

# **The UN Convention on the Law of the Sea, the European Union and the Rule of Law**

**What is going on in the Adriatic Sea?**

Davor Vidas





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**Abstract**

In October 2003, Croatia declared an ‘Ecological and Fisheries Protection Zone’ in the Adriatic Sea. However, in June 2004 Croatia decided to delay the implementation of that Zone for the European Union (EU) Member States. Then, in December 2006 it decided to implement the Zone fully from 1 January 2008 – only to discontinue its application to EU countries from 15 March 2008. The developments and underlying reasons for the changing jurisdictional picture in the Adriatic Sea are the subject of this paper. Key Adriatic Sea features, trends in uses of its living resources and maritime space, and resource conservation and marine pollution concerns are presented. Developments leading to recent national legislation and positions on maritime jurisdiction by Croatia as well as Italy and Slovenia are discussed. These regulations, positions and developments are assessed from the perspective of the law of the sea. Relevant policy perspectives, including aspects of EU membership, are included.

**Key Words**

Adriatic Sea, Exclusive Economic Zone, Environmental and Fisheries Protection Zone, fisheries, marine pollution, maritime delimitation, Croatia, Italy, Slovenia, European Union

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## Contents

Acknowledgements	iii
1 Introduction	1
2 The Adriatic Sea: coastal states, key maritime uses, conservation and environmental concerns	3
2.1 The Adriatic Sea as a maritime transport route: key aspects and trends	4
2.2 Maritime uses of the Adriatic Sea: conservation and environmental concerns	5
3 Croatia and its Adriatic Sea Zone	9
3.1 The long road towards an EEZ	9
3.2 Preparing the ground for the extension of maritime jurisdiction	10
3.3 Declaring the ‘Ecological and Fisheries Protection Zone’	13
3.4 Croatia’s Zone as an expression of unilateralism	14
3.5 From bilateral, regional and EU – to trilateral Adriatic dialogue	15
3.6 Postponing implementation of the Zone to EU countries	18
3.7 Agreed minutes: record of the meeting, or an agreement?	19
4 Slovenia: The high seas too far away	25
4.1 Baselines and breadth of the territorial sea of Slovenia	25
4.2 The Croatian Zone as prejudicing the border at sea with Slovenia	29
4.3 The right of Slovenia to a ‘territorial exit to the high seas’	30
4.4 Asserting claims to sovereign rights in the maritime area south of Point 5	36
4.5 Towards a consensual solution – ‘in the EU spirit’	38
5 Italy: Not yet ready for delimitation of Adriatic Sea zones?	41
5.1 The Italian note of April 2004	42
5.2 Law on the Italian ecological protection zone, February 2006	43
5.3 The Italian note of March 2006	44
5.4 Assessment	44
6. Outcome	51
6.1 Deciding to implement the Zone fully	51
6.2 Discontinuing the application to EU Member States	56
6.3 Credibility and the Rule of Law	62
7 Concluding remarks	65

**Maps**

1	The Adriatic Sea: coastal states and main ports	3
2	Agreed maritime boundaries in the north Adriatic Sea	27
3	IMO traffic separation scheme in the north Adriatic Sea	34
4	Italy: maritime boundaries and delimitation issues	46

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‘The Union is founded on ... the rule of law’

*Treaty on European Union\**

‘No problem is more important or more vexing  
for international lawyers than that of promoting  
the rule of law in international affairs’

*Bernard Oxman\*\**

## 1 Introduction

On 10 December 2007, the ‘Constitution for the Oceans’, as the United Nations Convention on the Law of the Sea (LOS Convention) is sometimes called, marked its 25<sup>th</sup> anniversary.<sup>1</sup> On that same day, the Council of the European Union (EU) called on Croatia ‘not to apply any aspect of the Zone [in the Adriatic Sea] to the EU Member States until a common agreement in the EU spirit is found’.<sup>2</sup>

Why would the European Council use such an occasion – the unique anniversary of one of the most important international treaties of our time – to call on an Adriatic Sea coastal state to refrain from implementing its maritime Zone based on the Exclusive Economic Zone (EEZ) provisions, which contain some among fundamental rights and duties of a coastal state under the LOS Convention? In 2002, the UN Secretary-General had reported: ‘twenty years after the adoption of the Convention, there is almost a universal acceptance of maritime zones as established by UNCLOS’.<sup>3</sup> What is going on in the Adriatic Sea, five years later, that could have prompted the European Council to require a ‘common agree-

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\* Treaty on European Union, Article 2 (consolidated version of 9 May 2008).

\*\* Bernard Oxman, ‘The Rule of Law and the United Nations Convention on the Law of the Sea’, *European Journal of International Law*, Vol. 7, 1996, p. 353.

<sup>1</sup> See Tommy Koh, ‘A Constitution for the Oceans’, in *The Law of the Sea, United Nations Convention on the Law of the Sea* (UN Pub. Sales No. E.83V.5, 1983), p. xxiii. The Convention was opened for signature on 10 December 1982 at Montego Bay, Jamaica, marking the culmination of over 14 years of work, preceding and during the Third UN Conference on the Law of the Sea (1973–82) involving participation by more than 150 countries representing all regions of the world. The Convention entered into force on 16 November 1994; *International Legal Materials*, Vol. 21, 1982, p. 1261. There are (as of 30 June 2008) 155 parties to the Convention, including all 27 EU Member States, as well as the European Community.

<sup>2</sup> Council of the European Union, 2839<sup>th</sup> Council Meeting, *General Affairs and External Relations*, Brussels, 10 December 2007, 16326/07 (Presse 288), p. 10.

<sup>3</sup> *Oceans and the law of the sea: Report of the Secretary-General*, UN Doc. A/57/57, 7 March 2002, para. 51.

ment in the EU spirit' before an EEZ, a part of international customary and treaty law, is applied to EU Member States?

That something must indeed be going on is evident from several recent annual Reports of the UN Secretary-General on 'Oceans and the Law of the Sea'. Since the August 2003 addendum to the Annual Report, there has been regular mention of Adriatic Sea developments in the section on 'Maritime claims and the delimitation of maritime zones'.<sup>4</sup> Moreover, there is hardly any issue of the UN *Law of the Sea Bulletin* published since No. 53 in 2004 which does not contain some exchange of diplomatic notes or translation into 'world languages' of new and amended national legislation by some of the Adriatic Sea states. Before late 2003/early 2004, those publications rarely made any mention of the Adriatic Sea, let alone of maritime disputes there. In the past few years, however, maritime issues in the Adriatic Sea, in addition to diplomatic exchanges, have become a frequent subject of statements made by high-level politicians, documents adopted by various EU bodies, and heated debates in domestic political fora, including the national parliaments of some eastern Adriatic countries, accompanied by considerable media attention as well.

In this paper we first briefly look at some key features of the Adriatic Sea as a region, including aspects and trends in uses of Adriatic Sea living resources and maritime space, as well as resource conservation and marine pollution concerns. A review of developments leading to recently adopted national legislation and positions on maritime jurisdiction by the Adriatic Sea states of Croatia, Italy and Slovenia is presented in the following sections. These regulations, positions and developments are assessed from the perspective of the law of the sea, as well as from relevant policy perspectives, including aspects of EU membership. Developments in and underlying reasons for the changing jurisdictional picture in that marine region are examined, to enable a documented response to the basic question: What is going on in the Adriatic Sea?

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<sup>4</sup> *Oceans and the law of the sea: Report of the Secretary-General*, UN Docs: A/58/65/Add.1, 29 August 2003, para. 30; A/59/62, 4 March 2004, paras. 30–31; A/59/62/Add.1, 18 August 2004, paras. 39–44; A/60/63, 4 March 2005, para.12; A/60/63/Add.2, 15 August 2005, para. 22; A/61/63, 9 March 2006, paras. 7, 9 and 11; A/61/63/Add.1, 17 August 2006, paras. 18–20; and A/62/66/Add.1, 31 August 2007, paras. 25 and 27–28.

## 2 The Adriatic Sea: coastal states, key maritime uses, conservation and environmental concerns

The Adriatic Sea, although a part of the wider Mediterranean region, has its own specific features and is considered a distinct marine sub-region.<sup>5</sup> It is a narrow, semi-enclosed sea, formed as a gulf deeply incised into the European mainland, and connected to the rest of the Mediterranean only by the Strait of Otranto.



**MAP 1: The Adriatic Sea: coastal states and main ports**

<sup>5</sup> See also Art. 4(2)(b) of the EU Marine Strategy Framework Directive (Directive 2008/56/EC of the European Parliament and of the Council, of 17 June 2008, establishing a framework for community action in the field of marine environmental policy, *Official Journal of the European Union*, L 164, 25 June 2008, p. 19).

Prior to 1991, there were only three coastal states on the Adriatic Sea north of the Strait of Otranto: Albania, Italy and Yugoslavia. Today, there are six: in addition to Albania and Italy, also Bosnia and Herzegovina, Croatia, Montenegro and Slovenia. Except for Italy, all these states are situated on the eastern coast of the Adriatic Sea.

The share of the Adriatic Sea coast of each of those countries differs greatly. Croatia has by far the longest coastline of all. Including the coasts of its numerous islands,<sup>6</sup> Croatia's coastline extends over 6200 kilometres – approximately 75 per cent of the length of all the Adriatic Sea coastlines together (which is around 8300 km).

Italy, situated on the western coast, has an Adriatic Sea coastline of some 1300 kilometres, i.e., around 15 per cent of the total. However, Italy has by far the largest share of maritime traffic and trade in the region: Italian ports annually receive around 75 per cent of all commercial ship traffic in the Adriatic Sea. Also in some other economic aspects, such as fisheries, Italy is by far the biggest user of the Adriatic Sea, as will be further discussed below. The proportions are diametrically reversed in that respect as well: although Italy has the dominant fishing fleet, most of the fishing grounds lie in waters closer to the Croatian island chain.

Thus it should be noted that there exist great regional imbalances, even diametrically opposed situations – as illustrated by the share of coastline, on the one hand, and the extent of key maritime uses of the Adriatic Sea, on the other. As a result, while some overall interests in the Adriatic Sea remain shared, other, more specific ones, are quite different.

Some of the remaining eastern Adriatic states have very short coastlines: Slovenia has around 45 km; Bosnia and Herzegovina has even less than half of that, only some 20 km. The unusual positions of those coasts are but one indication of the complex and generally troubled past of the region, where boundaries have been subject to the vagaries of history.

## **2.1 The Adriatic Sea as a maritime transport route: key aspects and trends**

Deeply incised into the European mainland, the Adriatic Sea has long been an important transport route. The reason is obvious from its geo-

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<sup>6</sup> For recent research on the exact number of islands along the Croatian coast and coastal length measurements, see Tea Duplačić-Leder, Tin Ujević and Mendi Čala, 'Coastline lengths and areas of islands in the Croatian part of the Adriatic Sea determined from the topographic maps at the scale of 1 : 25000', *Geoadria*, Vol. 9, No. 1, 2004, pp. 5–32. While Croatia's mainland coastline extends over 1880 km, its island chain (with 4398 km coastline length) has important international law implications for the drawing of straight baselines, from which the breadth of the territorial sea (as well as the EEZ) is measured; see Art. 7 of the LOS Convention.

graphical, and indeed geopolitical, placement. On its western coast is a highly industrially developed country, Italy. As to the eastern coast, although coastal states there are less industrially developed, various developed mid-European countries (several of which are land-locked) gravitate naturally to the Adriatic Sea. Some of these are heavily dependent on that maritime route for their energy imports: Austria, for instance, receives 75 per cent of its oil imports through Adriatic ports, and Bavaria in Germany even 100 per cent.

In the foreseeable future the Adriatic region may see major changes. The Eurasian space today is in a process of tremendous restructuring, due to the changes in energy export/import flows. As to future oil transport routes, several large-scale visions clash when it comes to projections for the next decade. While this is not the place to enter into further details of that highly complex matter,<sup>7</sup> it is important to note that maritime transport patterns in the Adriatic Sea are likely to be undergoing change in the near future, in terms of the use intensity of existing routes and due to the introduction of new ones.

The eastern Adriatic coast, due to its geological (*karst*) composition, has several deep-water ports, especially along the Croatian coast (thus also closer to mid-Europe). These can accommodate super-tankers. And this, under various scenarios, could be part of the future solution for today's bottlenecks in oil export routes in Eurasia. In addition, plans are underway for large LNG (liquefied natural gas) import terminals, to help in diversifying mid-European gas imports and lessen the dependence on Russia. The Croatian coast, due to its placement and natural features, is central in several such energy transport plans and projects. In addition to industrial interests, also the geopolitical interests of main players on the Eurasian scene – Russia, the USA and some key EU countries – are at stake here, and should be taken into account when explaining overall Adriatic Sea developments.<sup>8</sup>

## **2.2 Maritime uses of the Adriatic Sea: conservation and environmental concerns**

By the early 2000s, scientific and monitoring projects had already documented the worrisome effects and risks of current maritime uses of the Adriatic Sea – both shipping and fishing – on the state of its living resources and the marine environment. Due to its special features and the

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<sup>7</sup> For an overview see Davor Vidas, 'Particularly Sensitive Sea Areas: The Need for Regional Cooperation in the Adriatic Sea', in Katarina Ott (ed.), *Croatian Accession to the European Union: The Challenges of Participation* (Zagreb, Institute of Public Finance/Friedrich Ebert Stiftung, 2006), pp. 354–358 and 361–363. Available on-line at [www.ijf.hr/eng/EU4/vidas.pdf](http://www.ijf.hr/eng/EU4/vidas.pdf).

<sup>8</sup> See Davor Vidas, 'Global Trends in Use of the Seas and the Legitimacy of Croatia's Extension of Jurisdiction in the Adriatic Sea', *Croatian International Relations Review*, Dossier, Vol. 9, No. 32, 2003, pp. 4–10.

slow exchange of water with the rest of the Mediterranean through the Strait of Otranto, the Adriatic is a particularly sensitive sea, highly vulnerable to marine pollution.<sup>9</sup>

As to maritime transport and shipping in general, the current levels of traffic in the Adriatic Sea, apart from accident risks, raise serious concerns for the coastal states. That especially relates to *operational* oil discharges from large ships, mainly on international shipping routes that traverse the Adriatic. The extent and frequency of that type of pollution in the Adriatic Sea have been confirmed by an analysis performed from 1999 onwards by the Sensors, Radar Technologies and Cybersecurity Unit, DG Joint Research Centre of the European Commission. Analysis of images obtained through special satellite technology (satellites equipped with Synthetic Aperture Radar, SAR) has demonstrated the occurrence of enhanced spill concentrations along major maritime routes. An analysis made for the Adriatic Sea detected an average of between 200 and 250 of such possible illegal oil spills from ships each year, for the period from 1999 to 2002.<sup>10</sup> These studies, carried out under the auspices of the European Commission, have provided the first accurate statistical mapping of oil discharges from ships in the Adriatic Sea. The studies also proved that such activity is underway on a large scale here – despite the Special Area status of the entire Mediterranean Sea, including the Adriatic, under MARPOL Annex I, whereby the discharge of oil and oily waste is prohibited.<sup>11</sup>

Another major concern relates to the marine living resources and their conservation and management. Due to its specific characteristics, the Adriatic Sea contains some of the highest fish-producing areas in the entire Mediterranean.<sup>12</sup> This is especially the case in the northern Adriatic, as well as in several other localities along the Croatian coast. Overall, however, the Adriatic ichthyofauna is characterised by high

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<sup>9</sup> See further discussion in Vidas, 'Particularly Sensitive Sea Areas', *op. cit.*, *supra* note 7, pp. 359–365.

<sup>10</sup> See European Commission, DG Joint Research Centre, *Atlante dell'inquinamento da idrocarburi nel mare Adriatico* (Luxembourg, European Communities, 2005), p. 10. According to that report, 257 oil spills from ships were detected in the Adriatic Sea (area north of latitude 39° N) in 1999; 263 spills in 2000; 184 in 2001; and 244 spills in 2002. A special campaign for the Adriatic Sea during only two-and-a-half summer months in 2004 (16 July–30 September) revealed 77 possible oil spills there; see *ibid.*, pp. 9–10 and 49–53.

<sup>11</sup> The International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto; for the Convention with Annexes, including unified interpretations and amendments, see *MARPOL 73/78 – Consolidated edition 2002* (London, International Maritime Organization, 2002).

<sup>12</sup> On this and other features of the Mediterranean fisheries, see 'Mediterranean fisheries', in *Development and agri-food policies in the Mediterranean region* (Paris, International Centre for Advanced Mediterranean Agronomic Studies, 2002), pp. 151–229.

diversity, with numerous species but low abundance. Exploitation pressure has not been proportional to the productivity of many important species and stocks, resulting in a key problem for the sustainability of the Adriatic Sea fisheries.

Historically, there has been only one strong fishing fleet in the Adriatic Sea – that of Italy.<sup>13</sup> A comparison of total catches of the three Adriatic coastal states whose legal and policy positions are discussed further in this paper – Croatia, Italy and Slovenia – shows their highly unequal involvement in Adriatic Sea fisheries. In the early 2000s, total Italian marine capture fisheries for all areas stood at around 300,000 tons (and at least half of that came from the Adriatic Sea); the Croatian catch in the Adriatic Sea was for several years at around 20,000 tons (gradually returning to pre-1990 levels of over 30-40,000 tons from 2004 on), while the Slovenian catch remained at around 1,500 tons per year.<sup>14</sup> Among the coastal states of the Adriatic, Italy has always been the undisputed fishing super-power. The disproportion is especially obvious in bottom-trawl fishery, with the Croatian catch at around 5,000 tons and the Italian catch exceeding 50,000 tons.

From the commercial perspective, the most interesting species are demersal (benthic, bottom-dwelling) ones, because of their market price. In the Adriatic Sea, the profitability and accessibility of demersal resources, due also to the wide and mostly shallow shelf, have contributed to their depletion.<sup>15</sup> At the same time, the abundance of typical prey species has increased. Especially disturbing findings were revealed in 2000/2001, based on data comparison of two research survey cruises monitoring the state of demersal fish stocks over a span of 50 years: the results of the HVAR cruise in 1948 and those of the MEDITS cruise in

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<sup>13</sup> In addition, the involvement of (mostly seasonal) extra-regional fishing vessels has been observed in the Adriatic Sea, targeting large pelagic species such as tuna. Neither has the Adriatic Sea been spared the phenomenon of IUU (illegal, unregulated and unreported) fishing. On problems in deterring IUU fishing and the law of the sea aspects, see Davor Vidas, 'IUU Fishing or IUU Operations? Some Observations on Diagnosis and Current Treatment', in David D. Caron and Harry N. Scheiber (eds.), *Bringing New Law to Ocean Waters* (Leiden, Brill, 2004), pp. 125–144.

<sup>14</sup> See FAO Yearbooks of Fishery Statistics and FAO Fishery Country Profiles, at [www.fao.org](http://www.fao.org). As for Adriatic fisheries, see especially FAO AdriaMed at [www.faoadriamed.org](http://www.faoadriamed.org). Statistics on marine capture fisheries of other Adriatic states do not change the picture to any significant degree: Albania's annual catch in the Adriatic Sea in the same period was at around 2,500 tons, while Montenegro's marine capture fisheries was under 1,000 tons per year. However, the problem of reliability of statistics on Adriatic Sea fisheries has often been noted; see, e.g., Ivan Katavić and Neda Skakelja, 'Status and Future of Croatian Marine Fisheries', *Croatian International Relations Review*, Dossier, Vol. 9, No. 32, 2003, pp. 28–32.

<sup>15</sup> See also Katavić and Skakelja, 'Status and Future', *op. cit.*, *supra* note 14, p. 29.

1998.<sup>16</sup> The comparison revealed several major negative changes in the composition and distribution of demersal fish resources, clearly indicating their overexploitation (decrease of elasmobranch diversity and occurrence, considerably lower biomass indices, etc.). Some species, such as rays, have been especially affected by the intensity of trawl fishery and were disappearing; moreover, various indicators of the poor state of, in particular, demersal Adriatic fish stocks have been documented.

