slovenia, "[t]he current legal framework, no doubt

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2153 Slovenia's Memorial, para. 10.123.

2154 *Ibid*.

2155 Transcript, Day 8, p. 46:14-18.

2156 Transcript, Day 8, p. 51:11-12.

2157 Transcript, Day 8, p. 51:7-20.

2158 Slovenia's Memorial, paras 10.124-25, *citing* Agreement between the Republic of Slovenia and the Republic of Croatia on Border Traffic and Cooperation, 28 April 1997, Annex SI-295; Memorandum of Understanding between the Government of the Republic of Slovenia, the Government of the Republic of Croatia and the Government of the Italian Republic on the Establishment of a Common Routing System and Traffic Separation Scheme in North Part of the North Adriatic, 19 May 2000, Annex SI-310.

2159 Slovenia's Counter-Memorial, para. 12.30.

2160 Slovenia's Counter-Memorial, para. 12.33; Transcript, Day 8, pp. 51:13-52:11.

2161 Slovenia's Counter-Memorial, paras 12.30-32; Transcript, Day 8, p. 52:11-14.

modified from time to time, will remain in place, and [one] can see no reason why it should be affected by the award."[2162]

1107. Slovenia submits that the Tribunal's Award may establish regimes that "modify or suspend the operation of provisions of UNCLOS as between Slovenia and Croatia, provided they do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of UNCLOS, and provided that such arrangements do not affect the application of the basic principles embodied in UNCLOS."[2163]

1108. In response to Croatia's arguments, Slovenia contends that Croatia "conflates 'Slovenia's junction to the High Sea' and 'the regime for the use of the maritime areas'."[2164] It also argues that Croatia refers to a "regime of innocent passage"[2165] while failing to acknowledge that the right of innocent passage is significantly restricted by "the existing IMO traffic separation scheme as may be modified from time to time". [2166]

1109. Slovenia also objects to the uncertainty arising out of Croatia's statement that "[the regime for use] needs to enable access to the High Sea that is as unimpeded as possible, in conformity with international law" [insertion by Slovenia].[2167] In particular, Slovenia argues that the term "access" is uncertain and "heavily qualified" by the phrase "as unimpeded as possible", and Croatia does not indicate which rules of international law it refers to.[2168] Moreover, Slovenia notes the lack of reference to outbound ships,[2169] aircraft,[2170] or other important elements of the right of communication[2171] in Croatia's proposals.

1110. Slovenia argues that Croatia's arrangements are inadequate in "meeting Slovenia's vital interest in a territorial access to the high seas."[2172] In respect of UNCLOS Article 45, Slovenia contends that the right of innocent passage "is far removed from unimpeded communication,"[2173] and

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2162 Transcript, Day 8, p. 47:3-9.
2163 Transcript, Day 8, p. 45:5-14.
2164 Transcript, Day 4, pp. 84:20-24, 87:19-20.
2165 Transcript, Day 4, p. 87:20-21.
2166 Slovenia's Counter-Memorial, para. 12.11; Transcript, Day 4, p. 88:4-10.
2167 Slovenia's Counter-Memorial, para. 12.13; Transcript, Day 4, p. 88:12-15.
2168 Slovenia's Counter-Memorial, para. 12.13; Transcript, Day 4, p. 88:15-23.
2169 Slovenia's Counter-Memorial, para. 12.18; Transcript, Day 4, p. 87:17-24.
2170 Slovenia's Counter-Memorial, para. 12.19.
2171 Slovenia's Counter-Memorial, para. 12.25.
2172 Slovenia's Counter-Memorial, para. 12.20.
2173 Slovenia's Counter-Memorial, para. 12.22.

neither the right of transit passage nor the right of archipelagic sea lanes passage provides a right of unimpeded passage.[2174]

ii. Croatia's Position

1111. It is Croatia's position that the purpose of Article 3(1)(c) of the Arbitration Agreement is to secure maritime access in Croatia's territorial seas, not to determine sovereignty or rights to resources.[2175] Croatia notes that while the Arbitration Agreement applies only to Croatia and Slovenia, a full solution for the "regime for the use" cannot be found on one side of the Treaty of Osimo delimitation line only. [2176] However, Croatia argues that while the Tribunal cannot impose any obligations on Italy, it can take note of the obligations Italy already has under the existing regulations and which it has consistently implemented.[2177]

1112. Croatia submits that there is a range of maritime transit rights presently recognized in the law of the sea, namely innocent passage through the territorial sea; transit passage through international straits; passage through the EEZ; and archipelagic sea lanes passage.[2178] Croatia acknowledges that vessels flying the Slovenian flag, and foreign vessels bound for Slovenian ports, should be entitled to secure and uninterrupted passage through Croatian waters.[2179] According to Croatia, it has acted consistently with this regime with Slovenia enjoying uninterrupted access to the high seas.[2180]

1113. Considering the applicable rules under the law of the sea as well as the IMO traffic separation scheme, which Croatia submits has operated virtually without incident since its inception in 2004, Croatia argues that there is "little or no practical need for any further guarantees." [2181] Croatia submits that "the junction and the regime should be, *mutatis mutandis*, the usual regime of innocent passage through international straits under UNCLOS, subject to the existing IMO scheme."[2182]

2174 Slovenia's Counter-Memorial, para. 12.23.

2175 Croatia's Memorial, para. 10.47.

2176 Croatia's Memorial, para. 10.84.

2177 *Ibid*.