Despite serious concerns for the sustainability of Adriatic Sea fisheries as well as frequent incidents of illegal oil spills from vessels, most of the Adriatic Sea remained under the legal status of the high seas until the autumn of 2003, because no state had proclaimed an EEZ there. It was therefore not possible for coastal states to exercise their sovereign rights and jurisdiction as guaranteed under the LOS Convention – neither for the purposes of living resource management and conservation, nor in respect of marine environmental protection regarding pollution from vessels.

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<sup>16</sup> See S. Jukić-Peladić, N. Vrgoč, S. Krstulović-Sifner, C. Piccinetti, G. Piccinetti-Manfrin, G. Marano and N. Ungaro, 'Long-term changes in demersal resources of the Adriatic Sea: comparison between two trawl surveys carried out in 1948 and 1998', *Fisheries Research*, Vol. 53, No. 1, 2001, pp. 95–104.

### 3 Croatia and its Adriatic Sea Zone

#### 3.1 The long road towards an EEZ

In 1994, Croatia adopted its Maritime Code, according to which the '[exclusive] economic zone of the Republic of Croatia comprises the maritime spaces from the outer limit of the territorial sea in the direction of the open sea up to its outer limit permitted by general international law'.<sup>17</sup> However, the 1994 Code also stipulated that its provisions on the EEZ (Articles 33 to 42) are to apply only after the Parliament has decided to declare such a zone.<sup>18</sup>

For years, Croatian scientists and experts had argued for an EEZ to be implemented in the Adriatic Sea, in vain presenting increasingly alarming scientific findings about the state of fish stocks, the need for improved resource conservation and marine environmental protection, all supported by legal arguments. Indeed, soon after the conclusion of the Third UN Conference on the Law of the Sea (UNCLOS III, 1973–82), several (Croatian) experts and members of the Yugoslav delegation to that Conference proposed to the federal (Yugoslav) governmental bodies the establishment of an EEZ by Yugoslavia. Nevertheless, from the mid-1980s (in the final years of Yugoslavia), and likewise in the 1990s (in the first years of an independent Croatian state), no ruling policies favoured such a move. The official explanation was that Yugoslavia (later also Croatia) lacked the facilities necessary to control an EEZ in the Adriatic Sea.<sup>19</sup> The real reason behind that hesitant policy was the concern not to challenge Italy – the biggest user of and indeed the major regional power on the Adriatic Sea coasts. In the final years before its dissolution, Yugoslavia had quite different priorities than an EEZ; as did Croatia too, especially in years following the 1991–1995 war, when the country faced other pressing problems in both its domestic and foreign politics.

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<sup>17</sup> Art. 33 of the Maritime Code of 27 January 1994, published in *Narodne novine – Službeni list Republike Hrvatske* (Official Gazette of the Republic of Croatia), No. 75, 1994; English translation in *Law of the Sea Bulletin*, Nos. 42 and 43, 2000; emphasis on the word 'exclusive' added. Although the English translation in the *Bulletin* uses the term 'exclusive economic zone', in the original Croatian text of the Code published in *Narodne novine* that term is not found: 'economic zone' (*gospodarski pojas*) is the wording employed. Drafters of the Code omitted the word 'exclusive' from the notion, perhaps seeking not to over-emphasize that aspect of the EEZ. See also comment by Budislav Vukas, 'Croatia and the Law of the Sea', in Budislav Vukas (ed.), *Essays on the New Law of the Sea 3* (Zagreb, Liber, 1996), pp. 13-22 at p. 19.

<sup>18</sup> Art. 1042 of the Maritime Code, *op. cit.*, *supra* note 17.

<sup>19</sup> The Adriatic Sea is rather narrow (on average 86 nm in width), and the size of an EEZ is thus limited (Croatia's Zone would hence comprise around 23,500 square km). Compared to many other EEZs, that is a relatively small area, and is also close to many ports. Although not a legal requirement for establishing an EEZ, controlling an area with such features should not present a major challenge either.

The first political move for declaring a Croatian EEZ was made in 2001, when the Parliament opened a debate on a proposal submitted by an opposition party.<sup>20</sup> That was met with reservations by the parliamentary majority and the government, and the decision on the substance of the proposal was postponed until the next year (and then not reverted to).

In February 2003, Croatia submitted its application for membership in the EU. In the spring of the same year, the Croatian government established an inter-ministerial Working Group on the Common European Fisheries Policy in the Mediterranean (hereinafter: Working Group). EU fisheries policy was then undergoing a process of review, and a Ministerial Conference on the sustainable development of fisheries in the Mediterranean, scheduled to be held in Venice in November 2003, was in preparation. In that context, discussions on the need to consider extending the jurisdiction of coastal EU Member States beyond the territorial sea in the Mediterranean, possibly by establishing fisheries protection zones, were initiated by the European Commission.<sup>21</sup> That in turn triggered the consideration of a Croatian EEZ within the coalition government. Concerns about the state of the living resources of the Adriatic Sea were rising. Moreover, prompted by oil transport projects discussed for the Adriatic Sea, fears of marine pollution incidents were voiced in public, not least in the aftermath of the disaster of the tanker *Prestige*. Parliamentary elections scheduled for the autumn of 2003 were approaching, and sentiments among the Croatian public for preservation of the Adriatic Sea environment were growing. Indeed, the country was increasingly gaining international recognition for the beauty of its coastal areas and its preserved marine environment, attracting tourists from many countries and gradually replacing the war images that had dominated perceptions of the region throughout most of the 1990s.

### **3.2 Preparing the ground for the extension of maritime jurisdiction**

The Working Group was tasked with presenting Croatia's intention to extend its maritime jurisdiction beyond the territorial sea, and exploring the positions of the neighbouring countries, other Mediterranean countries and the European Commission. As later documented in a report adopted by the Croatian Government,<sup>22</sup> in the period from late spring to

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<sup>20</sup> The proposal for the adoption of a 'Decision on the declaration of the exclusive economic zone of the Republic of Croatia in the Adriatic Sea' was made by the Croatian Party of Rights, which at that time held only four seats in the Croatian Parliament, *Sabor*. See *Izvjješća Hrvatskoga sabora* (Reports of the Croatian Parliament), No. 304, 23 July 2001, pp. 38–44.

<sup>21</sup> See Commission of the European Communities, *Communication from the Commission on the reform of the Common Fisheries Policy ('Roadmap')*, COM(2002) 181 final, Brussels, 28 May 2002, p. 8.

<sup>22</sup> Government of the Republic of Croatia, *Izvjješće o mogućnostima i učincima širenja jurisdikcije Republike Hrvatske na Jadranu* (Government Report on the

early autumn 2003, representatives of the Working Group engaged in a series of bilateral and multilateral meetings.<sup>23</sup>

At the multilateral level, the Croatian position was initially outlined at the first preparatory meeting (Athens, June 2003) for the Venice ministerial conference on fisheries in the Mediterranean, and elaborated in Croatia's position paper for the second preparatory meeting (Brussels, September 2003), where also a meeting of the Adriatic Sea countries was arranged by Croatia.<sup>24</sup> As to bilateral contacts with Adriatic neighbours, of special concern for Croatia were reactions by Italy, as well as Slovenia, while it also engaged in talks with Montenegro. Bilateral consultations with Italy, on the deputy-foreign-minister level, commenced in June 2003, and in July it was agreed that a Joint Croatian/Italian working group should be formed, to coordinate the activities. Initial reactions by Italy were not perceived as negative, although Italy expressed its preference for a protected fishing zone instead of an EEZ.<sup>25</sup> Slovenia, soon (on 1 May 2004) to become another Adriatic Sea EU Member State, was, however, 'not interested in bilateral talks on a political level so as not to provide Croatia with the argument to consume the process of consultations', and it only agreed to a meeting at the level of heads of legal departments at foreign ministries.<sup>26</sup> Reactions were also sought from the European Commission.

Croatian diplomacy initially received ambivalent responses which, while not challenging the legal or scientific foundations of the intended extension of the country's jurisdiction, referred to political aspects, including the timing, as unfortunate. In addition came arguments that proclaiming an EEZ would, among other undesirable effects, emphasise 'exclusion' (as involved in the very notion of an 'Exclusive' Economic Zone), which was perceived as not being inclusive or in a 'EU spirit'.

Croatia, which had submitted its application for EU membership earlier in 2003, proved sensitive to reactions of this type. Regarded as a goal ever since the inception of the Republic of Croatia, future EU membership has been highly desired (and equally uncertain). Croatian policy-makers thus took care not to obstruct the country's road towards the EU. At the same time, they wanted to use the legitimate means available to protect Croatia's marine resources and the Adriatic Sea environment, in

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possibilities and effects of the extension of jurisdiction of the Republic of Croatia in the Adriatic Sea), Zagreb, 2 October 2003. English translation published in *Croatian International Relations Review*, Dossier, Vol. 9, No. 32, 2003, pp. 50–60 (hereinafter: Government Report 2003).

<sup>23</sup> *Ibid.*, pp. 56–59.

<sup>24</sup> *Ibid.*, p. 58. See also Government of the Republic of Croatia, Working Group on the European Fisheries Policy in the Mediterranean, *Position of the Republic of Croatia on the Fisheries Policy in the Mediterranean and the Extension of Jurisdiction in the Adriatic*, Zagreb, 15 September 2003.

<sup>25</sup> Government Report 2003, *op. cit.*, *supra* note 22 at pp. 56–57.

<sup>26</sup> *Ibid.*, p. 57.

accordance with international law. This episode took place during Italy's EU presidency (July–December 2003). Moreover, the President of the European Commission was a prominent Italian politician, Romano Prodi (who before then, as well as later, served as Italian Prime Minister).

The rapid shift from quiet diplomacy to a political show in public was triggered on 1 August 2003 by a memo published on the web-pages of the Croatian Ministry of Agriculture (also in charge of fisheries), unambiguously arguing for the declaration of Croatia's EEZ.<sup>27</sup> That announcement was followed by two months of intense pressure on Croatia not to proclaim an EEZ, or any similar zone in the Adriatic Sea. While the main criticism of Croatia's intentions came from a range of sources, including top political leaders of Italy, Slovenia and the European Commission, the heart of the debate is encapsulated in a passage in the 2003 Croatian Government Report, stating:

He warned that if the Government of Croatia was to pass the decision on the extension of jurisdiction this could affect the pace of its approaching the EU, *notwithstanding Croatia's reasons*.<sup>28</sup>

That coincided with European Commission President Romano Prodi's letter to the Croatian Prime Minister, Ivica Račan, who referred to it as 'another warning that, with regard to our intention of joining the EU, we need to accept behaviour according to European criteria'.<sup>29</sup> As later reported by the Croatian Government, President Prodi's letter expressed concerns about Slovenian/Croatian relations and suggested refraining from unilateral decisions.<sup>30</sup> Slovenia was then indeed by far the most outspoken critic of Croatia's intended extension of jurisdiction (see further discussion below); Italy, while less in evidence in media headlines, was the most convincing and persistent one.

At that stage, Italy was already advocating the idea of a single *joint fishing zone* for the Adriatic states, as well as the inclusion of Slovenia in further talks.<sup>31</sup> Although the idea of a joint zone was not accepted by Croatia, it was to re-emerge in the spring of 2004, as a proposal presented by Slovenia.

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<sup>27</sup> Croatian Ministry of Agriculture and Forestry, 'Isključivi gospodarski pojas (IGP) u Jadranu' (An exclusive economic zone (EEZ) in the Adriatic Sea), published at [www.mps.hr](http://www.mps.hr) on 1 August 2003, coinciding with the first day of the summer recess for most public institutions in Croatia (and Italy). The Ministry was under the second coalition party, the Croatian Peasant Party, the main proponent of an EEZ declaration within the governing coalition.

<sup>28</sup> Government Report 2003, *op. cit.*, *supra* note 22 at p. 58, summarising the reactions at the meeting held on 23 September 2003 with Eneko Landaburu, Director-General, DG External Relations, the European Commission (emphasis added).

<sup>29</sup> 'Premijer Račan o pismu Romana Prodi' (Prime Minister Račan on the letter of Romano Prodi), Zagreb, 26 September 2003, on the website of the Croatian Government: [www.vlada.hr](http://www.vlada.hr).

<sup>30</sup> Government Report 2003, *op. cit.*, *supra* note 22 at p. 58.

<sup>31</sup> *Ibid.*, p. 57.

### 3.3 Declaring the ‘Ecological and Fisheries Protection Zone’

The Croatian government, faced with both intense international pressure to refrain from declaring an EEZ, and at the same time with a domestic public that largely supported such a move, eventually opted for a proposal on extending Croatia’s jurisdiction, albeit in a somewhat milder form, labelled the ‘Ecological and Fisheries Protection Zone’. There were several reasons for choosing that option. Presentationally, the concept of a zone being ‘exclusive’ was not expressly included in the notion. Also, it suggested that Croatia was not venturing beyond the practice of some other EU Member States that had already declared their zones in the Mediterranean: Spain had declared a *fisheries* protection zone in 1997, while France had adopted regulation on an *ecological* protection zone earlier in 2003, and implemented it in January 2004.<sup>32</sup> Croatia’s proposed zone implied that it only combined the two ‘European’ concepts into one, and refrained from setting a precedent.

As to the substance, under the notion of an ‘Ecological and Fisheries Protection Zone’ (hereinafter: Zone) the Croatian Parliament proclaimed on 3 October 2003 only certain functions, or parts of the full ‘content’ of an EEZ under the LOS Convention.<sup>33</sup> Those functions related to three sets of rights which were the minimum acceptable to Croatia:

- sovereign rights for the purpose of exploration and exploitation, conservation and management of living resources;
- jurisdiction with regard to the protection and preservation of the marine environment;
- jurisdiction with regard to marine scientific research.

Croatia declared the Zone, but it initially postponed its implementation for one year. According to para. 3 of the 2003 Decision, that period was to be used for ‘preparing the implementation mechanisms and for possible signing of agreements or making arrangements with interested States and the European Communities’.

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<sup>32</sup> As for Spain, see Royal Decree No. 1315/1997, of 1 August 1997, establishing a Fisheries Protection Zone in the Mediterranean Sea; English translation in *Law of the Sea Bulletin*, No. 36, 1998, pp. 47–48. As to the French Ecological Protection Zone (‘zone de protection écologique’) in the Mediterranean, see Law No. 2003-346 of 15 April 2003, implemented by Decree No. 2004-33 of 8 January 2004; published in *Journal Officiel de la République Française*, of 16 April 2003 and 10 January 2004, respectively.

<sup>33</sup> Decision on the Extension of Jurisdiction of the Republic of Croatia in the Adriatic Sea, published in *Narodne novine* (Official Gazette), No. 157, of 6 October 2003; English translation in *Law of the Sea Bulletin*, No. 53, 2004, pp. 68–69. Hereinafter: 2003 Decision. The Parliament reserved the right to proclaim other elements of the EEZ when it deems appropriate; para. 2 of the 2003 Decision.

Furthermore, according to the 2003 Decision (paras. 5 and 6), the outer limit of the Zone shall be as allowed under general international law, and ‘shall be determined through delimitation agreements’ with the neighbouring states. Pending the conclusion of these delimitation agreements, the outer limits of the Zone temporarily follow those of the relevant delimitation agreements in the Adriatic Sea – most importantly, the delimitation line established under the 1968 Agreement on the delimitation of the continental shelf with Italy.<sup>34</sup>

A comment by the Croatian deputy minister of foreign affairs, who headed the Working Group, captured the essence of how Croatian diplomacy and politicians of the governing majority at first perceived the outcome:

time will show that we can be very satisfied with what we have accomplished – we have protected our interest *without unnecessary irritation of others*.<sup>35</sup>

Time can indeed be a tough test of how durable political decisions are.

### 3.4 Croatia’s Zone as an expression of unilateralism

Although avoiding the direct use of the notion of an EEZ, and instead drawing nominally on the recent practice of two EU countries (Spain and France) in the Mediterranean Sea, as well as expressly opening opportunities for additional arrangements with the states concerned and allowing a period of one year of postponed implementation of the Zone, Croatia’s decision was met with strong criticism from the neighbouring Adriatic Sea countries, Italy and Slovenia. The keyword of that criticism was that Croatia’s decision was a ‘unilateral’ measure. That label could hardly be understood to imply criticism of the unilateral proclamation of an EEZ in its technical legal meaning, because how else (bilaterally? multilaterally?) could one declare an EEZ?<sup>36</sup>

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<sup>34</sup> Published in *Službeni list SFRJ, Dodatak: Međunarodni ugovori i drugi sporazumi* (Official Gazette of the SFR Yugoslavia, Annex: International Treaties and Other Agreements), No. 28, 1970; English translation in *International Legal Materials*, Vol. 7, 1968.

<sup>35</sup> Ivan Šimonović, Concluding remarks at the Round Table on Fisheries Policy in the Mediterranean and the Extension of Jurisdiction in the Adriatic Sea, Zagreb, 14 October 2003, in *Croatian International Relations Review*, Dossier, Vol. 9, No. 32, 2003, p. 48 (emphasis added).

<sup>36</sup> See also Vladimir Ibler, ‘Legal Foundations of the Economic Zone in the Framework of International Legal Regimes at Sea’, *Croatian International Relations Review*, Dossier, Vol. 9, No. 32, 2003, p. 3. Some authors, however, questioned the compatibility with the LOS Convention; see, for instance, Peter Sand, ‘“Green” Enclosure of Ocean Space – *Déjà Vu?*’, *Marine Pollution Bulletin*, Vol. 54, 2007, pp. 374–376, who commented on Croatia’s (and several other) zones as having a common feature of ‘unabashed unilateralism (“enclose now, negotiate later”)’ and ‘a hidden neo-Seldenian agenda’ (p. 375). The legal basis for that comment remains vague.

Also, the content of the Zone was strictly within the confines of the LOS Convention – and thus based on a multilaterally agreed framework to which all the states concerned were parties. The label of unilateralism was thus a political one, implying that Croatia, due to its decision on the Zone, was not viewed as sufficiently cooperative. That its decision was regarded as ‘unilateral’ was swiftly echoed by some leading European policy-makers and soon by documents adopted by EU bodies. On the other hand, it was difficult to deny that Croatia’s proclamation of the Zone was indeed in accordance with international law. For instance, when meeting the Croatian Prime Minister Ivica Račan immediately after Croatia’s proclamation, EU High Representative for the Common Foreign and Security Policy, Javier Solana, spoke of the recent ‘unilateral decision by Croatia’ on the Zone, yet added that its legitimacy under international law was not in question.<sup>37</sup> In a similar vein, a document adopted thereafter by the European Council ‘noted with regret that the Croatian Parliament decided to declare a protected ecological and fishing zone in the Adriatic Sea without appropriate dialogue and co-ordination with the other countries concerned’, yet went on to state that this was noted ‘without prejudice to sovereign rights of States deriving from the relevant international law’.<sup>38</sup> In other words, while attributed the mark of unilateralism, Croatia’s proclaimed Zone in the Adriatic Sea had to be, hesitantly or not, accepted as a legal fact.

### **3.5 From bilateral, regional and EU – to trilateral Adriatic dialogue**

Following on the European Council's call on Croatia ‘to urgently pursue a constructive dialogue with its neighbours to meet the concerns of all the parties involved’,<sup>39</sup> Croatia entered into further consultations with Italy and Slovenia.<sup>40</sup> That course had in fact been envisaged in Croatia’s own 2003 Decision on the proclamation of the Zone, where a one-year span of postponed implementation had been set aside for that purpose.

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<sup>37</sup> Press release S0202/03, ‘Javier Solana, EU High Representative for the CFSP, met today with Ivica Račan, Prime Minister of the Republic of Croatia’, Brussels, 9 October 2003.

<sup>38</sup> Council conclusions on Western Balkans, in *European Council, 2533rd Council meeting, External Relations*, Luxembourg, 13 October 2003 (available at: <http://ue.eu.int/>). On the same day the Council meeting on Agriculture and Fisheries was held, noting that in respect of the Mediterranean the European Commission identified over-exploited fishery areas in the Adriatic Sea, as well as a significant fall in some important fish stocks; see *European Council, 2534th Council meeting, Aquaculture and Fisheries*, Luxembourg, 13 October 2003 (available at: <http://ue.eu.int/>).

<sup>39</sup> Council conclusions on Western Balkans, *op. cit.*, *supra* note 38.

<sup>40</sup> Those consultations were, however, postponed by both Italy and Slovenia until *after* the conclusion of the Venice Conference on sustainable fisheries in the Mediterranean, held 25–26 November 2003. In practice, that also meant after the elections (23 November 2003) and formation of the new government in Croatia (end December 2003).

However, due to substantially different sets of issues to be dealt with the neighbouring countries in question, Croatia had originally intended to engage in a bilateral dialogue with each of these separately. Moreover, because key aspects of fisheries lay within the European Community's exclusive competence regarding its Member States, Croatia aimed at discussing with the European Commission a possible provisional regime, pending its future EU membership.<sup>41</sup> A year ahead of Croatia's adopting its decision on the Zone, the European Commission suggested in its Action Plan for fisheries in the Mediterranean that bilateral fisheries agreements could be concluded with non-EU countries (such as Croatia) who followed by establishing their own zones.<sup>42</sup> And finally, Croatia offered to host a sub-regional conference of all Adriatic Sea countries in March 2004;<sup>43</sup> this was also announced to all countries at the Venice Conference in November 2003.<sup>44</sup>

Yet, instead of those intended bilateral and multilateral avenues to complement its national measure, a third option was eventually pursued. Following the change of government in Croatia at the end of 2003, in early 2004 Croatia entered into trilateral – political, not technical – meetings with Italy and Slovenia (at a later stage also facilitated by the European Commission), held at the deputy-foreign-minister (state secretary) level.<sup>45</sup>

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<sup>41</sup> According to the former Croatian Minister of Foreign Affairs, Tonino Picula, the European Commission, by a letter of its Director-General for Fisheries, Jörgen Holmquist, had on 15 December 2003 invited Croatia to enter into expert consultations on arrangements regarding the fisheries aspects of the Zone, with a view to future Croatian membership in the EU; see *Izvješća Hrvatskoga sabora* (Reports of the Croatian Parliament), No. 393, 8 July 2004, p. 45. Picula was in mid-December 2003 still Croatian Foreign Minister; however, in a 'technical' government only, following the defeat of the – then governing – SDP at the November 2003 parliamentary elections and in anticipation of the new, HDZ-led coalition government, confirmed by the Parliament on 23 December 2003.

<sup>42</sup> Commission of the European Communities, *Communication from the Commission to the Council and the European Parliament laying down a Community Action Plan for the conservation and sustainable exploitation of fisheries resources in the Mediterranean Sea under the Common Fisheries Policy*, COM(2002) 535 final, Brussels, 9 October 2002, p. 14.

<sup>43</sup> See Croatian Ministry of Foreign Affairs and European Integration, Press Release 343/03, Zagreb, 5 November 2003 (available at the website of the Ministry: [www.mvpei.hr](http://www.mvpei.hr)).

<sup>44</sup> Croatia maintained that an effective protection of the Adriatic Sea was possible only through complementary national, bilateral and multilateral measures; see *ibid.* For the Croatian proposal on regional cooperation towards designating a PSSA in the Adriatic Sea, see Vidas, 'Particularly Sensitive Sea Areas', *op. cit.*, *supra* note 7, pp. 369–371.

<sup>45</sup> The first trilateral meeting of state secretaries was held in Trieste, Italy, on 12 February 2004; the second in Portorož, Slovenia, on 11 March 2004; and the third in Pula, Croatia, on 7 April 2004. The fourth and last meeting was held at the European Commission's headquarters in Brussels, on 4 June 2004, as further discussed in the text.

During those meetings, three options were proposed to Croatia by the other two countries. The key proposal, now put forward by Slovenia and supported by Italy, involved establishing a joint zone of the three countries in the Adriatic Sea. While understandably favoured by Italy (which had by far the dominant fishing fleet) and Slovenia (without any major fishing interest, but a geographically disadvantaged coastal state, because it cannot lawfully claim an EEZ of its own),<sup>46</sup> this proposal was not acceptable to Croatia, which was in a favourable geographical position and had the major share of Adriatic Sea living resources closer to its own coasts. The disparities in rights under international law, interests and capabilities among the three states proved so great that the proposal on a joint zone could not be a realistic solution.

The two other options proposed to Croatia basically involved maintaining the *status quo* in the Adriatic Sea, either by postponing implementation of the Zone until Croatia became an EU Member State (at an uncertain date), or by not applying the Zone to EU countries. Neither of these proposals was in fact related to conservation of fish stocks or marine environmental protection. Croatia, which did not regard a joint zone as a feasible solution, felt that agreements among the Adriatic states, pursuant to the establishment of their own zones, might enable a more equitable distribution of fish resources, subject to fisheries conservation and management decisions based on scientific knowledge. Within such a framework, it was prepared to make regionally (or bilaterally) agreed concessions. Bearing in mind the exclusive competence of the European Community in fisheries, Croatia aimed at negotiating a fisheries partnership agreement with the European Commission.

Soon after the third trilateral meeting was held in Pula, the European Commission adopted its Opinion on Croatia's application for EU mem-

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<sup>46</sup> See the Slovenian 'Memorandum o Piranskem zalivu' (Memorandum on the Bay of Piran) of 7 April 1993 (hereinafter: 1993 Memorandum), which stated that 'Slovenia belongs to the group of so-called geographically disadvantaged states, which due to their geographical situation can claim no exclusive economic zones of their own'. Document on file with the author. The Croatian language translation of the 1993 Memorandum is reproduced in Vladimir Ibler, *Međunarodno pravo mora i Hrvatska* (International Law of the Sea and Croatia) (Zagreb, Barbat, 2001), pp. 553–554. Several commentators indicate that the 1993 Memorandum by the Government was also discussed and approved by the Slovenian Parliament; for the analyses of the Memorandum, see Ibler, *ibid.*, pp. 136–167; also Iztok Simoniti and Marko Sotlar, 'The land boundary between the Republic of Slovenia and the Republic of Croatia and the negotiations on the maritime boundary delimitation', *Journal of International Relations*, Vol. 3, Nos. 1–4, 1996, pp. 85–91. See also a commentary on the origins of that governmental Memorandum and a special session of the Slovenian Parliament on relations with Croatia (25–26 May 1993), in Igor Mekina, *Mladina*, 15 October 2003.

bership.<sup>47</sup> The Opinion in many respects gave a favourable assessment of conditions in Croatia, and concluded with the recommendation that negotiations for accession to the EU should be opened, pending certain requirements. Among critical remarks, the Opinion linked Croatia's declaration of the Zone to the outstanding delimitation dispute with Slovenia over the Bay of Piran, and concluded that 'Croatia's unilateral decision ... has provoked considerable tensions with neighbouring countries'.<sup>48</sup> The Opinion further stated that the 'unilateral declaration' of the Zone 'was an initiative not in line with the European principle of regional co-operation', and that it was 'regrettable that Croatia decided to declare ... [the Zone] ... without appropriate dialogue and co-ordination with the other countries concerned'.<sup>49</sup> Concluding on the 'Political criteria' for Croatia's EU membership, the European Commission stated the need for Croatia to resolve issues arising from its unilateral declaration of the Zone.<sup>50</sup>

### 3.6 Postponing implementation of the Zone to EU countries

A European Council meeting of Prime Ministers was soon to follow (in mid-June 2004), and here the EU candidate status of Croatia was scheduled to be decided upon (as well as, possibly, the date for commencing negotiations on EU accession). Croatia's aspirations of becoming a candidate for EU membership, which the country openly expressed as its key foreign policy strategic objective, soon proved to be closely related to the future of its Adriatic Sea Zone.

The leader of the main opposition party (SDP), Ivica Račan, confirmed in an interview that earlier in June he had been informed by the current Prime Minister, Ivo Sanader, that 'Croatia may face a veto by Slovenia and Italy' at the upcoming European Council meeting.<sup>51</sup>

Rushing ahead of the June trilateral meeting to be held in Brussels, the Croatian Government sent to the Parliament a proposal for amending and modifying the 2003 Decision on the Zone, to be dealt with as a matter of urgency. After strong polarisation of political parties on the issue, the Parliament modified its only eight-months-old Decision on the Zone. A new paragraph was added which provided that, with regard to the EU Member States:

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<sup>47</sup> Commission of the European Communities, *Communication from the Commission: Opinion on Croatia's Application for Membership of the European Union*, COM(2004)257 final, Brussels, 20 April 2004.

<sup>48</sup> *Ibid.*, p. 35. Although referring only to the delimitation dispute with Slovenia, it should be noted that in the Communication the plural form was used of the 'countries' with whom tensions had been provoked.

<sup>49</sup> *Ibid.*, pp. 37 and 75.

<sup>50</sup> *Ibid.*, p. 118.

<sup>51</sup> Interview with Ivica Račan, President of the SDP (Social-Democratic Party), in *Novi list*, 5 June 2004.

implementation of the legal regime [of the Zone] shall commence after the conclusion of the fisheries partnership agreement between the European Community and the Republic of Croatia.<sup>52</sup>

This was adopted on 3 June 2004, only one day before the trilateral meeting in Brussels was scheduled to take place. It is difficult to see why non-application to the EU Member States of Croatia's jurisdiction regarding protection of the marine environment (namely, the 'ecological' component of the Zone) would be linked with and made directly conditional on reaching a *fisheries* partnership agreement. While fisheries was a chapter to negotiate with the EU, and the one in which the European Community has exclusive competence, marine environmental protection was not. However, within the European Commission, the handling of the issue was already the matter in which its External Relations Directorate-General (DG) was involved, rather than the DG for Fisheries and Maritime Affairs, under whose competence the substance of the matter would belong. By that time, indeed, the involvement of the European Commission in the issue of the Croatian Zone had crystallised. It was left to the *political* aspects, and thus the involvement of DG External Relations – and, later in the process, also the DG for Enlargement.

The scheduled trilateral meeting of deputy ministers of foreign affairs of Croatia, Italy and Slovenia was held in Brussels on 4 June 2004. The deputy director-general of the European Commission's DG on External Relations, Michael Leigh, took part as 'facilitator of the discussion'. A record of that meeting was written in the form of 'agreed minutes', and signed by the three deputy ministers and the European Commission's deputy director-general Leigh.

### **3.7 Agreed minutes: record of the meeting, or an agreement?**

It is beyond doubt that the agreed minutes represented a record of the meeting held in Brussels. However, the issue was raised whether the minutes were more than a meeting record only. Because the agreed minutes were later attributed key weight in developments on the Zone, they need to be examined in some detail. As written in these minutes:

[The] State Secretary from Croatia informed the parties about the Decision taken on 3 June 2004 by the Croatian Parliament ... which states that the implementation of the [Zone] with respect to the [EU countries] shall start after the conclusion of the Fisheries Partnership Agreement between [Croatia] and the European Community, and expressed Croatia's readiness to enter into talks to this end.

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<sup>52</sup> Decision on Amending the Decision on the Extension of the Jurisdiction of the Republic of Croatia in the Adriatic Sea, *Narodne novine* (Official Gazette), No. 157, 2004; English translation published in *Law of the Sea Bulletin*, No. 55, 2004, p. 31. Hereinafter: 2004 Decision.

Croatia confirmed that during that period there will be no changes in the present regime for the [EU countries] in the area of the Adriatic Sea concerned.

The Italian and Slovenian State Secretaries took note of the decision of the Croatian Parliament. They welcomed suspension of all aspects of the [Zone] to [EU countries]. They *expressed the view* that this *should* apply *until a common agreement in the EU spirit is found* taking into account the interests of the neighbouring EU states.

The participants at the meeting expressed their readiness to *continue to work together ... until a common agreement is reached*.<sup>53</sup>

Following the Brussels meeting, in the evening of the same day, Slovenia's Prime Minister, Anton Rop, publicly stated that an 'agreement' had been reached at that meeting.<sup>54</sup> Moreover, the Slovenian Ministry of Foreign Affairs issued a statement according to which, at the Brussels meeting, '[t]hose present *agreed* that Croatia would postpone the implementation of the zone in respect of EU Member States *until a consensual solution* in a European spirit is reached, one that will take into account the *interests* of EU neighbouring countries'.<sup>55</sup> However, on the next day, Croatia's Foreign Minister, Miomir Žužul, stated that an understanding with Slovenia had not yet been achieved on all the elements in connection with the Zone, and expressed hope that clarifications could soon be achieved.<sup>56</sup> Moreover, after the Brussels meeting, the Italian State Secretary for Foreign Affairs, Roberto Antonione, stated that in the agreed minutes from the meeting Croatia confirmed in writing that during that period (until conclusion of the Fisheries Partnership Agreement) there will be no changes in the present regime for the EU countries.<sup>57</sup>

Soon afterwards, at its meeting on 17–18 June 2004, the Presidency of the European Council adopted Conclusions by which it:

notes the *Croatian decision* not to apply to EU Member States *any aspect* of the [Zone]. In this context, it welcomes the *agreement*

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<sup>53</sup> See text of the Agreed Minutes in Croatian Ministry of Foreign Affairs and European Integration, Press Release 160/04, Zagreb, 4 June 2004 (available in English and Croatian at the website of the Ministry: [www.mvpei.hr](http://www.mvpei.hr)); emphasis added.

<sup>54</sup> Slovenian PM Rop to POP-TV and TV Slovenia (emission 'Odmevi') on the evening of 4 June, also reported by STA (Slovenian News Agency) and HINA (Croatian News Agency) on 4 and 5 June 2004.

<sup>55</sup> Slovenian Ministry of Foreign Affairs, Press Release, Ljubljana, 4 June 2004; available at the website of the Ministry: [www.mzz.gov.si/nc/en/tools/news/cns/news/article/141/9046/](http://www.mzz.gov.si/nc/en/tools/news/cns/news/article/141/9046/); emphasis added.

<sup>56</sup> Statement of the Foreign Minister Žužul to HINA on 5 June, after the meeting of foreign ministers of Austria, Croatia and Slovenia held on the margins of the European forum 'Wachau 2004' at Goettweig, Austria, 5 June 2004.

<sup>57</sup> Statement by the State Secretary Roberto Antonione as reported by ANSA (Italian Press Agency), 4 June 2004; also by HINA, 4 June 2004.

reached by Italy, Slovenia and Croatia at the Trilateral meeting in Brussels on 4 June 2004.<sup>58</sup>

Thus, instead of ‘agreed minutes’ from that meeting, an ‘agreement’ was referred to. Other than its possible political perceptions, the name of the document is rather irrelevant as to its possible legal effect. As, for instance, stated by the International Court of Justice when deciding on jurisdiction and admissibility in the case concerning maritime delimitation and territorial questions between Qatar and Bahrain:

[c]ontrary to the contentions of Bahrain, the Minutes are not a simple record of a meeting, similar to those drawn up within the framework of the Tripartite Committee; they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement.<sup>59</sup>

The Qatar/Bahrain minutes indeed started with the clause ‘the following was agreed’, and proceeded with enumerating the agreed points. The Brussels minutes of 4 June 2004, however, only contained a reference to the readiness of the participants to continue working with a view to reaching an agreement. Moreover, they contained the views presented by *two parties* at the meeting, and not all, that suspension of (application of) all aspects of the Zone to the EU countries should apply until a common agreement in the EU spirit is found. What would be the exact effect of an ‘agreement’, which the Conclusions welcomed as already being reached, was also left open. However, additional specifications were later to follow (see discussion below, and in Section 6, ‘Outcome’) – in which the views presented by only some of the parties were gradually becoming presented as the content of a trilateral agreement reached.

At that point, though, the focus of Croatian policy-makers was elsewhere. By the same Conclusions, the Presidency of the EU Council decided that Croatia had become a candidate country for EU membership – a milestone long desired by Croatia.<sup>60</sup> Yet the exact date for opening negotiations on Croatian accession remained unspecified, although the Council had indicated that this should take place ‘early in 2005’.<sup>61</sup> Croatian

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<sup>58</sup> Council of the European Union, *Presidency Conclusions (17 and 18 June 2004)*, 10679/2/04 Rev. 2, Brussels, 19 July 2004, para. 38 (emphasis added); available at: [www.consilium.europa.eu](http://www.consilium.europa.eu). Slovenia at that time had recently become an EU Member State (1 May 2004) and was involved in the decision-making process.

<sup>59</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, para. 25, p. 12.

<sup>60</sup> Council of the European Union, *Presidency Conclusions, op. cit., supra* note 58, para. 33.

<sup>61</sup> *Ibid.*, para. 34.

policy-makers saw this as a political ‘victory’, due to an alternative version in earlier drafts that had envisaged the opening of negotiations ‘in the course of 2005’.<sup>62</sup> In fact, negotiations did not start until October 2005.

Further specifications of understanding the terms of the Brussels document followed. In a diplomatic note of 30 August 2004, Slovenia claimed that, at the trilateral meeting of state secretaries in Brussels:

...agreement was reached that Croatia would postpone the implementation of the regime of the [Zone] for European Union Member States until a joint, consensual solution is found, which would take into account interests of Croatia’s neighbouring countries.<sup>63</sup>

But there had been no tacit consent by Croatia to such an interpretation. In a diplomatic note of 11 January 2005, sent to the UN Secretary-General, Croatia stressed that:

...no agreement has ever been reached to the effect that Croatia would postpone the legal regime of the zone *until a consensual solution is found*. At the meeting of State Secretaries ...[on 4 June 2004] ... Croatia communicated the already adopted decision of the Croatian Parliament by which the regime of the [Zone] will not be implemented with regard to the European Union Member States *until the partnership agreement on fisheries is concluded* with the European Commission. The Agreed Minutes of the said meeting provide the record of the meeting at which the participants gave their statements and expressed their views and readiness to continue to work together in the EU spirit.<sup>64</sup>

In fact, there already existed an unambiguous agreement of all states concerned, on the regime of the EEZ (or a zone based on it), including the exercise of states’ rights and duties in such a zone: this is the LOS Convention. All the states whose state secretaries participated in the 4 June Brussels meeting and signed the agreed minutes from that meeting are parties to the LOS Convention and are bound by it. Should the parties wish to conclude agreements modifying or suspending the operation of the LOS Convention applicable solely to relations between them, they may do so under certain conditions.<sup>65</sup> Moreover, the LOS Convention is explicit on the requirement that states parties *intending* to conclude such an agreement:

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<sup>62</sup> Report by HINA, 4 June 2004.

<sup>63</sup> See note verbale by Slovenia, dated 30 August 2004 addressed to the UN Secretary-General, published in *Law of the Sea Bulletin*, No. 56, 2005, pp. 139–142.

<sup>64</sup> See note verbale by Croatia, dated 11 January 2005 addressed to the UN Secretary-General, published in *Law of the Sea Bulletin*, No. 57, 2005, pp. 125–128 (emphasis added).

<sup>65</sup> See LOS Convention, Art. 311(3).

...shall notify other States Parties through the depositary of this Convention of their intention to conclude the agreement and of the modification or suspension for which it provides.<sup>66</sup>

No such notification of intention had been made by the states parties concerned; quite the contrary, there were contradictory ‘notifications’ made to the UN Secretary-General, and both came *after* the trilateral meeting. Slovenia claimed that an agreement had been concluded, while Croatia argued that there was none, because it considered that the only binding instrument remained the one adopted by the Croatian Parliament on 3 June 2004 (which can thus also be altered only by the Parliament itself). Croatia argued that the substance of the matter (a fisheries partnership agreement) should be resolved, whereas Slovenia argued that political aspects were the key ones (consensual solution in an EU spirit). Both those notes were made after, not prior to, the trilateral meeting of 4 June 2004, and the LOS Convention requirement on notification of the ‘intention to conclude an agreement’ had not been followed. There was thus no indication of the intention of the LOS Convention parties to conclude an agreement, at least not in accordance with the LOS Convention to which they all are parties.