2178 Croatia's Memorial, para. 10.89, *citing* James Crawford, *Brownlie's Principles of Public International Law* (2012), pp. 316-20; Transcript, Day 2, pp. 183:19-24; 184:11-185:1.

2179 Croatia's Memorial, paras 10.69, 10.90.

2180 *Ibid*.

2181 Croatia's Memorial, para. 10.91.

2182 Transcript, Day 2, 185:2-7.

1114. Croatia asserts that Slovenia's claim of geographic disadvantage is "irrelevant to Slovenia's rights of transit or access through Croatian territorial waters," stating that "only landlocked states have special transit rights" under UNCLOS.[2183] While Croatia agrees that the Adriatic Sea qualifies as a semi-enclosed sea for the purposes of the general applicability of UNCLOS Article 123, Croatia submits that this is of limited guidance to the Tribunal because "[u]nlike the Arbitration Agreement, Article 123 proceeds on the basis that maritime territory and sovereign rights are pertinent to territory, are to be delimited in accordance with international law, and not in accordance with general equity."[2184]

1115. Croatia notes as well that "there is no reason to anticipate that the minimum legal framework" of EU law, treaties and regulations currently governing the Parties' conduct in the territorial sea "would be subject to adverse change" that would justify a heightened regime.[2185] However, should any heightened regime for the use of the relevant maritime areas be considered necessary by the Tribunal, Croatia submits that it "should not exceed the application of the 1982 Law of the Sea Convention provisions for innocent passage through international straits, by analogy, in the area consisting of the north-bound navigational way of the IMO traffic separation scheme insofar as it, or its extension from Point 5, falls within Croatian territorial sea."[2186]

(b) Regime for the Use of the Continental Shelf

1116. Slovenia submits that the legal regime of the continental shelf is provided for in UNCLOS Articles 77 to 82 and 85[2187] and that there is no need to adjust it either for Slovenia's or Croatia's continental shelf.[2188] As such, Slovenia claims sovereign rights and jurisdiction on the part of the continental shelf allocated to it in accordance with its explanations given above.[2189]

1117. Slovenia notes that apart from obligations which might arise from future EU rules, there do not seem to be special obligations in this area.[2190]

2183 Transcript, Day 5, p. 102:10-14.

2184 Transcript, Day 5, p. 138:8-12.

2185 Transcript, Day 5, p. 135:8-21; pp. 138:22-139:3.

2186 Croatia's Memorial, para. 10.91.

2187 Slovenia's Memorial, para. 10.126; Transcript, Day 8, p. 55:2-3.

2188 Transcript, Day 8, p. 55:2-5.

2189 Slovenia's Memorial, para. 10.127, Slovenia's Counter-Memorial, para. 12.35.

2190 Slovenia's Memorial, para. 10.128 n.112.

1118. Croatia asserts that "Slovenia has no continental shelf."[2191] In particular, Croatia notes that Slovenia, "being hemmed in due to its geographical situation by the territorial seas . . . of Italy and Croatia, can have no claim to an EEZ or continental shelf."[2192]

(c) Regime for the Use of the High Seas

1119. Slovenia contends that the legal regime of the high seas is provided for in UNCLOS Articles 86 to 115,[2193] and argues that this regime must be "fully applied within the [high seas] corridor."[2194] As such, Slovenia submits that, in the corridor, all States, including Croatia and Slovenia, benefit from the freedom of the high seas, including the freedom of navigation and overflight.[2195]

1120. Furthermore, Slovenia argues that the legal regime of the high seas in UNCLOS should apply "in the area beyond point P3 [shown on Figure 10.9, reproduced after paragraph 1054, above] which marks the outer limit of the corridor of high seas, until it reaches the area on which third States may have overlapping claims, over which this Tribunal has no jurisdiction."[2196] Slovenia notes that the Tribunal is not called to fix the southernmost limit of the area where the high seas regime applies since it does not have jurisdiction in areas in which third States may have overlapping claims.[2197] Nevertheless, Slovenia submits that the Tribunal should specify that if Croatia were to claim sovereign rights over part of this area, such claim could not jeopardize Slovenia's junction with the High Sea.[2198] In particular, Slovenia argues that "[t]he Tribunal's award determining an area of high seas south of the line of the junction . . . will mean that neither party will be entitled to declare an exclusive economic zone in that area, [which] is essential in order for the award to meet Slovenia's vital interest in a direct contact with the high seas."[2199]

1121. Croatia submits that "the regime of access from Slovenia's territorial sea to the high seas, the direct link between the two, could only be achieved through the regime of innocent passage under existing international law."[2200] According to Croatia, no special regime is warranted under

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2191 Transcript, Day 5, p. 96:3.

2192 Transcript, Day 5, p. 102:15-21.

2193 Slovenia's Counter-Memorial, para. 12.37; Transcript, Day 8, p. 55:12-13.

2194 Slovenia's Memorial, para. 10.129.

2195 *Ibid*.

2196 Slovenia's Memorial, para. 10.130.

2197 *Ibid*.

2198 Slovenia's Memorial, para. 10.130, Slovenia's Counter-Memorial, para. 12.39; Transcript, Day 4, p. 91:6-16.

2199 Transcript, Day 8, p. 55:16-21.

2200 Transcript, Day 5, p. 102:22-25.

UNCLOS because "[t]here is no strait in this area, as a matter of existing international law and the existing definition of 'straits'."[2201]

2. The Tribunal's Analysis

(a) Regime of the Junction Area

1122. The Tribunal now turns to the regime that shall apply to the Junction Area.[2202] The Tribunal recalls again that it is directed by the Parties, by Article 4 of the Arbitration Agreement, to determine the regime for the use of the relevant maritime areas applying "international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result by taking into account all relevant circumstances." It has given that instruction the most careful consideration; and in the light of the submissions of the Parties, the framework established by UNCLOS, and the geography of the northern Adriatic Sea, it has determined a regime that fulfils that instruction.

i. The Content and Scope of the Freedoms of Communication

1123. The regime that has been determined by the Tribunal is intended to guarantee both the integrity of Croatia's territorial sea and Slovenia's freedoms of communication between its territory and the high seas. To that end, the Tribunal considers it essential that, in the Junction Area,[2203] there is freedom of communication for the purposes of uninterrupted and uninterruptible access to and from Slovenia, including its territorial sea and its airspace. That freedom consists in the freedoms of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines.

1124. These freedoms apply to all ships and aircraft, civil and military, of all flags or States of registration, equally and without discrimination on grounds of nationality. The extension of these rights to ships and aircraft of all States, and not just to Slovenian ships and aircraft, is necessary for the practical realization of rights of access to and from Slovenia's ports and waters, which is a matter that relates not only to Slovenian vessels and aircraft but also to vessels sailing and aircraft flying under the flags of all countries other than Slovenia.

2201 Transcript, Day 5, pp. 102:25-103:2.

2202 As defined in paragraph 1083 above.

2203 No other areas of Croatia's territorial sea are affected by this special regime for the Junction Area.

1125. Ships and aircraft are entitled to the freedoms of communication in the Junction Area described above when travelling to or from Slovenia, including its territorial sea and its airspace.

1126. The freedoms of communication in the Junction Area do not include the freedom to explore, exploit, conserve or manage the natural resources, whether living or non-living, of the waters or the seabed or the subsoil in the Junction Area. Nor do they include the right to establish and use artificial islands, installations or structures, or the right to engage in marine scientific research, or the right to take measures for the protection or preservation of the marine environment.

1127. Unlike innocent passage, the freedoms of communication in the Junction Area are not conditioned upon any criterion of innocence and are not suspendable under any circumstances. The freedoms of communication in the Junction Area are not subject to any duty of submarine vessels to navigate on the surface, nor to any coastal State controls or requirements other than those permitted under the legal regime of the EEZ established by UNCLOS.

1128. Unlike transit passage, the freedoms of communication in the Junction Area are exercisable as if they were high seas freedoms exercisable in an exclusive economic zone. They are not subject to any additional restrictions and conditions except as provided in this Award. They include the freedoms of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms. The laying of submarine cables and pipelines is subject to the conditions set out in UNCLOS Article 79, including the right of Croatia under Article 79(4) to establish conditions for such cables and pipelines entering other parts of Croatia's territorial sea.

ii. Guarantees of, and Limitations to, the Freedoms of Communication

1129. The Tribunal considers that, in order to guarantee the freedoms of communication as defined above, it is necessary that ships and aircraft of all flags and of all kinds, civil and military, exercising the freedom of communication are not subject to boarding, arrest, detention, diversion or any other form of interference by Croatia while in the Junction Area.[2204]

[2204] The Tribunal notes that specific regimes have been established in legal instruments ensuring unhindered access rights in the territorial waters of certain straits, which go clearly beyond those of transit passage in accordance with UNCLOS Article 35(c). *See e.g.*, Article 1 of the Treaty on the Redemption of the Sound Dues between Denmark and Sweden, done in Copenhagen on 14 March 1857, C. Parry, *Consolidated Treaty Series*, Vol. 116, No. 357 (1969). It is also noted that the Danish Straits are an example of a maritime area of vital interest to Denmark and other Baltic States, *see* Kaare Bangert, "Belts and Sund" *in Max Planck Encyclopedia of Public International Law*, paras 1-3 (R. Wolfrum ed., 2013); Erik Brüel, "La topographie, la fonction géographique et l'histoire politique des détroits", Recueil des Cours, Vol. 55, p. 604 (1936).