However, the agreed minutes, while controversial among their ‘signatories’ as to the real intentions and effects, remained written on paper – and the signature of the Croatian state secretary of foreign affairs was on it. From that moment, the Croatian Zone, earlier criticised as being politically ‘unilateral’, albeit formally in accordance with international law, gained a new dimension. Now a signed document (meeting minutes) became available to enable a question-mark to be posed also regarding the formal legal validity of the Zone, should it be made applicable to the EU Member States (in reality, Italy and Slovenia) ‘without their consent’.

That was to become a crucial element in further developments (as discussed below, in Section 6, ‘Outcome’). At this point, however, we should first see what were the ‘interests of the neighbouring EU states’ referred to in the agreed minutes.

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<sup>66</sup> *Ibid.*, Art. 311(4), emphasis added.



## 4 Slovenia: The high seas too far away

Soon after the trilateral Brussels meeting, Slovenia expressed its view that, until a final consensual solution is found and an agreement reached between Croatia and its neighbouring EU countries (Italy and Slovenia), the high seas regime should continue to apply to (all 27) EU countries in the area of the Zone.<sup>67</sup> Otherwise, according to Slovenia, Croatia would be unilaterally infringing on the area of the high seas and denying the rights of Slovenia.<sup>68</sup> Ever since Croatia proclaimed the Zone in 2003, Slovenia argued that this decision ‘prejudices the border at sea’ between the two countries and ‘encroaches on the area in which [Slovenia] exercises its sovereignty and sovereign rights’.<sup>69</sup> The key question is, therefore, whether the Zone proclaimed by Croatia falls, in any of its parts, within the area where Slovenia exercises sovereignty or sovereign rights – or may exercise these in accordance with international law.

That is an important matter to examine, because the linking of the Croatian Zone to the maritime delimitation dispute with Slovenia was not left as a bilateral issue between the two countries only, but emerged as a crucial problem attributed to the Zone also in documents adopted by EU bodies. As stated by the European Commission in its Opinion on Croatia’s application for EU membership: ‘As [a] consequence of this outstanding border issue [the border dispute between Croatia and Slovenia over the Bay of Piran], Croatia’s unilateral decision of October 2003 ... has provoked considerable tensions with neighbouring countries’.<sup>70</sup> The question is whether such a causal relationship is based on international law or rather on the political perceptions created. Several aspects need to be considered before a conclusion based on international law can be reached.

### 4.1 Baselines and breadth of the territorial sea of Slovenia

The law of the sea is unambiguous on the right of a coastal state to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles (nm).<sup>71</sup> The 12-nm breadth is to be measured from baselines determined in accordance with the LOS Convention.

Currently, the distance of the Slovenian coast, and any related baseline, from the nearest point of the Croatian Zone (i.e., the nearest high seas,

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<sup>67</sup> See note verbale by Slovenia, dated 30 August 2004, *op. cit.*, *supra* note 63 at p. 140.

<sup>68</sup> *Ibid.*

<sup>69</sup> See note verbale by Slovenia, dated 7 November 2003 addressed to the UN Secretary-General, published in *Law of the Sea Bulletin*, No. 53, 2004, p. 70.

<sup>70</sup> Commission of the European Communities, *Opinion on Croatia’s Application for Membership of the European Union*, 20 April 2004, *op. cit.*, *supra* note 47 at p. 35; emphasis added.

<sup>71</sup> Breadth of the territorial sea, as codified in Art. 3 of the LOS Convention.

before the Zone was proclaimed in 2003) *exceeds* 12 nm.<sup>72</sup> In fact, the distance is 15.5 nm as measured between *Point 5* at sea and the nearest point on the Slovenian coast (Cape Madona, close to Piran; see Map 2).<sup>73</sup>

Nevertheless, Slovenia argues that Point 5, which ‘marks the *beginning* of the high seas in the Adriatic’, is ‘the point of Slovenia’s territorial exit to the high seas’.<sup>74</sup>

The breadth of the Slovenian territorial sea in the direction of the high seas is not only limited by the LOS Convention, but is also pending until a solution of the maritime delimitation dispute with Croatia is reached. In 1975 Yugoslavia and Italy delimited their territorial seas by the Treaty of Osimo. After the dissolution of Yugoslavia, a dispute emerged between the two newly independent states, Croatia and Slovenia, on the territorial sea delimitation in the maritime area situated between their coasts and the Osimo delimitation line with Italy.

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<sup>72</sup> As stated in Art. 13(2) of the 2001 Maritime Code of Slovenia: ‘The baseline shall be the hydrographic zero line running along the coast, or a straight line enclosing the entrance to a bay’. The Maritime Code, as amended by the 2006 Act Amending the Maritime Code, provides in its Art. 5: ‘The internal waters of the Republic of Slovenia shall encompass all ports, bays and the anchorage of the Port of Koper circumscribed by meridian 13°40’ east and latitude 45°35’ north’. For an English translation of the Maritime Code and Acts amending it, see *Law of the Sea Bulletin*, No. 60, 2006, pp. 58–126; No. 61, 2006, pp. 22–95; No. 62, 2007, pp. 16–51 and No. 63, 2007, pp. 59–71. The English translation is in many places imprecise or incomplete, occasionally confusing the meaning of the original, Slovene-language text of the Code, as published in *Uradni list Republike Slovenije* (Official Gazette of the Republic of Slovenia), No. 26, 2001 and No. 120, 2006 (consolidated text). See also *infra* notes 101, 103, 104 and 113.

<sup>73</sup> The position of ‘Point 5’ is of utmost importance for north Adriatic maritime delimitations. This is both the *final* point for territorial sea delimitation with Italy under the 1975 Treaty of Osimo (published in *Službeni list SFRJ, Dodatak: Međunarodni ugovori i drugi sporazumi* (Official Gazette of the SFR Yugoslavia, Annex: International Treaties and Other Agreements), No. 1, 1977), and, as ‘Point 1’, the *first* point of delimitation of the continental shelf with Italy under the 1968 Agreement, *op. cit.*, *supra* note 34.

<sup>74</sup> Ministry of Foreign Affairs of the Republic of Slovenia, *White Paper on the Border between the Republic of Slovenia and the Republic of Croatia*, Ljubljana, 2006, p. 11 (English translation); emphasis added.



**MAP 2: Agreed maritime boundaries in the north Adriatic Sea**

As shown on Map 2, the coasts of the two states lie opposite to each other in the Bay of Piran (hereinafter: the Bay),<sup>75</sup> and meet at the foot of the Bay. It is therefore that area within the Bay where the endpoint of the

<sup>75</sup> In Croatia, some call it also Savudrija Bay. Slovenia protested against the usage of any other name but the ‘Bay of Piran’, arguing that Croatia ‘unilaterally changed the historic and internationally recognised name of the Bay of Piran (Piranski zaliv) into the Bay of Savudrija (Savudrijska vala)’; *ibid.*, p. 25.

land frontier between Croatia and Slovenia meets the sea. Yet the two countries are in profound disagreement as to the exact point from which to draw their maritime delimitation line, and how it is to be drawn. Croatia argues that, pending final delimitation *within* the Bay, neither of the two states is entitled to extend its *territorial sea* beyond the median line. Slovenia, on the contrary, argues, and has recently also stated in its domestic regulations, that the *entire* Bay is *internal waters* of Slovenia – notwithstanding the fact (which it does not dispute) that also Croatia has part of the coast within the Bay.<sup>76</sup>

It is not necessary for the present analysis to enter into any further details of that segment of the delimitation dispute, confined to the area of the Bay.<sup>77</sup> The key conclusion here remains unaffected by any possible final solution to that question. No matter how the Bay is eventually delimited, the resulting Slovenian baselines will remain more than 12 nm away from Point 5 (be it the high seas or the Croatian Zone that ‘begins’ from that point). This is so even if the entire Bay is, hypothetically, regarded as internal waters of Slovenia, and a closing line at the mouth of the Bay is thus determined as a straight baseline.

In order to arrive at a 12-nm distance from Point 5, Slovenia would need to extend its baseline considerably outside the mouth of the Bay – but such a baseline would not be related to the Bay, nor to its own coast. The closest point on the coast located at a distance of 12 nm from Point 5 is in fact well beyond the area of dispute: all the way around Cape Savudrija, where the northernmost Croatian lighthouse is situated (see Map 2). To be valid, however, baselines need to be determined in accordance with the LOS Convention – and must be related to one’s own coast, not the coast of a neighbouring country.

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<sup>76</sup> On the Bay as internal waters of Slovenia, see the 1993 Memorandum, as reproduced in Ibler, *op. cit.*, *supra* note 46 at pp. 553–554, and the Slovenian Decree passed in January 2006 (see further discussion below, as well as *infra* note 105).

<sup>77</sup> For informed analyses of that delimitation dispute, see, e.g., Gerald H. Blake and Duško Topalović with Clive Schofield and Mladen Klemenčič (eds.), ‘The Maritime Boundaries of the Adriatic Sea’, *Maritime Briefing*, Vol. 1, No. 8, 1996, pp. 1–12 and 19–33; Simoniti and Sotlar, *op. cit.*, *supra* note 46; Ibler, *op. cit.*, *supra* note 46 at pp. 136–184; Kristian Turkalj, *Piranski zaljev. Razgraničenje teritorijalnog mora između Hrvatske i Slovenije* (‘The Bay of Piran: Territorial Sea Delimitation between Croatia and Slovenia’), (Zagreb, Organizator, 2001); Budislav Vukas, ‘Maritime Delimitation in a Semi-enclosed Sea: The Case of the Adriatic Sea’, in Rainer Lagoni and Daniel Vignes (eds.), *Maritime Delimitation* (Leiden, Brill, 2006), pp. 205–222 at pp. 209–215; Vladimir-Djuro Degan, ‘Consolidation of Legal Principles on Maritime Delimitation: Implications for the Dispute between Slovenia and Croatia in the North Adriatic’, *Chinese Journal of International Law*, Vol. 6, No. 3, 2007, pp. 601–634.

Moreover, *delimitation* of the territorial seas between Croatia and Slovenia is still pending – and this question cannot be resolved merely by extending Slovenia's territorial sea in the direction of the high seas. However, it is important to clarify that, independent of Croatia's territorial sea in the area, Slovenia would remain cut off from the high seas already due to the *distance* from Point 5, because this exceeds the breadth of the territorial sea allowed under the LOS Convention. Neither is it within the rights of Croatia and Slovenia to between themselves agree on a breadth of the territorial sea in excess of the 12-nm limit.

The conclusion at this stage is clear: there neither is nor can there be any impact of the Croatian Zone on Slovenian sovereignty or sovereign rights at sea. The reason is found in basic geographic circumstances and relevant international law. Bluntly stated, it is not Croatia's territorial sea (or the Zone) that is cutting Slovenia off from the high seas – it is the high seas that are too far away from Slovenia for it to be able to 'territorially' access them.

#### 4.2 The Croatian Zone as prejudicing the border at sea with Slovenia

There is to date no agreement in force between Croatia and Slovenia on their maritime delimitation. However, in 2001 negotiators of the two countries initialled a 'final working adjustment' for the text of an agreement on the state border.<sup>78</sup> There is no disagreement between Croatia and Slovenia that the text was neither signed nor ratified, and that it is legally not in force. Where they differ is in interpretations as to whether the initialled text was just a phase in the treaty negotiation process or an agreement (record of the agreement reached).<sup>79</sup> Slovenia has since presented it as an 'agreement', while Croatia referred to it as a 'draft agreement'. We hereinafter refer to it as the 'final working adjustment', because that is how both negotiating parties designated the text that they initialled in 2001.

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<sup>78</sup> The initialled text has often been called the 'Drnovšek-Račan Agreement', after the surnames of the then Prime Ministers of the two countries, although it was in fact designated as the 'final working adjustment' ('končna delovna uskladitev' in the Slovene language; 'konačno radno usklađenje', in the Croatian language), and as such was initialled by the two officials involved in actual negotiations, attached to the ministries of foreign affairs of Croatia and Slovenia – and not by the Prime Ministers.

<sup>79</sup> See especially the exchange of diplomatic notes by Slovenia and Croatia on that matter: note verbale by Slovenia, dated 30 August 2004, *op. cit.*, *supra* note 63 at p. 139; and note verbale by Croatia, dated 11 January 2005, *op. cit.*, *supra* note 64 at p. 125. See also note verbale by Slovenia, dated 15 April 2005, published in *Law of the Sea Bulletin*, No. 58, 2005, pp. 20–22. The two countries agree that the text was initialled by the heads of the negotiating delegations. Slovenia, however, argues that the text was 'then also endorsed' by both governments on 20 July 2001. Croatia points out that 'no treaty on land and maritime boundary has either been signed or concluded'.

In Slovenia's view, by declaring the Zone, Croatia has prejudiced the final enforcement of a consensual solution to the issue of the maritime boundary and encroached on the area in which Slovenia exercises its sovereignty and sovereign rights. Slovenia has held that Croatia's decision on the Zone 'hinders the final enforcement of an agreed solution concerning the border at sea between the two States'.<sup>80</sup>

Here we need to examine two aspects of the 2001 'final working adjustment'. First, does the area to which it related in any part overlap with the area in which the Croatian Zone is proclaimed? That is not the case, because the respective areas of application are each on a different side of Point 5.

Second, would Slovenia's territorial sea, under the 'final working adjustment' and the chart attached to it,<sup>81</sup> extend to Point 5? That too is not the case, because the territorial sea of Slovenia would not extend to Point 5, but rather would remain separated from it by several nautical miles (and only the territorial sea of Croatia would remain in contact with Point 5).

To date, the solutions contained in the 'final working adjustment' have clearly been abandoned by both countries; Slovenia, for instance, has since passed regulations for the entire Bay as its internal waters, as well as extending its territorial sea to Point 5 (thereby well exceeding the 12-nm limit). However, the relevant conclusion here is that, even under the hypothesis that the 'final working adjustment' would become a treaty in force, the Zone proclaimed by Croatia would in no way hinder its final enforcement, because it is located in an area beyond and without any direct effect on either the sovereignty or sovereign rights of Slovenia that can be based on the LOS Convention.

### 4.3 The right of Slovenia to a 'territorial exit to the high seas'

Slovenia nevertheless claims that it is entitled to a 'territorial exit to the high seas', and has specified Point 5 as the point of that territorial 'exit'.<sup>82</sup> So far, Slovenia has put forth various arguments to support its claim; those arguments have evolved and changed over time. In its 1993 Memorandum, Slovenia stated its 'specific situation' as well as that it 'belongs to the group of so-called geographically disadvantaged states, which due to their geographical situation can claim no exclusive economic zone of

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<sup>80</sup> See note by Slovenia to Croatia dated 3 October 2003, published also as an Annex to the note verbale by Slovenia dated 7 November 2003, *op. cit.*, *supra* note 69 at p. 71.

<sup>81</sup> For a chart based on the 'final working adjustment', see Annex to the note verbale by Slovenia, dated 30 August 2004, *op. cit.*, *supra* note 63 at p. 142.

<sup>82</sup> See, e.g., Ministry of Foreign Affairs of Slovenia, *White Paper 2006*, *op. cit.*, *supra* note 74 at p. 11.

their own'.<sup>83</sup> On those grounds, Slovenia explained its need for an 'exit to the high seas', arguing that it is 'in accordance with the principle of equity and taking into account special circumstances, to draw the boundary with [Croatia] so as to enable, at least in a narrow section, the *contact* of the *territorial sea* of [Slovenia] with the high seas in the Adriatic'.<sup>84</sup> Several years later, the 'need' to enable contact of Slovenia's territorial sea with the high seas was expressed as the 'right' to a direct *territorial* 'exit' to the high seas, but was now based on different grounds. In 1999, Slovenia stated that it had, just like Croatia, in the former joint state of Yugoslavia 'exercised all rights based on that territory, including the direct territorial exit to the high seas, and thus has inherited that sovereignty as a successor of the former [Yugoslavia]'.<sup>85</sup> Consequently, Slovenia now claims that it has:

...a direct territorial exit to the high seas *and has the right to declare its own exclusive economic or ecological and fisheries protection zone*. Slovenia has already exercised this right as one of the coastal Republics of the former [Yugoslavia] ever since its dissolution, and consequently has the same right also at present.<sup>86</sup>

In 2006, Slovenia went a step further in an attempt to affirm the basis of its 'preserved territorial exit to the high seas'. It argued that Italy had recognised Slovenia's succession to the 1968 Agreement on the continental shelf, 'consequently "admitting" that Slovenia has the continental shelf ... Since Slovenia has the continental shelf, it also has territorial exit to the high seas'.<sup>87</sup> According to Slovenia, 'all this leads to a very simple conclusion: The Slovenian territorial sea extends to [Point 5] where the Slovenian continental shelf starts'.<sup>88</sup>

It is indeed not possible to acquire territorial sea rights by logical deduction. Rather, sovereignty over the coast and the application of the relevant

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<sup>83</sup> The 1993 Memorandum, as reproduced in Ibler, *op. cit.*, *supra* note 46 at p. 554.

<sup>84</sup> *Ibid.*, emphasis added.

<sup>85</sup> 'Odgovor Republike Slovenije na Odgovor Republike Hrvatske na Stališča Republike Slovenije o določitvi meje na morju med Republiko Slovenijo in Republiko Hrvatsko' ('Response of the Republic of Slovenia on the Response of the Republic of Croatia on 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 (hereinafter: 1999 Response). For a detailed discussion of that document, see Ibler, *op. cit.*, *supra* note 46 at pp. 167–184.

<sup>86</sup> See note verbale by Slovenia, dated 7 November 2003, *op. cit.*, *supra* note 69 at p. 70; emphasis added. See also note verbale by Slovenia, dated 15 April 2005, *op. cit.*, *supra* note 79 at p. 20.

<sup>87</sup> Ministry of Foreign Affairs of Slovenia, *White Paper 2006*, *op. cit.*, *supra* note 74 at p. 11.

<sup>88</sup> *Ibid.*, p. 13. For a comment on the effect under international law of such an interpretation of Italian 'recognition', see Degan, *op. cit.*, *supra* note 77 at pp. 623–624.

rules of the LOS Convention to that situation are the key requirements under the law of the sea. Moreover, the main Slovenian thesis, placing its 'territorial exit to the high seas' in the context of state succession, requires a brief comment. The territorial sea in Yugoslavia was not delimited between the various republics, in contrast to their land territories, where administrative borders did exist between the republics within the federation. In Slovenia's view, the 'joint', once-Yugoslav, sea is yet to be divided; and as long as there is no agreed division, Slovenia preserves all the rights it had as a Yugoslav republic, including the right of a territorial exit to the high seas.<sup>89</sup> However, a 'territorial exit' to the high sea is not found in the LOS Convention – there is only the territorial sea *through* which such an 'exit' can be practised. A territorial sea, in turn, is acquired *ratione territorii*, and not through a division of the sea as a 'succession mass'. In other words, upon becoming an independent state, Slovenia did not 'inherit' an ideal, undivided part of the sea (and all various rights appertaining to it) as a unit separate and independent of its coast – but only got that part of the sea, and those rights appertaining to it, which can be related to its own coast. Today, when Yugoslavia no longer exists, that coast is the basis for the determination of Slovenia's rights on the adjacent sea. As stated by the International Court of Justice, it is:

...the terrestrial territorial situation that must be taken as [a] starting point for the determination of the maritime rights of a coastal State.<sup>90</sup>

Apart from the fundamental legal aspects under the law of the sea discussed above, there is, however, another aspect not to be underestimated: the interest of a coastal state in having unimpeded *access* to the high seas.<sup>91</sup> It is of considerable importance for Slovenia not to be cut off from such access to the high seas, and that point in itself should not be controversial. Where the controversy arises is whether such access must be *territorial* or not.

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<sup>89</sup> Slovenian arguments according to the 1999 Response, *op. cit.*, *supra* note 85.

<sup>90</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001*, para. 185, p. 97. In its numerous judgments the International Court of Justice has indeed emphasised the fundamental law of the sea axiom, that 'the land dominates the sea'.

<sup>91</sup> The LOS Convention does not include the notion of *access to the high seas* as such, which is guaranteed by various rights and freedoms, and accordingly duties, under the Convention. The term 'access' is used by the Convention in the context of the right of land-locked countries of *access to and from the sea*, for the purpose of exercising the rights under the Convention, including those relating to the freedom of the high seas. Since those countries do not have a direct territorial contact with the sea, they enjoy freedom of transit, by all means of transport, *through the territory of states situated between their territory and the sea* ('transit states'). The terms and modalities for exercising freedom of transit are agreed upon through bilateral, sub-regional or regional agreements. See Art. 125 of the LOS Convention.

Croatia did propose, already in the mid-1990s, that a navigation ‘way’ be determined *within* the territorial sea of Croatia to connect the territorial sea of Slovenia with the high seas.<sup>92</sup> Within that area, not innocent passage but a regime more liberal than a transit passage, and ‘almost identical to the high seas regime’, would be established for ships of all flags.<sup>93</sup> That proposal, however, was not accepted by Slovenia<sup>94</sup> – so the countries were back to a deadlock.

The key obstacle to the resolution of this north Adriatic Croatian/Slovenian ‘Rubik’s cube’ puzzle lies in the mixing, within a single set of solutions, of maritime delimitation between the two countries on the one hand, and Slovenia’s legitimate concern for as unimpeded an *access* to the high seas as possible, on the other. If the problem remains confined to one set of solutions only, that can lead to no solution at all. It is important to realize that maritime delimitation between Slovenia and Croatia is one issue to be solved, while Slovenia’s access to the high seas is yet another one, and is only partly related. Just like access to the sea by land-locked states, also access, or ‘exit’, to the high seas by a geographically disadvantaged coastal state is not a function of (maritime) delimitation only. As observed by the UN Secretary-General:

UNCLOS was not negotiated to correct geographical circumstances. To compensate partially for the latter, the Convention provides adequate remedies for situations where States are at a disadvantage.<sup>95</sup>

As to the *maritime delimitation line* between Croatia and Slovenia, it will have to be drawn in the area of the previously Yugoslav side of the Osimo delimitation line; that is certainly an open bilateral issue between Croatia and Slovenia (and those two states alone). Regarding Slovenia’s *access to the high seas*, a solution in harmony with existing navigation rules and established practice in the area of the Gulf of Trieste ought to be considered. That access, while legally as unimpeded as possible under international law, must be as safe as possible from the aspect of navigation as well. A solution for the latter cannot be found on one side of the Osimo delimitation line only, because a meaningful and practical solution must include *both* sides, and thus *three* countries – Italy, Croatia and Slovenia – and not only two.

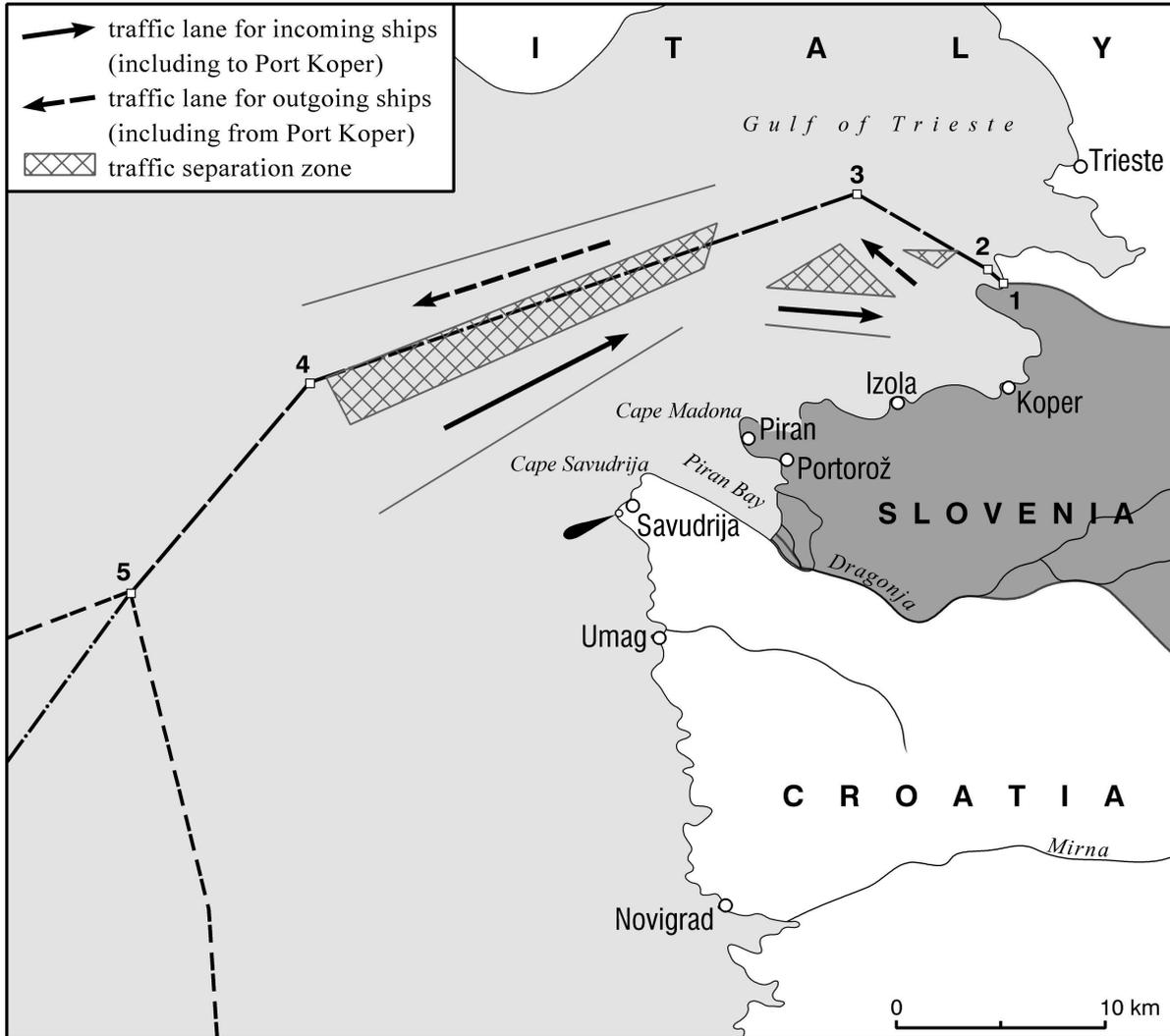
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<sup>92</sup> See ‘Non-paper by Croatia’, reprinted in Ibler, *op. cit.*, *supra* note 46 at p. 555. See also note verbale by Croatia, dated 11 January 2005, *op. cit.*, *supra* note 64 at p. 127.

<sup>93</sup> Ibler, *op. cit.*, *supra* note 46 at p. 555.

<sup>94</sup> In its 1999 Response, *op. cit.*, *supra* note 85, Slovenia stated, *inter alia*, that ‘it cannot accept that its exit to the high seas would lead through a sovereign territory of another state’.

<sup>95</sup> *Oceans and the law of the sea: Report of the Secretary-General*, UN Doc. A/59/62 of 4 March 2004, para. 41.



**MAP 3: IMO traffic separation scheme in the north Adriatic Sea**

As of 1 December 2004, a set of new traffic separation schemes adopted by the Maritime Safety Committee of the International Maritime Organization (IMO) applies to all ships in the north Adriatic – including approaches to the Gulf of Trieste and to/from Slovenia’s sole international commercial port, Koper.<sup>96</sup> That routing system was jointly proposed by the Adriatic Sea countries, including Slovenia, Italy and Croatia, with the objective of enhancing the safety of navigation and protection of the marine environment, and facilitating the efficiency of vessel traffic in the area.<sup>97</sup> This IMO traffic regulation relates to the Gulf

<sup>96</sup> See ‘Report of the Maritime Safety Committee on its Seventy-Eighth Session’, IMO Doc. MSC 78/26 of 28 May 2004, p. 86 and Annex 21; and ‘New and Amended Traffic Separation Schemes’, IMO Doc. COLREG.2/Circ.54 of 28 May 2004.

<sup>97</sup> See Albania, Croatia, Italy, Slovenia and Serbia and Montenegro, ‘Establishment of new recommended Traffic Separation Schemes and other new Routeing Measures in the Adriatic Sea’, IMO Doc. NAV 49/3/7, of 23 March 2003.

of Trieste, which is among maritime areas with the highest density of Adriatic Sea commercial traffic. Over 40 million tons of oil are transported on tankers every year in this small area, as well as various other forms of hazardous cargo. In practical navigation terms, the 'exit' (i.e., the direction for outgoing traffic) as regulated by the IMO is not where the Slovenian politicians argue that it should be – because the 'entrance' (the direction for incoming traffic) is in the sea along the Croatian coast of Istria, or for that matter in that area of the former Yugoslav side of the Osimo delimitation line. To have in the same area, or on that side of the Osimo line only, a 'corridor' enabling direct 'exit' to the high seas (and thus traffic in both directions) would be contradictory to the IMO regulation and the established practice of navigation there. The 'exit' for ships is indeed regulated in an area different from where the 'entrance' is – on the Italian side of the Osimo delimitation line. It is the territorial seas of both Italy and (once the limits are drawn) Croatia that have enclosed the territorial sea of Slovenia, upon its emergence as an independent state. Aspects of Slovenia's access to the high seas should be resolved with those two countries, while taking into account the existing IMO traffic regulation and established navigation practice in the area. This should not be difficult to achieve, as long as the access (or 'exit') to the high seas is not viewed as synonymous with territorial sea gains beyond what is permitted under international law.

Slovenia has expressed concerns for the 'exercise of its right of communication with the rest of the world'<sup>98</sup> and stated that a 'territorial exit to the high seas is also important because of maritime transport to and from the Port of Koper (which, in turn, is important for Slovenia's economic development)'.<sup>99</sup> However, facts and figures so far do not support these views. In 1990, while Slovenia was still a Yugoslav republic, and thus allegedly with a 'direct territorial exit to the high seas', its single international commercial port, Koper, had an annual throughput of only 5 million tons. By 2007, the annual throughput in that port had tripled to 15 million tons (increasing on average by one million tons every year since 2003, when Croatia proclaimed the Zone).<sup>100</sup> These figures may indicate that access to and from the high seas in the area is functioning well in practice, and any remaining practical, political or legal issues could best be resolved by building on the existing regulation and practice of navigation.

As it stands, therefore, it is apparent that Slovenia's desired 'territorial exit' to the high seas is not prejudiced by Croatia's Zone. Rather, the exercise of Slovenia's territorial rights at sea is confined by the basic

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<sup>98</sup> The 1993 Memorandum, as reproduced in Ibler, *op. cit.*, *supra* note 46 at p. 554.

<sup>99</sup> Ministry of Foreign Affairs of Slovenia, *White Paper 2006*, *op. cit.*, *supra* note 74 at p. 12.

<sup>100</sup> See statistics on the website of the Port of Koper, at [www.luka-kp.si](http://www.luka-kp.si).

provisions of the LOS Convention. The ‘territorial exit’ is moreover prevented by geographic circumstances, because between the Slovenian coast (and/or any conceivable baseline), on the one hand, and Point 5 at sea, on the other, lies the Peninsula of Savudrija – which is indisputably under the sovereignty of Croatia. In order for Slovenia to gain, even theoretically, a ‘territorial’ contact with the high seas at Point 5, either the LOS Convention or the legal status of the Savudrija Peninsula would need to be changed.

#### 4.4 Asserting claims to sovereign rights in the maritime area south of Point 5

Notwithstanding political claims, Slovenian legislation and regulations long remained in line with the statement contained in the 1993 Memorandum, according to which Slovenia:

...belongs to the group of so-called geographically disadvantaged states, which due to their geographical situation *can claim no exclusive economic zones of their own*. (Emphasis added)

Accordingly, its 2001 Maritime Code regulated Slovenia’s maritime ‘sovereignty’ (as well as its ‘jurisdiction’ and ‘control’) in the territorial sea and the internal waters, but not ‘sovereign rights’ in maritime areas beyond these.<sup>101</sup>

However, in December 2003, soon after Croatia proclaimed its Zone, Slovenia followed by amending its own Maritime Code.<sup>102</sup> The words ‘sovereign rights’ were inserted after ‘sovereignty’ in Article 1 of the Code, and a new paragraph was added to Article 4, which now states that Slovenia ‘may exercise its sovereign rights, jurisdiction and control over the sea surface, water column, sea bed and subsoil beyond the limits of state *sovereignty* in accordance with international law’.<sup>103</sup>

Two years later, Slovenia adopted additional legislation and passed regulations specifying to where it exercises sovereignty at sea, and from where it exercises sovereign rights. Its October 2005 Act on the Proclamation of the Ecological Protection Zone and on the Continental Shelf

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<sup>101</sup> Art. 1 of the 2001 Maritime Code, *op. cit.*, *supra* note 72. The English translation in the *Law of the Sea Bulletin* uses the word ‘supervision’ instead of control, which is the legal term as used in the Slovenian language text (‘nadzor’).

<sup>102</sup> See Act Amending the Maritime Code (PZ-B) of 19 December 2003; published in *Uradni list* (Official Gazette), No. 2, 2004; English translation in *Law of the Sea Bulletin*, No. 60, 2006, p. 126.

<sup>103</sup> *Ibid.*, Art. 2(1); emphasis is added to the word ‘sovereignty’, because the English translation in the *Law of the Sea Bulletin* contains the word ‘jurisdiction’ at that place, while the Act in its original Slovenian-language text published in *Uradni list* uses the word sovereignty (‘suverenosti’).

(hereinafter: 2005 Act)<sup>104</sup> and the January 2006 Decree on the Determination of the Fisheries Sea Area (hereinafter: 2006 Decree),<sup>105</sup> when juxtaposed, largely explain the national legislative and regulatory patchwork of marine areas to which Slovenia has asserted sovereignty and sovereign rights claims. According to the 2006 Decree, the *internal waters* of Slovenia lie between the coast and the line connecting Cape Savudrija and Cape Madona – thus in fact closing the Bay at its mouth and actually serving as a straight baseline (see Map 2).<sup>106</sup> From Cape Savudrija (which, incidentally, is the coast of Croatia), the *territorial sea* of Slovenia extends in the direction of the high seas,<sup>107</sup> to the point from where sovereign rights of Slovenia are asserted under the 2005 Act. The relevant points are Point 5 (presented also as point ‘T5’ in the 2005 Act) and, temporarily, until final agreement on maritime delimitation with Croatia is reached, ‘Point T6’ (2006 Decree).<sup>108</sup> Both Points 5 and T6 lie at a distance well exceeding 12 nm from even the nearest point of the line closing the Bay. Even if measured from Cape Savudrija, which the 2006 Decree explicitly uses as the relevant point (although that Cape is on the Croatian coast),<sup>109</sup> the closest distance to Point T6 is still 13 nm, whereas the distance between Point T6 and the nearest Slovenian coast (Cape Madona) is 15.8 nm. In addition, the maritime delimitation dispute with Croatia is pending both within and outside the Bay.

Slovenia extended its *sovereign rights* to apply in, *inter alia*, its ‘Ecological Protection Zone’. The provisional ‘external border’ of that zone follows the continental shelf delimitation line of Yugoslavia/Italy under the 1968 Agreement, and extends along that line from Point 5 southwards, as far as the parallel 45°10’ N. That parallel, according to the 2005 Act, also forms the provisional ‘external border’ of the ecological zone in the south, and the southern boundary of the zone runs along this parallel.<sup>110</sup> In other words, Slovenia’s proclaimed zone of sovereign rights extends at sea southwards from Point 5, running parallel to the Croatian coast of Istria, (provisionally) to the latitude just under Cape Grgetov – close to the town of Vrsar on the western Istrian coast of Croatia (see Map 2).

<sup>104</sup> Adopted by the Slovenian Parliament, *Državni zbor*, on 4 October 2005 and published in *Uradni list* (Official Gazette), No. 93, 2005 (2005 Act). English translation in *Law of the Sea Bulletin*, No. 60, 2006, pp. 56–57; that translation, however, does not contain the word ‘proclamation’ in the title of the Act, which is otherwise contained in the title of the Act in its original Slovenian language-version: ‘Zakon o razglasitvi’ (Act on the Proclamation).

<sup>105</sup> The Decree was passed by the Government of Slovenia on 5 January 2006, and published in *Uradni list* (Official Gazette), No. 2, 2006 (2006 Decree).

<sup>106</sup> Art. 2 of the 2006 Decree. See also Arts. 5 and 13(2) of the 2001 Maritime Code, with amendments.

<sup>107</sup> See Art. 3 of the 2006 Decree.

<sup>108</sup> See *ibid.* Coordinates of ‘Point T6’ are determined as 45°25’ N and 13°13’42.9’’ E.

<sup>109</sup> Arts. 2 and 3 of the 2006 Decree both refer to Cape Savudrija as the key point for determining *Slovenian* internal waters and territorial sea, respectively.

<sup>110</sup> Art. 4 of the 2005 Act.

Indeed, also the continental shelf that Slovenia claims to have in that area is *not* a natural prolongation of its own land territory, but rather of the land territory of Croatia in front of its western Istrian coast.<sup>111</sup>

Moreover, calling the proclaimed zone ‘ecological’ might have been a ‘name of convenience’, because rights in the zone are not limited to jurisdiction with regard to the protection and preservation of the marine environment,<sup>112</sup> but comprise also Slovenia’s ‘sovereign rights relating to research and sustainable use, preservation and management of marine wealth’ (2005 Act, Article 3).<sup>113</sup>

So far, there have been no official or public reactions from the EU bodies or other EU Member States to Slovenia’s evidently excessive territorial sea claim, nor to further extension of its sovereign rights based on that claim, although both are clearly in violation of the LOS Convention. No state except Croatia has publicly protested.<sup>114</sup> However, as observed by the UN Secretary-General when commenting on the universal applicability of the provisions of the LOS Convention regarding the regime of maritime zones:

...no international recognition must be given to maritime claims in excess of the limits allowed by these provisions and ... the regime of maritime zones and jurisdiction established under national legislation must fall within their scope.<sup>115</sup>

The Slovenian ‘ecological zone’, although a paper tiger only, remains formally in effect under its national legislation, and with no distinction made as to whether or not it applies to the EU Member States.

#### 4.5 Towards a consensual solution – ‘in the EU spirit’

Several main observations on the trend of development follow from the above discussion. First, Slovenia managed to link its *bilateral* delimitation dispute with Croatia to the issue of the Zone, although there exists no international law basis for that whatsoever. Various documents adopted by EU bodies have confirmed and strengthened the thesis of a causal link between the boundary dispute of the two countries, Slovenia’s ‘exit’ to the high seas, and Croatia’s Zone. That thesis has become broadly accepted, not only in political decisions but also in the media – including

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<sup>111</sup> See Art 76(1) of the LOS Convention.

<sup>112</sup> See Art. 56(1)(b)(iii) of the LOS Convention.

<sup>113</sup> Terms as used in the English language translation of the 2005 Act published in the *Law of the Sea Bulletin*. In the LOS Convention terminology, that is actually ‘sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources’ (Art. 56(1)(a) of the Convention).

<sup>114</sup> See note verbale by Croatia, dated 31 May 2007, in *Law of the Sea Bulletin*, No. 64, 2007, pp. 40–42.

<sup>115</sup> *Oceans and the law of the sea: Report of the Secretary-General, op. cit., supra* note 95 at para. 40.

some leading international ones – regardless of the basically local character of the dispute at hand.<sup>116</sup>

Second, neither rules of international law nor evidently needed environmental, conservation and management aspects of the Croatian Zone have been decisive in the process that developed within the EU, which has been dominated by *political* aspects. This made it possible to maintain the thesis of a causal relationship between the Croatian-Slovenian boundary dispute and the Zone proclaimed by Croatia – as long as the matter was left to political *perceptions* only.