1130. A distinction must be drawn between, on the one hand, Croatia's right to prescribe laws and regulations for ships and aircraft within the Junction Area and, on the other hand, Croatia's right to take action to enforce its laws and regulations in that area. The Tribunal considers it fair, just, and practical for Croatia to remain entitled to adopt laws and regulations applicable to non-Croatian ships[2205] and aircraft in the Junction Area, giving effect to the generally accepted international standards in accordance with UNCLOS Article 39(2) and (3). Ships and aircraft exercising any aspect of the freedom of communication would be under an obligation to comply with such Croatian laws and regulations.

1131. In this regard, the Tribunal observes that the Junction Area is small, and Croatia retains its rights to enforce its laws and regulations in all other areas of its territorial sea and other maritime zones in accordance with UNCLOS. Notably, the present Award does not affect the right of Croatia to take enforcement action outside the Junction Area in accordance with international law. Those rights include the right to take enforcement action in respect of violations of Croatian law that had been committed in the Junction Area.

1132. The Tribunal considers that, in order to ensure a fair, just, and practical result, it is necessary that in the Junction Area Croatia should retain the right to respond to a request made by the master of a ship or by a diplomatic agent or consular officer of the flag State for the assistance of the Croatian authorities and also, exceptionally, that Croatia should retain the right to exercise in the Junction Area powers under UNCLOS Article 221 in respect of maritime casualties.

1133. The Tribunal emphasises that, in order to achieve a fair and just result, all rights and obligations established by this Award must be exercised and fulfilled in good faith and in a reasonable manner, and in accordance with other applicable rules of international law.

iii. Duty of Cooperation and Other Agreements between the Parties

1134. In every case the rights and obligations of the Parties under the regime of the Junction Area must be exercised in good faith and with due regard for the rights and obligations of other States. The Tribunal observes that, given the small size of the Junction Area and its proximity to adjacent States, this obligation is a particularly important element of the legal regime of the Junction Area. The Tribunal recalls, in addition, the express obligations under UNCLOS Articles 123

[2205] The right to adopt laws and regulations in respect of Croatian ships remains unaffected by the Tribunal's decision.

("Cooperation of States bordering enclosed or semi-enclosed seas"), 300 ("Good faith and abuse of rights"), and 301 ("Peaceful uses of the seas") on all States.

1135. Moreover, there are many international treaties and other arrangements under which States cooperate in order to ensure that limitations upon their right to exercise jurisdiction do not enable wrongdoers to escape legal controls.[2206] The Tribunal notes the importance of such agreements and of similar practical arrangements, and encourages the Parties to cooperate fully with each other, and with other States, in the exercise of their rights and the performance of their obligations in the northern Adriatic. It emphasises that the Parties are obliged by the special regime for the Junction Area to cooperate with one another to the extent necessary to ensure that the Junction Area does not unreasonably impede law enforcement activities consistent with this Award.

1136. This Award is without prejudice to any existing or future agreements between the Parties. Nor does anything in this Award affect the IMO Traffic Separation Scheme in the northern Adriatic Sea, or international rules applicable to air navigation.

1137. Similarly, nothing in this Award purports to address any rights or obligations of the Parties arising under EU law.

1138. The rights and obligations of Croatia and Slovenia, in accordance with UNCLOS, in all areas of their respective territorial seas and other maritime zones apart from the Junction Area are unaffected, except to the extent necessary to ensure the application of the regime established by this Award.

1139. The boundary between the territorial seas of Croatia and Slovenia, the special regime for the Junction Area, and the rights and obligations of Croatia and Slovenia established by this Award shall subsist unless and until they are modified by agreement between those two States.

1140. The Tribunal notes that UNCLOS States Parties must not conclude agreements that affect the application of the basic principles embodied in UNCLOS.[2207] The Tribunal is satisfied that the special regime for the Junction Area described above is consistent with those basic principles.

2206 *See e.g.*, United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done in Vienna on 20 December 1988, 1582 U.N.T.S. 95. Another example are Shiprider Agreements between States that grant law enforcement officers of one State the right to board ships in the territory waters of the other State and exercise certain sovereign powers in respect of these ships. Similarly, Croatia and Slovenia have commited themselves, in the Paris Memorandum of Understanding on Port State Control (39th Amendment, adopted on 27 May 2016), to a system of effective port State control, inspections and information exchange in accordance with that Memorandum.

2207 UNCLOS Article 311(3).

(b) Regime for the Use of the Continental Shelf

1141. As a result of the Tribunal's decision with respect to the maritime boundary, there is no need to establish any particular usage regime, different from what already applies under international law, applicable to the continental shelf.

(c) Regime for the Use of the High Seas

1142. As regards the 'high seas'—that is, the area lying beyond the 12 NM limit of the territorial sea prescribed by UNCLOS Article 3—the Tribunal again finds it unnecessary to define any particular usage regime. As has been explained, if coastal States exercise their rights under UNCLOS to establish exclusive economic zones, every part of the 'high seas' in the Adriatic Sea and Mediterranean Sea could be converted into exclusive economic zones. International law does not require the creation of a special regime for parts of the exclusive economic zone in the northern Adriatic Sea, and neither do equity or the principle of good neighbourly relations. The Tribunal is satisfied that its determinations concerning "Slovenia's junction to the high sea" and the regime for use of the territorial sea achieve a fair and just result.

VII. COSTS OF THE ARBITRATION

1143. The Tribunal takes note of Article 6(7) of the Arbitration Agreement, which provides that "[t]he costs of the Arbitral Tribunal shall be borne in equal terms by the two Parties." The Tribunal further notes that neither side has requested the Tribunal to make any other determination on costs or presented any submission on costs to the Tribunal.

1144. In these circumstances, the Tribunal decides that the costs of the Tribunal and the Registry shall be borne by the Parties in equal shares.

VIII. DISPOSITIF

For the foregoing reasons, the Arbitral Tribunal unanimously,

I. In relation to the land boundary between Croatia and Slovenia,

A. Determines that the boundary in the **Mura River Region** runs as follows:

1. In the area of Brezovec-del/Murišće, as set out in paragraph 413, the boundary follows a line along the southern wayside of a path to the south of that settlement, as illustrated on Award Map I;

2. In the areas of Podturen/Pince and Novakovec/Pince, as set out in paragraph 440, the boundary follows the cadastral limits as modified in 1956 and 1957;

3. In the area of Ferketinec/Pince, as set out in paragraph 440, the boundary follows the aligned limits of the cadastres of Croatia and Slovenia as they stood before 1956;

4. In the area of Mursko Središće/Peklenica, as set out in paragraph 446, the boundary is as recorded in the 1956 Minutes on the Determination of the Borders of the Cadastral District of Peklenica;

5. In all other areas, to the extent that the boundary is disputed, the boundary follows the aligned limits of the cadastres of Croatia and Slovenia;

B. Determines that the boundary in the **Central Region** runs as follows:

1. In the Slovenske gorice,

   a. In the area of Razkrižje, as set out in paragraph 473, the boundary follows the aligned limits of the cadastres of Croatia and Slovenia;

   b. In the area of Robadje/Globoka, as set out in paragraph 478, the boundary follows the limits recorded in the cadastre of Slovenia;

   c. In certain areas in the vicinity of the Santavec River, as set out in paragraph 482, the boundary follows the aligned limits of the cadastres of Croatia and Slovenia;

d. In the vicinity of the Zelena River, as set out in paragraph 485, the boundary follows the aligned cadastral limits of Croatia and Slovenia.

2. In the area of the Drava River, as set out in paragraph 495, the boundary follows the aligned limits of the cadastres of Croatia and Slovenia;

3. In the area of Haloze-Macelj, as set out in paragraph 505, the boundary follows the boundaries as depicted on maps dated 1914, corresponding to the limits of the cadastre of Slovenia;

4. Within the Sotla River area,

    a. In area 5.1, as set out in paragraph 521, the boundary follows the limits of the cadastre of Croatia;

    b. In area 5.2, as set out in paragraph 522, the boundary follows the limits recorded in the cadastre of Croatia;

5. Within the areas of the Sava and Bregana Rivers,

    a. In area 6.1, as set out in paragraph 531, the boundary follows the middle of the Sava River;

    b. In the area of the junction of the Sava and Bregana Rivers, as set out in paragraph 540, the boundary follows the aligned limits of the cadastres of Croatia and Slovenia;

6. Within the area of Gorjanci/Žumberak,

    a. In area 7.1, as set out in paragraph 564, the boundary follows the limits of the cadastre of Slovenia;

    b. In area 6.3, as set out in paragraph 578, the boundary follows the eastern limit of the Sekulići/Sekuliči Slovenian cadastral district;

c. In the area of Trdinov Vrh/Sveta Gera, as set out in paragraph 586, the boundary follows the aligned limits of the cadastres of Croatia and Slovenia;

7. Within the areas of the Kamenica, Kupa/Kolpa and Čabranka Rivers,

a. In the Kamenica River area, as set out in paragraph 608, the boundary is as shown on Map 23 of Volume III of Croatia's Counter-Memorial and on Map 59 of Volume III of Croatia's Reply;

b. In the Kupa/Kolpa River area, as set out in paragraph 614, the boundary is as concurrently depicted on the Parties' claim maps in the present proceedings;

c. In the Čabranka River area, as set out in paragraph 624, the boundary follows the aligned limits of the cadastres of Croatia and Slovenia;

8. In the area to the east of the settlement of Črneča Vas, as set out in paragraph 630, the boundary follows the aligned cadastral limits of Croatia and Slovenia.