Third, although negotiations on maritime delimitation failed to progress after the 2001 ‘final working adjustment’ (which both parties abandoned in the meantime), Slovenia, since becoming an EU Member State in spring 2004, has become positioned such that it will ultimately take part in approving whatever final solution may be found for applying the Croatian Zone to EU countries. That should be a joint, consensual solution – as first argued by Slovenia (in 2004), and then gradually adopted by the EU decision-makers and bodies in their documents (between 2004 and 2007), ultimately requiring a common agreement ‘in the EU spirit’.<sup>117</sup>

As commented by the Economist Intelligence Unit already in mid-August 2003:

...for Croatia there is plenty of reason to stay *within the rules*... On the diplomatic front, indeed, this represents Croatia’s best chance to show that it can be a team player inclined to compromise in the manner expected of an EU member.<sup>118</sup>

In protesting against Croatia’s Zone, Slovenia stated that this had been proclaimed ‘contrary to the European way’.<sup>119</sup> Slovenia’s own ecological zone has been proclaimed contrary to international law. Because in its

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<sup>116</sup> See, e.g., ‘Dispute festers in Slovenia, or is it Croatia?’, *International Herald Tribune*, 18 July 2006 ([www.iht.com/articles/2006/07/18/news/croatia.php](http://www.iht.com/articles/2006/07/18/news/croatia.php)); ‘A Balkan Border Dispute Is Nonviolent but Nettlesome’, *The New York Times*, 18 July 2006 ([www.nytimes.com/2006/07/18/world/europe/18customs.html](http://www.nytimes.com/2006/07/18/world/europe/18customs.html)); ‘Slovenia and Croatia: Hey, that’s my bit of the sea’, *The Economist*, 30 August 2003, p. 22. An analysis by the Economist Intelligence Unit (‘Eastern Europe marine: Calming the waves’; available at: [www.eiu.com](http://www.eiu.com)), used that line of argument already on 19 August 2003, some weeks after Croatia publicly announced its intention to declare the Zone.

<sup>117</sup> The European Council in its document adopted on 10 December 2007, *op. cit.*, *supra* note 2. Compare the wording in the note verbale by Slovenia, dated 15 April 2005 (*op. cit.*, *supra* note 79), underlining postponement of application of the Zone to the EU countries ‘until a common, consensual solution is reached in the European spirit, that would take into account the interests of the neighbouring countries’.

<sup>118</sup> Economist Intelligence Unit, *op. cit.*, *supra* note 116; emphasis on ‘rules’ added.

<sup>119</sup> See note by Slovenia, dated 3 October 2003, *op. cit.*, *supra* note 80.

very fundamentals the EU is based on the rule of law, the ‘European way’ and international law (in this case, the LOS Convention, to which all the EU Member States are parties) should indeed correspond.<sup>120</sup>

Placing the entire issue of the Zone in the context of Croatia’s accession process for EU membership facilitated an outcome that would certainly have been more difficult to achieve without having a ‘convincing’ issue to relate to, such as an unresolved territorial delimitation dispute.<sup>121</sup> Whether that was the main reason for opposing the Croatian Zone, or an optimal justification to put forth, remains to be seen. That leads us to the next section.

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<sup>120</sup> On the Convention and the rule of law see Bernard H. Oxman, ‘The Rule of Law and the United Nations Convention on the Law of the Sea’, *European Journal of International Law*, Vol. 7, 1996, pp. 353–371.

<sup>121</sup> Incidentally, Slovenia recently became an EU Member State despite that same open territorial dispute with its neighbouring country, then an EU candidate applicant, Croatia. The 2001 ‘final working adjustment’ might have sufficed for that purpose. Be that as it may, the unresolved delimitation issue with Croatia proved to be a rather low-key one in Slovenia’s accession process for EU membership.

## 5 Italy: Not yet ready for delimitation of Adriatic Sea zones?

According to one Italian author, Italy's 'interests in fishing may be compared to the typical interests of a distant water State'.<sup>122</sup> However, there is an important difference as well. Although fishermen of that country mostly fish outside the territorial sea limits, due to the poor state of fish stocks within the Italian territorial sea, this activity does not take place far away from Italian coasts – especially not in the narrow Adriatic Sea. Thus, in contrast to distant-water fishing fleets, the activities and fishing practices of Italian fishermen have an impact on resources in the relative vicinity of Italy's own coasts. As explained above (in the section on maritime uses of the Adriatic Sea), the sustainability of the Adriatic fisheries today is facing serious problems. In that respect, and given the largely subregional nature of the Italian fishery here, Italy would presumably have dual interests: the exploitation interest of a 'distant water'-like fishing state, and the rational management and conservation interest of an Adriatic coastal state.

In public statements, Italian politicians have related the prospects of a Croatian Zone to the negative economic effects this might have on Italian fisheries in the Adriatic Sea; however, the political implications have been mentioned as well. According to reports, the Italian State Secretary responsible for fisheries, Paolo Scarpa, has stated that Italian fishers, who currently fish in the Adriatic Sea in high seas waters up to the limits of the territorial seas of other countries, would be denied such access should limits of zones of sovereign rights be introduced in the middle of the Adriatic Sea.<sup>123</sup> On that point, the Croatian Governmental Report concluded:

The recent statements of State Secretary Scarpa clearly show that the interests of Italian fishermen are the basis of [the] Italian position on the extension of jurisdiction in the Adriatic, and it is as

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<sup>122</sup> Gemma Andreone, 'The Legal Regime of Fisheries in the Mediterranean: Some Issues Concerning Italy', in *The Italian Yearbook of International Law*, Vol. 11, 2001, pp. 231-261 at p. 231. Another Italian author has introduced an important distinction, and described perceived Italian interests as 'those of a State fishing outside its territorial sea'; see Tullio Treves, 'Italy and the Law of the Sea', in Tullio Treves and Laura Pineschi (eds.), *The Law of the Sea: The European Union and its Member States* (The Hague, Martinus Nijhoff, 1997), pp. 327-363 at p. 327.

<sup>123</sup> Statement by Italian State Secretary for Agricultural and Forestry Policy, Paolo Scarpa Bonazza Buora, on Slovenian television on 24 September 2003, as reported by STA (24 September 2003) and HINA (25 September 2003). The establishment of an EEZ or similar zone by Croatia would, in the Adriatic Sea circumstances, of course not result in denial of access to Italian fishermen – but rather in regulation of activities in accordance with the relevant LOS Convention provisions, as well as Croatian legislation based on this. Importantly, Croatia has often emphasized that it intends to employ non-discriminatory measures in its Zone.

yet uncertain which means Italy will employ to implement its policy.<sup>124</sup>

However, on 2 October 2003, one day prior to the Croatian proclamation of the Zone, the Italian press published excerpts from a letter sent on 1 October 2003 by State Secretary Scarpa to the European Commission President Romano Prodi and the Commissioner responsible for fisheries, Franz Fischler.<sup>125</sup> The letter, along with arguments for EU involvement in the issue, contained explanations about the special circumstances of the Adriatic Sea, where, allegedly, unilateral proclamation of an EEZ would have serious economic and political consequences. In that context, State Secretary Scarpa was cited as stating:

...Due to geomorphologic features of the [Croatian] Dalmatian coast, characterised by numerous islands, affecting baseline determination and the related criteria for maritime delimitation of EEZ, Croatia could [through its Zone] gain exclusive fisheries rights over some 3/5 of the Adriatic Sea.<sup>126</sup>

Moreover, the need for cooperation in and coordination of coastal state activities on the semi-enclosed Adriatic Sea was emphasized, and reference was made to the LOS Convention. At present, three important documents, issued or adopted by Italy in the period from 2004 to 2006, are the key for understanding its position regarding the extension of jurisdiction in the Adriatic Sea.

### 5.1 The Italian note of April 2004

On 16 April 2004, Italy sent a note to the UN Secretary-General,<sup>127</sup> in which two main arguments were stated against the lawfulness of the Croatian Zone under international law. Firstly, Italy pointed to Article 123 of the LOS Convention, and also argued that Croatia had failed to fulfil the obligation to cooperate when it issued the unilateral declaration of the Zone, because ‘this obligation to cooperate does not cease if a coastal State bordering an enclosed or semi-enclosed basin decides *to establish* reserved zones of functional jurisdiction’ (emphasis added). According to the Italian note, for coastal states bordering on enclosed or semi-enclosed seas, there is the *specific* obligation to cooperate in *determining the limits* of the zone of functional jurisdiction. This obligation, as argued by Italy, is even more evident in enclosed or semi-enclosed basins that are particularly narrow, such as the Adriatic Sea,

<sup>124</sup> Government Report 2003, *op. cit.*, supra note 22 at p. 57.

<sup>125</sup> Mauro Manzin, *Il Piccolo*, 2 October 2003, p. 7.

<sup>126</sup> *Ibid.*

<sup>127</sup> Note No. 1681 by Italy, dated 16 April 2004, concerning the declaration of an ecological and fisheries protection zone in the Adriatic Sea by the Republic of Croatia of 3 October 2003; published in *Law of the Sea Bulletin*, No. 54, 2004, pp.129-130.

where the circumstances are such that ‘coordination in determining the zone of functional jurisdiction is even indispensable’.

Second, Italy argued in its 2004 note that the determination, in a temporary manner, of the limit of the Croatian Zone coinciding with the delimitation line agreed for the continental shelf under the 1968 Agreement is ‘against Italian interests’. In support of that argument, Italy put forth the following reasons:

- the automatic extension of the continental shelf delimitation line agreed in 1968, to serve as the provisional outer limit of the Croatian Zone, is legally not well founded because that limit was agreed on the basis of special circumstances that differ from those to be considered in the determination of superjacent waters;
- the 1968 delimitation was agreed at a time when the notion of [an] EEZ was not well defined in the international law of the sea;
- a change of relevant geographical circumstances took place after the conclusion of the 1968 Agreement, implying a consequential change of the objective parameter of the median line.

## **5.2 Law on the Italian ecological protection zone, February 2006**

On 8 February 2006, Italy adopted Law 61 on the establishment of an ecological protection zone beyond the outer limit of the territorial sea (hereinafter: the 2006 Law).<sup>128</sup> It authorizes the establishment of ecological protection zones, on the basis of a decree by the President of Republic. This is related to achieving delimitation agreements with the ‘states involved’, i.e., those whose territory is adjacent to or facing Italian territory. Until the date when said agreements enter into effect, the outer limits of the ecological protection zones follow the outline of the *median line*, each point of which is equidistant from the closest points on the baselines of the Italian territorial sea and of the states involved.

Within the zone, Italy exercises its jurisdiction in the area of protection and conservation of the marine environment, including the archaeological and historic heritage. Norms of Italian and EU law, and international treaties, apply to foreign ships and persons in the zone regarding marine pollution, including from ships, ballast water, and dumping of garbage, as well as pollution from sea-bed exploration and exploitation activities, and of atmospheric origin. According to an explicit provision (Article 2(3)), the 2006 Law does *not* apply to fishing activities.

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<sup>128</sup> Published in *Gazzetta Ufficiale della Repubblica Italiana* (Official Gazette of the Italian Republic), No. 52, of 3 March 2006; English translation as provided by Italy in *Law of the Sea Bulletin*, No. 61, 2006, p. 98.

### 5.3 The Italian note of March 2006

On 15 March 2006, Italy sent a second note to the UN Secretary-General,<sup>129</sup> now prompted by Croatia's submission of the list of geographical coordinates defining the outer limit of its Zone.<sup>130</sup> In this Note, Italy stated that the provisional limit of the Croatian Zone appeared 'harmful to Italian interests', not only in procedural terms but also in substance.

As to procedural terms, Italy argued that Croatia, in violation of Article 74 of the LOS Convention, had failed to involve Italy in the setting of the provisional limit of the Zone, despite the provision on the need for cooperation contained in that Article. There was no reference to Article 123 in the 2006 Note.

As to provisional limits of the Croatian Zone being 'harmful to Italian interests' in substance, Italy put forth the following reasons in the 2006 Note:

- the 1968 Agreement had been concluded when the Italian system of baselines was profoundly different, because the method of straight baselines was introduced only later (in 1977)<sup>131</sup>;
- the flow of detritus from the Po River from 1968 to the present has led to a further lengthening of the Italian coastline toward the open sea;
- the constant jurisprudence of the International Court of Justice has consistently recognized that the delimitation of sea areas invokes special circumstances that differ for the continental shelf and for superjacent waters – such as, for example, *historic fishing rights* – which in turn leads to different delimitation methods, and that, consequently, in this specific case there is no legal foundation, however provisional, for the automatic extension of the 1968 seabed line to superjacent waters.

### 5.4 Assessment

The Italian position, as presented in those two diplomatic notes (of 2004 and 2006), along with the provisions of the 2006 Law, has introduced

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<sup>129</sup> Note verbale by Italy, dated 15 March 2006, published in *Law of the Sea Bulletin*, No. 60, 2006, pp. 127–128.

<sup>130</sup> Note verbale (No. 840/05) by Croatia, dated 2 September 2005, addressed to the UN Secretary-General, published in *Law of the Sea Bulletin*, No. 59, 2005, pp. 28–29. In the note, Croatia stated that, in accordance with its 2003 Decision on the Zone, the coordinates are 'provisional, pending the conclusion of the delimitation agreements with the States whose coasts are opposite or adjacent to the Croatian coast, once they extend their jurisdiction beyond their territorial sea in accordance with international law'.

<sup>131</sup> Decree No. 816 of 26 April 1977, published in *Gazzetta Ufficiale*, No. 306, of 9 November 1977.

several complex issues regarding the extension of jurisdiction in the Adriatic Sea, especially as to delimitation aspects between the Italian and Croatian zones.

*First*, in its 2004 Note, Italy argued that Croatia's 'obligation to cooperate', already when declaring the Zone, consisted 'in the specific obligation to cooperate in determining the limits of the zone /.../ i.e., in agreeing on those limits with other interested States', and that this was not fulfilled by Croatia when it unilaterally declared the Zone. Both Croatian and Italian leading experts on the international law of the sea have commented on this statement. According to Vukas, such a reaction is a misinterpretation of the LOS Convention (Article 123 in particular), because any state is free to establish unilaterally its EEZ; however, 'after having undertaken such a decision, it may be necessary to adjust the cooperation with neighbouring States to the new situation'.<sup>132</sup> Similarly, as observed by Scovazzi:

If the note meant that a State bordering an enclosed or semi-enclosed sea cannot proceed to establish its exclusive economic zone (or other *sui generis* zones) without the agreement of its neighbouring States, this would be wrong. It would be contrary to both the spirit and letter of Article 123 UNCLOS and the UNCLOS provisions on the exclusive economic zone (Part V), which do not distinguish among different categories of seas.<sup>133</sup>

Besides, it is difficult to see how this alleged 'obligation to cooperate' on agreeing, or even negotiating, on (provisional) limits of the zone ahead of its actual proclamation could be implemented by Croatia – given the fact that Italy has, already as of September 2003, argued for the establishment of a *joint* zone in the Adriatic Sea,<sup>134</sup> which thus by itself excludes any prospect of delimitation. In fact, once the Croatian intention to declare an EEZ became public (on 1 August 2003), further negotiations with Italy were headed in only one direction: Italian political disapproval of Croatia's 'unilateral' Zone proclamation.

*Second*, already in its 2004 Note (with additional views formulated in the 2006 Note), Italy clearly argued against a single maritime boundary in the Adriatic Sea, thus favouring a delimitation line between the Croatian Zone and the (prospective future) Italian zone distinct from the existing continental shelf delimitation based on the 1968 Agreement. This Italian

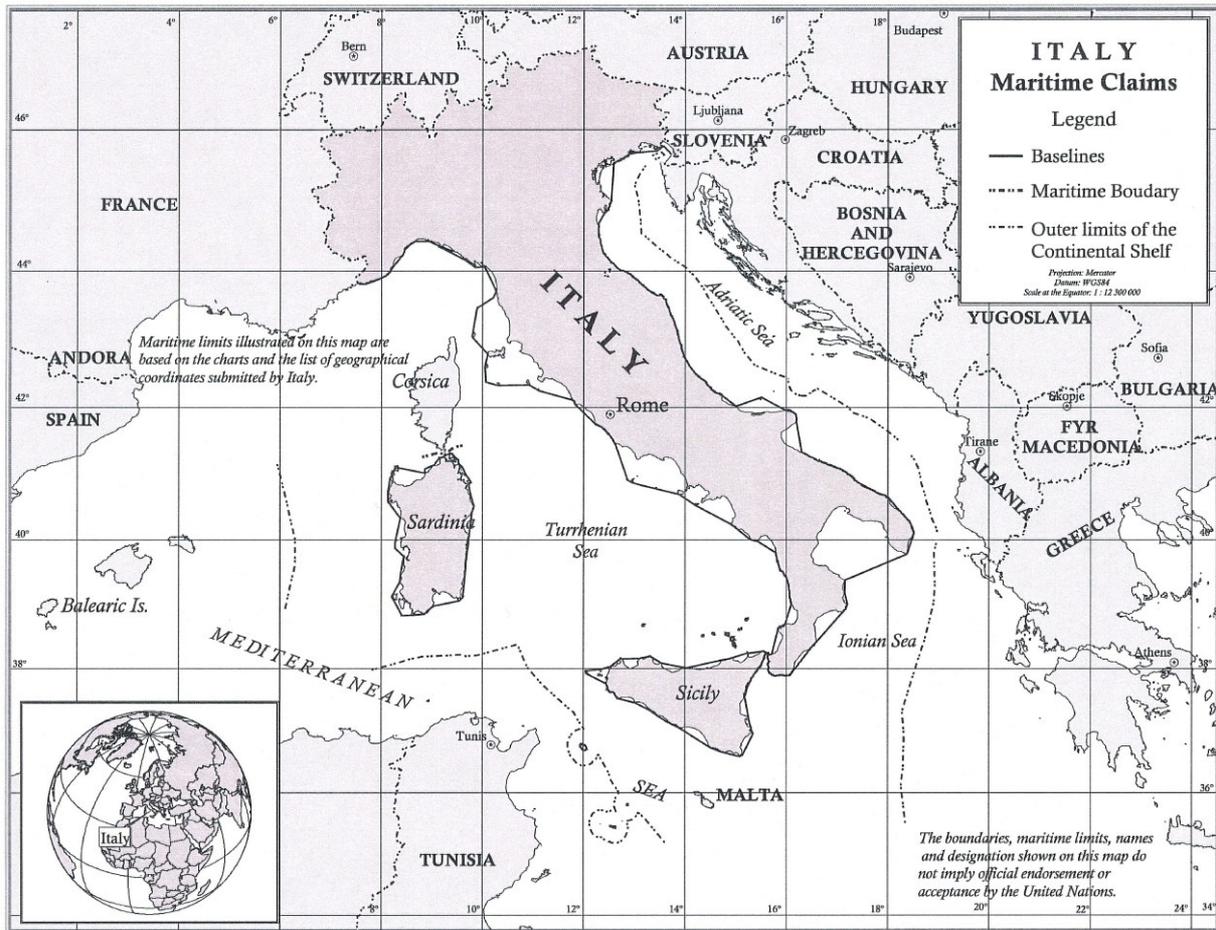
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<sup>132</sup> See Budislav Vukas, 'State practice in the aftermath of the UN Convention on the Law of the Sea: The Exclusive Economic Zone and the Mediterranean Sea', in Anastasia Strati, Maria Gavouneli and Nikos Skourtos (eds.), *Unresolved Issues and New Challenges to the Law of the Sea* (The Hague, Martinus Nijhoff, 2006), pp. 251-258 at p. 256 (emphasis added).

<sup>133</sup> Tullio Scovazzi, 'Recent Developments as regards Maritime Delimitation in the Adriatic Sea', in Rainer Lagoni and Daniel Vignes (eds.), *Maritime Delimitation* (Leiden, Brill, 2006), pp.189-203 at pp. 195–196.

<sup>134</sup> See Government Report 2003, *op. cit.*, *supra* note 22 at p. 57.

preference for a different maritime boundary on the continental shelf from that in the water column above it does not relate exclusively to the Adriatic Sea; it is of particular relevance to some other maritime delimitations that may be on the horizon for Italy in other seas surrounding its mainland.<sup>135</sup> However, when it comes to the delimitation of water-column zones (ecological or similar) and the relationship to the existing continental shelf boundaries, the situation in the Adriatic Sea may in fact be the converse of some other situations, like that between Italy and Tunisia, as to the zone in which to argue for the priority of the median line.



**MAP 4: Italy: maritime boundaries and delimitation issues<sup>+</sup>**

<sup>135</sup> See further Andreone, 'The Legal Regime of Fisheries in the Mediterranean', *op. cit.*, *supra* note 122 at pp. 243–248; Irimi Papanicolopulu, 'A Note on Maritime Delimitation in a Multizonal Context: The Case of the Mediterranean', *Ocean Development and International Law*, Vol. 38, No. 4, 2007, pp. 381–398.

<sup>+</sup> Map 4 is available from: [www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MAPS/ITA\\_MZN5\\_1996b&w.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MAPS/ITA_MZN5_1996b&w.pdf)

*Third*, in its 2006 Law, Italy relies on the median line, i.e., equidistance from the closest points of the baselines, as the temporary outer limits of its ecological protection zone until these limits are determined on the basis of agreements ‘with the states involved’. Due to Italy’s geographic position in the Mediterranean, there are a number of ‘states involved’, and on several seas other than the Adriatic where Italy will need to agree on outer limits of its zone. In several cases – especially due to Italian islands and baselines determined with reliance on these islands – upholding the median line is the delimitation method more advantageous for Italy. Given the configuration of Italian and Croatian coasts in the Adriatic Sea, the situation here is different, due to the Croatian island chain along the coast, and the straight baselines determined with reliance to this island chain, following the general direction of the coast.<sup>136</sup> In such a situation, and with its 2006 Law explicitly relying on the median line until a final agreement is reached, it may be reasonably expected that Italy would place priority, through negotiations towards agreements with the ‘states involved’, on the determination of those limits of its zone – or segments of it (i.e., ‘zones’)<sup>137</sup> – where stricter reliance on the median line can be argued for more favourably for Italy.

*Fourth*, in its 2004 Note, Italy had stated that ‘the determination, in a temporary manner’ of the limit of the Zone coinciding with the delimitation line of the continental shelf based on the 1968 Agreement was ‘against Italian interests in the Adriatic Sea’. In support of that position, the 2004 Note went on to say that ‘automatic extension of the delimitation of the seabed, agreed in 1968, is not legally well founded because that limit was agreed on the basis of special circumstances that differ from the circumstances to be considered in the determination of superjacent waters’.

The Italian view is correct insofar as the delimitation of an EEZ and a continental shelf does not necessarily, in all cases and situations, need to follow the same line – although in most cases these actually do follow the same line. As commented by Scovazzi, ‘the point is simply that, where an agreement refers to a certain zone (...) it cannot be automatically and unilaterally extended to other zones’. Moreover, the 1968 Agreement contains an explicit provision (Article 4) stating that it does not influence the juridical state of the waters (or air space) over the continental shelf. Here it must be added that Croatia, in its 2003 Decision, stated that the outer limits of its Zone are temporary and furthermore that the final limits

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<sup>136</sup> As commented by Blake *et al.*, *op. cit.*, *supra* note 77 at p. 10, those baselines, which are based on Yugoslavia’s straight baseline claims, ‘have attracted praise from commentators as an example of modest and appropriate application of straight baselines’ and were cited as a ‘model against which other baselines connecting fringing islands could be tested’.

<sup>137</sup> In the original Italian language version of the 2006 Law, the word ‘zone’ is also used in the plural.

are to be determined through delimitation agreements with neighbouring states. It also allowed for a period of postponed implementation of the Zone, to facilitate arriving at agreements or arrangements with interested states.

There are two key substantive facts in this context, as related to the 1968 Agreement. One is that the delimitation under the 1968 Agreement was mostly based on equidistance – the median line.<sup>138</sup> And the other is that the method of equidistance was modified through mutual concession, to give reduced effect to several islands situated significantly far offshore (and thus not following the general trend of the coastline) – and due to that, Italy, in total, actually received a sizeable concession through the 1968 Agreement, as compared to what would have been the case with a strict application of the median line. Some authors have estimated the total size of the concession in Italy's favour at 2,664 square km.<sup>139</sup> Although the exact surface area of that concession may still need to be determined precisely, there is no doubt that, as observed by Scovazzi, the 1968 Agreement 'provides for a boundary line which is more favourable to Italy with respect to what would result from the application of a strict equidistance method'.<sup>140</sup>

Directly related to this aspect are several circumstances that must be borne in mind regarding the situation existing when Croatia proclaimed its Zone in October 2003. No Italian zone had as yet been proclaimed, nor had any Italian law to that effect been adopted, and the outer limit of the Croatian Zone was to meet with the high seas. The Croatian Zone was, however, not intended to exceed the line at which Italian interests, based on international law, might be affected – should Italy decide to venture into establishing its own zone. The practice of the Mediterranean states in establishing unilaterally the outer limit of their jurisdictional zones vis-à-vis states that have no such zones has recently been assessed by Irini Papanicolopulu, who concluded that those states 'generally have not exceeded the median line, thus implicitly recognizing the entitlement of the opposite or adjacent state to a future claim of a similar jurisdictional zone'.<sup>141</sup> If, however, in the situation as of October 2003, Croatia were to rely on the 'outline of the median line' (as, e.g., provided by the 2006

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<sup>138</sup> At that time, Italian straight baseline system had not yet been introduced, and it is yet to be estimated to what extent this would have an impact on a different median line determination in the Adriatic Sea. However, some segments of the Italian straight baselines, as established by Decree No. 816 of April 1977, have been qualified as 'open to challenge under the provisions of Article 7 of the LOS Convention, particularly the use of Termiti as a basepoint'; Blake *et al.*, *op. cit.*, *supra* note 77 at p. 13.

<sup>139</sup> Blake *et al.*, *op. cit.*, *supra* note 77 at pp. 15–16; also Vukas, 'Maritime Delimitation in a Semi-enclosed Sea', *op. cit.*, *supra* note 77 at p. 207, citing the same figure.

<sup>140</sup> Scovazzi, 'Recent Developments', *op. cit.*, *supra* note 133 at pp. 200–201.

<sup>141</sup> Papanicolopulu, 'A Note on Maritime Delimitation', *op. cit.*, *supra* note 135 at p. 387.

Law on the ecological zone by Italy), this would in effect mean *exceeding* the projection of the existing continental shelf delimitation line of 1968. Provisional reliance (until agreement is reached) on the latter delimitation line can thus also be seen as a rather cautious move on the Croatian part. As commented by Blake *et al.*, 'it would be extremely difficult to maintain any claim, for example to an EEZ, *beyond* [this] well-established and accepted maritime [boundary] in the Adriatic'.<sup>142</sup>

*Fifth*, Italy – although its 2006 Law explicitly provided for the outline of the median line as a provisional outer limit of its ecological zone – in the Adriatic Sea, through its 2004 and 2006 Notes, in fact protested against reliance on a median line with sizeable adjustments, thereby considerably correcting a strict median line to Italy's advantage. In its 2004 Note, Italy stated that automatic extension of the 1968 delimitation line was 'against Italian interests' because it failed to take into account a 'change of relevant *geographical circumstances* that took place after the conclusion of the 1968 Agreement, which implies a consequential change of the objective parameter of the median line' (emphasis added). However, since 1968 there had been no major changes in the geography of the region that would have had an impact on the median line between Italy and Croatia.<sup>143</sup> It has thus been commented that the 'unclear reference to geography probably refers to political geography, and not to physical geography'.<sup>144</sup> Italy probably did not want to point out that, after the dissolution of Yugoslavia, there is a considerably smaller state, Croatia, that now has sovereignty over most of the eastern Adriatic coastline. On the other hand, the additional explanations offered by Italy in the 2006 Note, referring to the flow of detritus from the River Po from 1968 to the present, and leading to a lengthening of the Italian coastline to the open sea, would not appear particular relevant either.

*Sixth*, in its 2006 Note, Italy pointed to the example of 'historic fishing rights' as being among the special circumstances 'consistently recognized' in 'constant jurisprudence' of the International Court of Justice, leading to different delimitation methods for the continental shelf and the superjacent waters. However, maritime zone delimitation in the Adriatic Sea in the present situation would be between the Croatian Zone and the Italian ecological zone. In its 2006 Law, Italy stated that the law 'does not apply to fishing activity'. Fisheries rights are thus an element expressly excluded from the content of the Italian ecological zone. Therefore, even without further discussion of that subject – given the 2006 Law excluding fishing activity from its application – 'historic fishing rights' remain without any relevance for determining the outer limit of the Italian ecological zone.

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<sup>142</sup> Blake *et al.*, *op. cit.*, *supra* note 77 at p. 13.

<sup>143</sup> See also note verbale by Croatia, dated 31 May 2007 addressed to the UN Secretary-General, published in *Law of the Sea Bulletin*, No. 64, 2007, pp. 39-40.

<sup>144</sup> Vukas, 'Maritime Delimitation in a Semi-enclosed Sea', *op. cit.*, *supra* note 77 at p. 209.

In sum, there may be many complex reasons – not only economic and political, but in the current situation also legal – for Italy to prefer the *status quo* in the Adriatic Sea. It might have been all too tempting to present the issue of the Croatia's Zone as an Adriatic 'East Side Story' – yet another 'Balkan niggle', as *The Economist* put it<sup>145</sup> – where two small countries, Croatia and Slovenia, were shown as involved in a fierce but basically irrational dispute over a small area of sea. Although their maritime delimitation dispute is a real and unresolved one, we have seen in the preceding section that there is no basis in international law for relating that delimitation dispute to the Zone proclaimed by Croatia.

In fact, the implications of the Croatian Zone for the longitudinal Adriatic maritime delimitation with Italy, while essentially a bilateral issue – and entirely beyond a territorial one<sup>146</sup> – may represent the single most serious impediment to the application of that Zone to the EU Member States. An agreement on the substance of the rights of the neighbouring 'EU Member States' in that Zone presupposes the need for entering into negotiations between Croatia and Italy on the limits of their respective zones in the Adriatic Sea.

If, however, the Croatian Zone were to be made non-applicable to EU Member States, that might be a solution that could enable open access to the high seas resources to be maintained (and with the by-product of excluding non-EU states), while at the same time postponing the related delimitation implications along most of the Adriatic Sea.

From here, two avenues may be possible. One is to maintain the *status quo* as long as Croatia does not become a Member State of the EU; this would until that time also allow for the continuation of current fishing practices in the Adriatic Sea, including the consequences these have been shown to have for the sustainability of the Adriatic fisheries and status of fish stocks so far. The other avenue may be to continue trying to persuade Croatia to accept the establishment of a *joint zone* in the Adriatic Sea – regardless of its entitlement under international law to implement its own EEZ.

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<sup>145</sup> 'Slovenia and Croatia: Hey, that's my bit of the sea', *The Economist*, *op. cit.*, *supra* note 116 at p. 22.

<sup>146</sup> Italy, an EU Member State, is yet to delimit a number of maritime zones with its neighbours, including with EU Member States, such as France, Spain and Malta.

## 6. Outcome

The outcome developed in two phases. First, in December 2006, the Croatian Parliament adopted a decision to implement the Zone – also with regard to EU Member States – from 1 January 2008. From that date the Zone was, at least formally, in full implementation – yet for 75 days only. Croatia then decided to discontinue application of the Zone to the EU countries from 15 March 2008. How and why could that turnabout be possible in such a short period of time?

### 6.1 Deciding to implement the Zone fully

By the autumn of 2006, over two years had elapsed since Croatia amended its Decision on the Zone (on 3 June 2004) and since (on 4 June 2004) the trilateral meeting was held in Brussels. In the meantime, some important circumstances had changed, while others remained in stalemata.

On the one hand, the two Adriatic EU Member States, Slovenia (in October 2005 and January 2006) and Italy (in February 2006) had adopted their legislation and regulations on ‘ecological protection’ zones or aspects of extended maritime jurisdiction. On the other hand, it became evident that no fisheries partnership agreement would ever be concluded. In accordance with the 2004 Decision, implementation of Croatia’s Zone with regard to the EU countries was to commence only after the conclusion of a fisheries partnership agreement with the European Union. Croatia invited the European Commission to initiate negotiations on the agreement; however, Croatia’s calls to conclude such a fisheries partnership agreement remained unanswered after the Brussels trilateral meeting.<sup>147</sup> It was argued that the European Commission does not negotiate that kind of agreement with a candidate for EU membership, with which the accession negotiations were opened (for Croatia, in October 2005). It thus became evident that no fisheries partnership agreement would ever be reached. Instead, fisheries issues were to be discussed under a separate chapter of the accession negotiations. However, progress towards opening of negotiations on the fisheries chapter has remained deadlocked since autumn 2006, and remains blocked at the time of writing (30 June 2008). Croatian officials have pointed out that ‘one Member State’ (Slovenia) in effect blocked further procedures in the European Council – which requires unanimity by EU Member States for a Council decision

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<sup>147</sup> Explicit confirmation is found in ‘Address by Ambassador Vladimir Drob-njak, Chief Negotiator for Croatia, to the Committee on Foreign Affairs of the European Parliament’, given in Brussels on 29 January 2008; document on file with the author. See also Croatian Ministry of Foreign Affairs and European Integration, Press Release 289/06, Zagreb, 6 December 2006 (available at the website of the Ministry: [www.mvpei.hr](http://www.mvpei.hr)).

on preparedness for the opening of negotiations on individual chapters.<sup>148</sup> In this way, progress towards opening of the negotiations on Chapter 13 (Fisheries) has been prevented, and in that context any discussion of the fisheries segment of the issues related to the implementation of the Zone has been disabled.<sup>149</sup>

The stalemate on the Zone was increasingly becoming the subject of a renewed domestic political debate in Croatia. The government had long been reluctant to venture to propose a new amendment of the decision on the Zone, though it had no doubts as to the international legal basis for Croatia to change a previous decision adopted by its own Parliament; rather, it perceived maintenance of its position as self-restraint due to policy considerations. The deadlock in the process towards opening of the fisheries chapter in Croatia's EU accession negotiations, however, may have had a triggering effect for the government's change of position. Here it should be borne in mind that the question of the Zone – which by that time had remained unresolved for over three years – was already a dominant political issue in Croatia, and that calls by the main parliamentary opposition parties for full implementation of the Zone echoed those put forth by environmental non-governmental organizations (NGOs), fishers' associations, marine scientists and prevailing expert views, meeting a broad consensus in general public opinion.

In October 2006, the Croatian Prime Minister, Ivo Sanader, announced that the conditions had been met for proposing an amendment of the 2004 Decision to the Parliament, and he invited a consensual proposal by all

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<sup>148</sup> Memo by Croatia ('Non-paper'), of 1 February 2008, distributed to EU Member States; also Address, *op. cit.*, *supra* note 147 (documents on file with the author); and statement by Croatian Prime Minister Ivo Sanader, HINA, 4 February 2008. See also 'Union tightens conditions for Zagreb's membership', *Europolitics*, No. 3469, 13 February 2008, p. 13. In the Memo by Croatia, it was pointed out that 'Slovenia's position concerning Chapter 13 deviates from the EC's Screening Report recommendations and has not been supported by any other Member State'. Slovenian Prime Minister Janez Janša on 5 February 2008 confirmed Slovenia's reservation for the opening of Croatia's accession negotiations with the EU on the fisheries chapter, arguing that this was due to Croatia's failure to meet the conditions; see 'Slovenia expresses reservations about Croatia's fisheries policy', *SE Times*, 6 February 2008

(at: [www.csees.net/?page=news&news\\_id=65760&country\\_id=7](http://www.csees.net/?page=news&news_id=65760&country_id=7)).

<sup>149</sup> Still to date (30 June 2008), in respect of the fisheries Chapter, there is no unanimity required for the Council's decision on Croatia's preparedness for the opening of negotiations (or on opening benchmarks). The 'Negotiating Framework' for Croatia, of 3 October 2005, set the negotiating procedure to involve 'the Council [who], acting by unanimity on a proposal by the Commission, will lay down benchmarks for the provisional closure and, where appropriate, for the opening of each chapter' (para. 26 of the Negotiating Framework).

the parliamentary parties. It initially appeared that an amendment decision might result from following such a course.<sup>150</sup>

A key change, however, had been introduced since 30 November 2006, when the European Commissioner for Enlargement, Olli Rehn, visited Croatia and attended a meeting of the government. On that occasion Rehn had commented that a unilaterally decided application of the Zone to the EU Member States would be contrary to the agreement of June 2004, adding that this agreement had facilitated the EU membership candidate status for Croatia.<sup>151</sup> Reference to an international agreement, instead of a 2004 Decision by the Croatian Parliament, as the legal basis for the non-application of the Zone to the EU countries, marked a substantial difference. On this point, Croatian Prime Minister Sanader indicated that Commissioner Rehn might have been misinformed by his advisers regarding the existence of such an agreement.<sup>152</sup> The Delegation of the European Commission in Croatia then issued a Communiqué, stating:

The document to which Commissioner Rehn was referring to, are agreed minutes of a trilateral meeting Italy/Slovenia/Croatia which took place in Brussels on 4 June 2004. /.../ The agreed minutes set out a *jointly agreed procedure* and do include a *specific commitment* on the application of the Zone. In this respect, it would be detrimental to Croatia's credibility as a reliable partner in the region if it came out now with a unilateral move by activating the Zone. We believe that the reference to the European Council from June 2004 which conferred candidate status to Croatia is the key one for clear understanding.<sup>153</sup>

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<sup>150</sup> At a joint meeting of the government and opposition parliamentary parties, held 9 October 2006, conclusions were adopted by consensus; see Croatian government, 'Note on the meeting in the Government of the Republic of Croatia regarding issues of the Environmental and Fisheries Protection Zone', Zagreb, 12 October 2006 (Croatian-language original available at the website of the Croatian government: [www.vlada.hr](http://www.vlada.hr)). That was in contrast with the sharp polarisation of Croatian parliamentary parties in the processes that led to both the 2003 and 2004 Decisions.

<sup>151</sup> See *Delo*, 30 November 2006; *Jutarnji list*, 1 December 2006; *Poslovni dnevnik*, 1 December 2006; *Novi list*, 1 December 2006; *Glas Istre*, 1 December 2006; *Slobodna Dalmacija*, 2 December 2006; *Croatian radiotelevision*, 4 December 2006.

<sup>152</sup> Statement by Prime Minister Ivo Sanader, as recorded on video-tape of the Croatian radiotelevision, HRT-1, evening news, 4 December 2006 (available at the website of the Croatian radiotelevision: <http://vijesti.hrt.hr>).

<sup>153</sup> Delegation of the European Commission to the Republic of Croatia, 'Communiqué', Zagreb, 5 December 2006 (available at the website of the Delegation: [www.delhrv.cec.eu.int](http://www.delhrv.cec.eu.int)); emphasis added. Reference to the European Council was made in respect of the Presidency Conclusions (17–18 June 2004), in which an 'agreement' from the 4 June 2004 trilateral meeting was referred to, instead of 'agreed minutes'; see *supra* note 58 and the related text.

The day after, the Croatian Prime Minister reiterated that no such agreement existed.<sup>154</sup> Moreover, the Croatian Ministry of Foreign Affairs pointed out that ‘interpretations stating that the Minutes might be taken as a legally binding document are completely groundless’, and that any interpretations that could imply attempts to limit the rights of Croatian institutions to pass sovereign decisions would be unacceptable.<sup>155</sup> Indeed, also the European Commission's Screening Report for Chapter 13 (Fisheries) stated:

*Pursuant to the Decision of the Croatian Parliament of 3 June 2004, the Ecological and Fisheries Protection Zone is not applied to EU vessels. This decision was noted by the trilateral meeting between Croatia, Italy and Slovenia, facilitated by the Commission, of 4 June 2004.*<sup>156</sup>

Moreover, in its 2005 Progress Report on Croatia, the European Commission – under the ‘Political Criteria’ section – included a reference to the Decision of the Croatian Parliament of 3 June 2004, according to which implementation of the Zone to EU countries would start after the conclusion of an agreement on partnership in fisheries. Yet, under the section ‘Chapter 13: Fisheries’ of the Report, it was stated that ‘in line with the trilateral agreement between Croatia, Italy and Slovenia of June 2004, [the Zone] is not applied to EU vessels’.<sup>157</sup>

Nevertheless, it immediately became clear that the issue was not one of possible misinterpretation of a document (‘agreed minutes’ or ‘agreement’) made by the European Commission Delegation in Zagreb, or accidental misinformation of Commissioner Rehn by his advisers. The President of the European Commission, José Manuel Barroso, stated after the meeting held in Brussels on 6 December 2006 with the President of Croatia, Stjepan Mesić, that the European Commission expected Croatia, as a credible candidate country, to commit to its obligations assumed at the start of (accession) negotiations and not to take unilateral measures

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<sup>154</sup> See ‘PM Ivo Sanader protests against Degert’s statement about Fisheries Protection Zone’, 6 December 2006 (available at the website of the Croatian government: [www.vlada.hr](http://www.vlada.hr)).