9. Within the area of Novi Kot/Prezid, Draga/Prezid, Babno Polje/Prezid,

a. In the areas of Novi Kot/Prezid and Draga/Prezid, as set out in paragraph 636, the boundary follows the aligned limits of the cadastres of Croatia and Slovenia;

b. In the area of Babno Polje/Prezid, as set out in paragraph 642, the boundary is as indicated on an Imperial-Royal field sketch of June 1918 of the provincial boundary between Carniola and Croatia;

C. Determines that the boundary in the **Istria Region** runs as follows:

1. In areas 9.3 and 9.4, as set out in paragraph 688, the boundary follows the course of the former boundary between Italy and Yugoslavia as it stood from 1920 to 1947;

2. The area of 2 ha immediately south of Gomance, as set out in paragraph 696, forms part of the territory of Slovenia;

3. In the areas of Klana/Lisac and Zabiče/Sušak as well as Lisac/Sušak, as set out in paragraphs 719 and 720, the boundary follows the boundary between Lisac and Sušak as depicted on a 1878 map of Lisac;

4. In the area of Kućibreg/Topolovec, as set out in paragraph 737, the boundary follows the outer limits of the settlements transferred from Croatia to Slovenia in 1956, as reflected in cadastral records and maps maintaining the 1947 delimitation line as the new cadastral limits;

5. In the area of Merišće/Krkavče and in the Lower Dragonja region, as set out in paragraph 769, the boundary follows the Dragonja River up to a point in the middle of the channel of the St Odoric Canal with the coordinates 45°28′42.3″N, 13°35′08.2″E;[2208]

D. Determines that, in **all areas not specifically mentioned above**, the boundary is as agreed by the Parties in the course of the present proceedings; in the absence of such agreement, the boundary follows the aligned limits of the cadastres of Croatia and Slovenia;

E. Decides further that:

1. The Tribunal has no jurisdiction to address Croatia's request that the Tribunal adjudge and declare that "no Slovenian personnel, whether military, civilian, police or security, shall be entitled to remain at the facility located at Sveta Gera in the Croatian Municipality of Ozalj";

2. Croatia's request that the Tribunal adjudge and declare that "Slovenia shall not hinder communication between the Croatian municipality of Sveti Martin na Muri, including the area of Murišće" is moot, and no decision by the Tribunal is accordingly called for;

II. In relation to the Bay,

A. Finds that the Bay had the status of internal waters prior to the dissolution of the SFRY and determines that it retained that status after the independence of Croatia and Slovenia;

[2208] The geographical coordinates used in this Award are referenced to the ETRS89, unless otherwise indicated. *See* note 615.

B. Determines that the closing line of the Bay (dividing internal waters from territorial sea) runs from Cape Madona, Slovenia (45°31′49.3″N, 13°33′46.0″E) to Cape Savudrija, Croatia (45°30′19.2″N, 13°30′39.0″E);

C. Determines that the boundary between Croatia and Slovenia in the Bay shall be a straight line joining a point in the middle of the channel of the St Odoric Canal with the coordinates 45°28′42.3″N, 13°35′08.2″E, to point A with the coordinates 45°30′41.7″N, 13°31′25.7″E;

III. In relation to the maritime boundary between Croatia and Slovenia,

Determines that the maritime boundary between the territorial seas of Croatia and Slovenia is a geodetic line joining Point A with the coordinates 45°30′41.7″N, 13°31′25.7″E, with an initial geodetic azimuth of 299°04′45.2″, to Point B on the line established by the Treaty of Osimo;

IV. In relation to the Junction Area,

A. Establishes a Junction Area whose limits consist of the five geodetic lines joining the following six points in the order given:

Point T5, being a point on the boundary established by the Treaty of Osimo;

Point T4, being a point on the boundary established by the Treaty of Osimo;

Point B, being the tripoint on the boundary between the maritime zones of Croatia and Slovenia, and the boundary established by the Treaty of Osimo, at 45°33′57.4″N, 13° 23′04.0″E;

Point C, being a point on the boundary between the maritime zones of Croatia and Slovenia, at 45°32′22.5″N, 13°27′07.7″E;

Point D, being a point landward of the turning point T4 on the Treaty of Osimo boundary, at 45°30′42.2″N, 13°20′56.3″E;

Point E, being a point on the outer limit of Croatia's territorial sea, lying 12 NM from the coast of Croatia, at 45°23′56.6″N, 13°13′34.6″E;

and the line from Point E along the outer limit of Croatia's territorial sea to Point T5.

B. Determines that, in the Junction Area, the following usage regime shall apply:

a. Freedom of communication shall apply to all ships and aircraft, civil and military, of all flags or States of registration, equally and without discrimination on grounds of nationality, for the purposes of access to and from Slovenia, including its territorial sea and its airspace;

b. The freedom of communication shall consist in the freedoms of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines;

c. The freedom of communication shall not be conditioned upon any criterion of innocence, shall not be suspendable under any circumstances, and shall not be subject to any duty of submarine vessels to navigate on the surface or to any coastal State controls or requirements other than those permitted under the legal regime of the EEZ established by UNCLOS;

d. The laying of submarine cables and pipelines shall be subject to the conditions set out in UNCLOS Article 79, including the right of Croatia under Article 79(4) to establish conditions for such cables and pipelines entering other parts of Croatia's territorial sea;

e. The freedom of communication shall not include the freedom to explore, exploit, conserve or manage the natural resources, whether living or non-living, of the waters or the seabed or the subsoil in the Junction Area, nor shall it include the right to establish and use artificial islands, installations or structures, or the right to engage in marine scientific research, or the right to take measures for the protection or preservation of the marine environment;

f. Ships and aircraft exercising the freedom of communication shall not be subject to boarding, arrest, detention, diversion or any other form of interference by Croatia while in the Junction Area, but Croatia shall remain entitled to adopt laws and regulations applicable to non-Croatian ships and aircraft in the Junction Area, giving effect to the generally accepted international standards in accordance with UNCLOS Article 39(2) and (3);

g. Croatia shall retain the right in the Junction Area to respond to a request made by the master of a ship or by a diplomatic agent or consular officer of the flag State for the

assistance of the Croatian authorities and also the exceptional right to exercise in the Junction Area powers under UNCLOS Article 221 in respect of maritime casualties;

h. The rights and obligations of the Parties referred to in sub-paragraphs (a) to (g) shall be exercised in good faith and with due regard for the rights and obligations of other States;

C. Notes that this regime is without prejudice to any existing or future agreements regarding the usage of relevant maritime areas between the Parties, and that nothing in this Award affects the IMO Traffic Separation Scheme in the northern Adriatic Sea, or international rules applicable to air navigation, or any rights or obligations of the Parties arising under EU law;

D. Affirms that the rights and obligations of Croatia and Slovenia, in accordance with UNCLOS, in all areas of their respective territorial seas and other maritime zones apart from the Junction Area are unaffected, except to the extent necessary to ensure the application of the regime established by this Award;

E. Decides that, in view of the decisions set out above, no further determinations in respect of maritime matters are necessary or appropriate;

V. In relation to the permanence of the rights and obligations of the Parties under the Award,

Notes that the land boundary as well as the boundary between the territorial seas of Croatia and Slovenia, the special regime for the Junction Area, and the rights and obligations of Croatia and Slovenia established by this Award shall subsist unless and until they are modified by agreement between those two States;

VI. In relation to the costs of the arbitration,

Decides that the costs of the Tribunal and the Registry shall be borne by the Parties in equal shares.

Done in Brussels, Belgium, this twenty-ninth day of June, two thousand and seventeen:

Ambassador Rolf Einar Fife

Professor Vaughan Lowe QC

Professor Nicolas Michel

Judge Bruno Simma

Judge Gilbert Guillaume
President

Dr. Dirk Pulkowski
Registrar

PCA CASE NO. 2012-04

IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF CROATIA AND THE GOVERNMENT OF THE REPUBLIC OF SLOVENIA, SIGNED ON 4 NOVEMBER 2009

- between -

THE REPUBLIC OF CROATIA

- and -

THE REPUBLIC OF SLOVENIA

(together, the "Parties")

ANNEX TO THE FINAL AWARD

29 June 2017

ARBITRAL TRIBUNAL:
Judge Gilbert Guillaume (President)
Ambassador Rolf Einar Fife
Professor Vaughan Lowe
Professor Nicolas Michel
Judge Bruno Simma

REGISTRAR:
Dr. Dirk Pulkowski
The Permanent Court of Arbitration

ARBITRATION AGREEMENT
between the Government of the Republic of Croatia
and the Government of the Republic of Slovenia

The Governments of the Republic of Croatia and the Republic of Slovenia (hereinafter referred to as "the Parties"),

Whereas through numerous attempts the Parties have not resolved their territorial and maritime border dispute in the course of the past years,

Recalling the peaceful means for the settlement of disputes enumerated in Article 33 of the UN-Charter,

Affirming their commitment to a peaceful settlement of disputes, in the spirit of good neighbourly relations, reflecting their vital interests,

Welcoming the facilitation offered by the European Commission,

Have agreed as follows:

Article 1: Establishment of the Arbitral Tribunal

The Parties hereby set up an Arbitral Tribunal.

Article 2: Composition of the Arbitral Tribunal

(1) Both Parties shall appoint by common agreement the President of the Arbitral Tribunal and two members recognized for their competence in international law within fifteen days drawn from a list of candidates established by the President of the European Commission and the Member responsible for the enlargement of the European Commission. In case that they cannot agree within this delay, the President and the two members of the Arbitral Tribunal shall be appointed by the President of the International Court of Justice from the list.

(2) Each Party shall appoint a further member of the Arbitral Tribunal within fifteen days after the appointments referred to in paragraph 1 have been finalised. In case that no appointment has been made within this delay, the respective member shall be appointed by the President of the Arbitral Tribunal.

(3) If, whether before or after the proceedings have begun, a vacancy should occur on account of the death, incapacity or resignation of a member, it shall be filled in accordance with the procedure prescribed for the original appointment.

Article 3: Task of the Arbitral Tribunal

(1) The Arbitral Tribunal shall determine

(a) the course of the maritime and land boundary between the Republic of Croatia and the Republic of Slovenia;

(b) Slovenia's junction to the High Sea;

(c) the regime for the use of the relevant maritime areas.

(2) The Parties shall specify the details of the subject-matter of the dispute within one month. If they fail to do so, the Arbitral Tribunal shall use the submissions of the Parties for the determination of the exact scope of the maritime and territorial disputes and claims between the Parties.

(3) The Arbitral Tribunal shall render an award on the dispute.

(4) The Arbitral Tribunal has the power to interpret the present Agreement.

Article 4: Applicable Law

The Arbitral Tribunal shall apply

(a) the rules and principles of international law for the determinations referred to in Article 3 (1) (a);

(b) international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result by taking into account all relevant circumstances for the determinations referred to in Article 3 (1) (b) and (c).

Article 5: Critical date

No document or action undertaken unilaterally by either side after 25 June 1991 shall be accorded legal significance for the tasks of the Arbitral Tribunal or commit either side of the dispute and cannot, in any way, prejudge the award.

Article 6: Procedure

(1) Each Party shall submit a memorial to the Arbitral Tribunal within twelve months. Each Party has the right to comment on the memorial of the other Party within a deadline fixed by the Arbitral Tribunal.

(2) Unless envisaged otherwise, the Arbitral Tribunal shall conduct the proceedings according to the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States.

(3) The Arbitral Tribunal may seek expert advice and organize oral hearings.

(4) The Arbitral Tribunal shall, after consultation of the Parties, decide expeditiously on all procedural matters by majority of its members.

(5) The proceedings are confidential and shall be conducted in English.

(6) The Parties shall appoint representatives to act as intermediary between them and the Arbitral Tribunal. They may retain counsels to support their representative.

(7) The Arbitral Tribunal shall be supported by a Secretariat. The costs of the Arbitral Tribunal shall be borne in equal terms by the two Parties. The Parties invite the European Commission to provide secretarial support to the Arbitral Tribunal. The place of arbitration shall be Brussels, Belgium.

(8) The Arbitration Tribunal may at any stage of the procedure with the consent of both Parties assist them in reaching a friendly settlement.

Article 7: The award of the Arbitral Tribunal

(1) The Arbitral Tribunal shall issue its award expeditiously after due consideration of all relevant facts pertinent to the case. The Arbitral Tribunal adopts the award by majority of its members. The award shall state the reasons on which it is based. No individual or dissenting opinions shall be attached to the award.

(2) The award of the Arbitral Tribunal shall be binding on the Parties and shall constitute a definitive settlement of the dispute.

(3) The Parties shall take all necessary steps to implement the award, including by revising national legislation, as necessary, within six months after the adoption of the award.

Article 8: EU accession negotiation documents

(1) No document presented in the EU accession negotiations unilaterally shall prejudice the Arbitral Tribunal when performing its tasks or commit either side on the dispute.

(2) The above applies to all documents and positions either written or submitted orally, including, *inter alia*, maps, negotiating positions, legal acts and other documents in whatever form, produced, presented or referred to unilaterally in the framework of the EU accession negotiations. It also applies to all EU documents and positions which refer to or summarize the above-mentioned documents and positions.

Article 9: The continuation of the EU accession negotiations according to the negotiating framework

(1) The Republic of Slovenia shall lift its reservations as regards opening and closing of negotiation chapters where the obstacle is related to the dispute.

(2) Both Parties shall refrain from any action or statement which might negatively affect the accession negotiations.

Article 10: Stand-still

(1) Both Parties refrain from any action or statement which might intensify the dispute or jeopardize the work of the Arbitral Tribunal.

(2) The Arbitral Tribunal has the power to order, if it considers that circumstances so require, any provisional measures it deems necessary to preserve the stand-still.

Article 11

(1) The Agreement shall be ratified expeditiously by both sides in accordance with their respective constitutional requirements.

(2) The Agreement shall enter into force on the first day of the week following the exchange of diplomatic notes with which the Parties express their consent to be bound.

(3) All procedural timelines expressed in this Agreement shall start to apply from the date of the signature of Croatia's EU Accession Treaty.

(4) The Agreement shall be registered with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations.

Done at Stockholm, on 4 November 2009 in three originals in English language.

Signed by

For the Government of the Republic of Croatia

For the Government of the Republic of Slovenia

Witnessed by

For the Presidency of the Council of the European Union

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between the Government of the Republic of Slovenia and the Government of the Republic of Croatia

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