<sup>155</sup> Croatian Ministry of Foreign Affairs and European Integration, Press Release 289/06, Zagreb, 6 December 2006 (available at the website of the Ministry: [www.mvpei.hr](http://www.mvpei.hr)).

<sup>156</sup> Commission of the European Communities, ‘Screening report Croatia, Chapter 13 – Fisheries’, Brussels, 18 July 2006; emphasis added. Available at the European Commission website: [http://ec.europa.eu/enlargement/pdf/croatia/screening\\_reports/screening\\_report\\_13\\_hr\\_internet\\_en.pdf](http://ec.europa.eu/enlargement/pdf/croatia/screening_reports/screening_report_13_hr_internet_en.pdf). However, on the relevant website page of the Commission, where all other screening reports (32) are listed, the only missing report (as per 30 June 2008) was precisely the cited one, on the Fisheries chapter 13; see: [http://ec.europa.eu/enlargement/candidate-countries/croatia/screening\\_reports\\_en.htm](http://ec.europa.eu/enlargement/candidate-countries/croatia/screening_reports_en.htm).

<sup>157</sup> European Commission, ‘Croatia 2005 Progress Report’, SEC (2005) 1424, Brussels, 9 November 2005, pp. 32 and 68.

regarding the Zone.<sup>158</sup> At that point, the issue of the Croatian Zone, although still being handled by the European Commission as a political one, was no longer left to its DG for External Relations, but instead to the DG Enlargement. Although the Directorates were different, there was in fact a personal continuity, because the facilitator of the discussion at the 4 June 2004 Brussels meeting and a 'signatory' of the resultant agreed minutes on behalf of the European Commission, then deputy director-general of DG External Relations, had in the meantime become director-general of DG Enlargement.<sup>159</sup>

Croatian diplomacy intensified its activity on the issue of the Zone, while the government formed a working group tasked with preparing the proposal on the rules for application of the Zone.<sup>160</sup> Differences surfaced between the government's approach (possibly resulting from enhanced diplomatic consultations), and the major opposition parties. While still arguing for application of the Zone, the government was now also proposing a new one-year period of postponement. Key parliamentary opposition parties, however, argued for instant application of Croatia's jurisdiction on marine environmental protection within the Zone, while allowing for additional negotiations on the exercise of sovereign rights related to fisheries – yet within a predetermined time-limit of six months. In addition to sovereign rights related to living resources, Croatia's Zone notably related to jurisdiction with regard to the protection and preservation of the marine environment, and with regard to marine scientific research – thus not *all* aspects of application of the Zone to the EU countries could (and should) have been negotiated either through a fisheries partnership agreement or within the fisheries chapter of the accession negotiations.

In line with the proposal made by the government, the Croatian Parliament adopted on 15 December 2006 a third decision on the Zone.<sup>161</sup> This modified paragraph 3(2) of the 2004 Decision, by providing that:

For the Member States of the European Union the implementation of the legal regime of the [Zone] shall start no later than 1 January 2008, whereof, fisheries and ecological regulations of the Republic of Croatia shall be applied to fishing and other European Community vessels.

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<sup>158</sup> See 'Barroso warns Croatia against unilateral moves regarding EFPZ', HINA, Brussels, 6 December 2006, reproduced at the website of the Office of the President of the Republic of Croatia: [www.predsjednik.hr](http://www.predsjednik.hr)

<sup>159</sup> Dr. Michael Leigh, a political scientist from Oxford, has been director-general of the DG Enlargement since 2006; see further information at: [http://ec.europa.eu/civil\\_service/docs/directors\\_general/leigh\\_en.pdf](http://ec.europa.eu/civil_service/docs/directors_general/leigh_en.pdf).

<sup>160</sup> See 'Prime Minister: State leadership with party leaders on the proposal by the Government for the rules of application of the Zone', HINA, 7 December 2006, at the website of the Croatian Government: [www.vlada.hr](http://www.vlada.hr).

<sup>161</sup> Decision on Modifying and Amending the Decision on the Extension of the Jurisdiction of the Republic of Croatia in the Adriatic Sea, *Narodne Novine* (Official Gazette), No. 138, 2006; hereinafter: 2006 Decision.

Moreover, an amendment added to the same paragraph emphasized Croatia's orientation towards its future EU membership and underlined awareness of its current candidate status. The provision also contained a rather declaratory political slant:

Croatia will, through a partnership relation with the Member States of the European Union and the European Commission, in accordance with its status of a candidate country which negotiates on accession to full membership to the European Union and the importance of promoting good neighbourly relations, continue dialogue on measures that ensure sustainable fisheries and protection of the Adriatic marine environment, taking into account fundamental principles of the Common Fisheries Policy of the European Community, scientific data collected through national and international projects (...) and the regulations of the Republic of Croatia and interested parties.

The 2006 Decision, in fact, provided for a new postponement of the application of the Zone and enabled an additional (but now temporally defined) one-year span for further negotiations with neighbouring countries and the European Commission. With that decision, a period of more than four years altogether – since the adoption of the October 2003 Decision until 31 December 2007 – has been provided for such negotiations.

## 6.2 Discontinuing the application to EU Member States

In the first half of 2007, several rounds of technical consultations were held between Croatia, Italy and Slovenia, in the presence of the European Commission.<sup>162</sup> Croatia was ready to cooperate on aspects of implementation of the Zone in accordance with EU common fisheries policy and practice. However, certain issues remained controversial, including that of Croatian control over (Italian) fishing vessels in the Zone. No final solution on such issues emerged from those technical consultations.

With the date for full implementation of the Croatian Zone approaching, pressure on Croatia to suspend its decision was increasing. There were also two important political aspects of the timing, as embodied in the 2006 Decision. First, implementation of the Zone as of 1 January 2008 would follow immediately after the parliamentary elections in Croatia (scheduled for late November 2007). And second, beginning the implementation of the Zone on 1 January 2008 would coincide with the first day of Slovenia's six-month EU Presidency. It has been an unwritten rule that the EU Presidency does not use that position to promote the political agenda of its own country, as in bilateral issues.

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<sup>162</sup> Memo *supra* note 148; statement by Jan Truszczyński, deputy director-general, DG Enlargement, HINA, 1 October 2007; Ivan Katavić, interview in *Glas Istre*, 7 December 2007; and Davorin Rudolf, *Novi list*, 12 January 2008 (citing dates of the meetings held regarding the Zone in Rome and Brussels in 2007: 12 January, 6 March, 15 March, 20 March, 17 April, 25 April, 10 May and 27 June).

In early November 2007, the Commission issued its annual report on progress made by Croatia in preparing for EU membership.<sup>163</sup> Although the previous annual progress report did not include any direct reference to the Croatian Zone,<sup>164</sup> the 2007 report dealt with the Zone in the context of ‘Political Criteria’ for EU membership. Under the heading ‘Regional issues and international obligations’, the 2007 report stated that the 2006 Decision by Croatia:

...deviates from the *political* agreement reached between the countries concerned in June 2004, referred to in the European Council conclusions of 16-17 June 2004.<sup>165</sup>

The Commission simultaneously issued a draft for the revised Accession Partnership for Croatia, to update the 2005 Accession Partnership.<sup>166</sup> Compared to the 2005 Partnership document, major changes as related to the issue of the Zone were now introduced. In the 2005 Accession Partnership, the Zone was not mentioned under ‘Key Priorities’, or among the ‘Regional issues and international obligations’; the only reference was under the heading on ‘Fisheries’.<sup>167</sup> In the 2007 Accession Partnership for Croatia, the situation was reversed. There was no longer any mention of the Zone under the heading on ‘Fisheries’. References to the Zone were now included under ‘Key Priorities’ identified for Croatia and ‘Political Criteria’ defined for it. In that context, the Zone was ranked first in the listing of issues under ‘Regional issues and international obligations’:

...Fully respect the 4 June 2004 agreement concerning the Ecological and Fisheries Protected Zone referred to in the June 2004 European Council conclusions *and the Negotiating Framework* and do not apply any aspect of the Zone to the EU Member States until a common agreement in the EU spirit is found.<sup>168</sup>

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<sup>163</sup> European Commission, ‘Croatia 2007 Progress Report’, SEC(2007) 1431, Brussels, 6 November 2007.

<sup>164</sup> European Commission, ‘Croatia 2006 Progress Report’, SEC(2006) 1385, Brussels, 8 November 2006.

<sup>165</sup> Croatia 2007 Progress Report, *op. cit.*, *supra* note 163, para. 2.3, p. 16; emphasis on the term ‘political’ added.

<sup>166</sup> For the 2005 Accession Partnership for Croatia see Annex to the Council Decision 2006/145/EC of 20 February 2006, on the principles, priorities and conditions contained in the Accession Partnership with Croatia and repealing Decision 2004/648/EC, *Official Journal of the European Union*, L 55, 25 February 2006, p. 30. For the final 2007 Accession Partnership for Croatia see Annex to the Council Decision 2008/119/EC of 12 February 2008, on the principles, priorities and conditions contained in the Accession Partnership with Croatia and repealing Decision 2006/145/EC, *Official Journal of the European Union*, L 42, 16 February 2008, p. 51.

<sup>167</sup> The 2005 reference read: ‘With regard to the protected ecological and fishing zone, unilaterally declared by Croatia, continue the implementation of the trilateral agreement reached in June 2004’.

<sup>168</sup> Emphasis on the ‘Negotiating Framework’ added. No explicit reference to the Zone is found in the Negotiating Framework – only a general reference to take account of, *inter alia*, the European Council conclusions of 17–18 June 2004.

As commented by Christian Danielsson, director of the Directorate B (in charge of, *inter alia*, Croatia) in the DG Enlargement:

We are making clear that it is important for Croatia to address this issue and address it before the 1<sup>st</sup> of January. We should be aware that there was an agreement in 2004 on how this issue should be addressed and that agreement was *in force* for long time.<sup>169</sup>

At that point, it was highly unlikely that Croatia would address the issue of the Zone. Parliamentary elections were scheduled for 25 November 2007, and a move by the government towards changing the decision on the Zone could make winning the elections a ‘mission impossible’ for the governing party. However, 1 January 2008 was quickly approaching. Two weeks after the Croatian elections, on 10 December 2007, the European Council adopted conclusions on enlargement of the EU. These actually restated the wording already contained in the 2007 Accession Partnership draft, for Croatia to ‘fully respect the 4 June 2004 agreement’ and ‘not to apply any aspect of the Zone to the EU Member States until a common agreement in the EU spirit is found’.<sup>170</sup> Although carrying political weight, these conclusions by the Council came after the elections, but at a time when no government had been formed in Croatia, and the new Parliament had not been constituted as yet – so it was in fact technically impossible for any amendment to the existing decision to be adopted. Moreover, in order to form the government, the party that won the relative majority (the Croatian Democratic Party, HDZ) was negotiating with the Croatian Peasant Party (HSS) as the main prospective coalition partner. For the HSS, in turn, maintaining full application of the Zone was a key political issue.

Political messages to Croatia were at that stage increasingly referring to the prospect of blocking accession negotiations with the EU, should it persist with the scheduled implementation of the Zone. The Italian Minister of Agricultural, Food and Forestry Policies (responsible also for fisheries), Paolo de Castro, reportedly stated that four to five accession

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One direct reference in the Negotiating Framework that can be related to the Adriatic Sea issues, including the Zone, is ‘Croatia’s undertaking to resolve any border disputes in conformity with the peaceful settlement of disputes in accordance with the United Nations Charter, including if necessary *compulsory jurisdiction of the International Court of Justice*’ (emphasis added). Another such reference is to ‘international agreements concluded by the Communities, the Communities jointly with their Member States, the Union, and those concluded by the Member States among themselves with regard to Union activities’. Rather than relating to agreed minutes from a meeting, that reference would, in the context of the debate on the Croatian Zone, relate primarily to the LOS Convention – to which the European Community, and all the EU Member States, are parties.

<sup>169</sup> ‘Interview with Christian Danielsson, European Commission DG Enlargement’ (full transcript of interview), in *South Eastern Europe TV Exchanges*, 9 November 2007 (emphasis added), available at: [www.seetv-exchanges.com](http://www.seetv-exchanges.com).

negotiation chapters might be ‘frozen’.<sup>171</sup> Prior to that, Slovenian Foreign Minister Dimitrij Rupel already indicated that blocking of negotiations in ‘five to six’ chapters may be a possible scenario.<sup>172</sup> The key thesis put forward by Slovenian politicians was that the issue of the Zone was not a bilateral one, but the matter of the relationship between Croatia and the EU. The European Commission, in turn, was calling on Croatia to deal with the issue of the Zone as a matter of urgency, to avoid negative consequences for the accession process to EU membership.<sup>173</sup>

With no Parliament formed in Croatia by 31 December 2007, the implementation of the Zone, also with regard to EU countries, formally commenced on 1 January 2008, in accordance with the earlier Decision. Once a Croatian government was formed, its Prime Minister Sanader proposed quadrilateral talks (between Croatia, Italy, Slovenia and the European Commission), to discuss and find a solution for the reasons for Italian and Slovenian opposition to the Croatian Zone. Slovenia, however, repeatedly stated that it would be prepared for such talks only after Croatia had fulfilled its obligation under the ‘Brussels agreement’ (4 June 2004) and suspended application of the Zone to the EU countries.<sup>174</sup> Although, in contrast to Slovenia, Italy seldom expressed official views on the issue of the Zone publicly, its politicians were now indicating that Croatia should ‘freeze’ or ‘not apply’ the Zone to EU countries as long as a solution was not found.<sup>175</sup> However, days later, the Prodi government fell and Italy was left with a technical government, which further complicated handling the matter of the Zone.

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<sup>170</sup> See *supra* notes 2 and 168, and the accompanying text.

<sup>171</sup> ‘Minister de Castro: 4 to 5 chapters could be blocked due to the Zone’, HINA, 19 December 2007.

<sup>172</sup> ‘EU Calls on Croatia not to enforce Ecological Zone’, Slovenian Government Communication Office, 10 December 2007; available at Government’s website: [www.ukom.gov.si](http://www.ukom.gov.si).

<sup>173</sup> See, e.g., ‘Head of Delegation Degert meets President Mesić’, 19 December 2007, available at the website of the Delegation of the EC in Croatia, at: [www.delhrv.ec.europa.eu](http://www.delhrv.ec.europa.eu); ‘Degert to Mesić: “Worrisome clouds” over Croatia’s accession negotiations with EU’, HINA, 31 January 2008; and ‘Statement by Enlargement Commissioner Olli Rehn on Croatia and its respect for the 4 June 2004 agreement concerning the Ecological and Fisheries Zone’, available at: [http://ec.europa.eu/commission\\_barroso/rehn/press\\_corner/statements/statements\\_2007\\_en.htm](http://ec.europa.eu/commission_barroso/rehn/press_corner/statements/statements_2007_en.htm).

<sup>174</sup> See statements by the Slovenian Ministry of Foreign Affairs of 15 January 2008 (‘Slovenia is not threatening but warning’) and of 22 January 2008 (‘No consultations ongoing in connection with the Zone’), available at the website of the Ministry: [www.mzz.gov.si](http://www.mzz.gov.si).

<sup>175</sup> For a statement by Italian Foreign Minister D’Alema, see STA, 17 January 2008; *Delo*, 17 January 2008; and HINA, 18 January 2008. For a statement by the Italian Minister of Agricultural, Food and Forestry Policies, De Castro, see HINA, 21 January 2008.

Dramatic confirmation of the need for implementation of coastal state jurisdiction, also beyond territorial sea in the Adriatic, came on 6 February 2008, when the Turkish-flagged Ro-Ro freighter, *Und Adrijatik*, carrying hazardous cargo, caught fire 13 nm off Croatia's Istrian coast, near Rovinj.<sup>176</sup> An environmental disaster was prevented through an action that involved both Croatian jurisdiction and international cooperation, in accordance with international law.

Nonetheless, ten days later, the European Council, presided over by Slovene Foreign Minister Rupel, repeated its call to Croatia not to apply any aspect of the Zone to the EU countries, until a common agreement in the EU spirit is found.<sup>177</sup> The European Council invited the European Commission to continue dialogue with Croatia on the issue, and report back.

The turning point came with the visit to Croatia by the European Commissioner for Enlargement, Ollie Rehn, on 6 March 2008.<sup>178</sup> It also became clear that no quadrilateral meeting, which Croatian Prime Minister Sanader had expected might take place on 13 or 14 March, alongside the European Council meeting,<sup>179</sup> would be held.

Instead, on 13 March 2008, the Croatian Parliament adopted yet another amendment of its Decision on the Zone – the third in a row. Paragraph 3(2) of the 2004 Decision had been modified once again. It now provides that the Zone:

...shall provisionally not apply to Member States of the European Union, as of March 15, 2008, until a common agreement in the EU spirit is reached.<sup>180</sup>

On the same day, the President of the European Commission, José Manuel Barroso, listed several conditions for the European Commission's presenting an 'indicative timetable for the technical conclusion' of the accession negotiations with Croatia in 2009. These included:

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<sup>176</sup> 'Blazing freighter threatens oil spill off Croatia', *Reuters*, 6 February 2008 (at: [www.reuters.com/article/latestCrisis/idUSL06803310](http://www.reuters.com/article/latestCrisis/idUSL06803310)).

<sup>177</sup> Council of the European Union, 2850<sup>th</sup> *Council Meeting, General Affairs and External Relations*, Brussels, 18 February 2008, 6495/08 (Presse 40), p. 12.

<sup>178</sup> See: 'Resolution of the Zone key for continuation of accession negotiations' ('Rješenje ZERP-a ključno za nastavak pregovora s EU-om'), *Vjesnik*, 7 March 2008, p. 3.

<sup>179</sup> See: 'Swoboda says good talks on Croatia's fishing zone under way', Brussels, 27 February 2008, at the website of the Croatian Mission to the European Union: <http://eu.mfa.hr>.

<sup>180</sup> Decision on Modifying the Decision on the Extension of the Jurisdiction of the Republic of Croatia in the Adriatic Sea, *Narodne Novine* (Official Gazette), No. 31, 2008. The decision was adopted by a narrow majority, with 77 votes in favour, 56 abstentions and 5 against. Because there are 153 seats in the current Croatian Parliament, 77 votes are needed to secure a majority decision. HSS, a governing coalition party, voted against.

...last but not least, Croatia must suspend all aspects of the Ecological and Fisheries Protection Zone, with respect to EU vessels. I consider this now done.<sup>181</sup>

Indirectly confirming that Croatia's accession negotiations had in effect been blocked prior to the 13 March Decision of its Parliament, Commissioner Rehn commented:

...Removal of this obstacle by Croatia should now allow for chapters to be unblocked and negotiations to resume again at [a] normal pace...<sup>182</sup>

In other words, this outcome means further maintenance of the *status quo* regarding the application to EU countries of the Croatian Zone in the Adriatic Sea, as long as the (Adriatic) EU Member States do not *accept* a change in that situation. The roots of that outcome can be traced back to the spring of 2004, with the series of (political) trilateral meetings of state secretaries, first as a *proposed option* made by Italy and Slovenia.<sup>183</sup> Then, on 4 June 2004, the *view* was expressed by the same *two parties* at the trilateral meeting held in Brussels that suspension of all aspects of the Zone should apply until a common agreement in the EU spirit is found.<sup>184</sup> Thereupon, the outcome of that meeting was interpreted as an *agreement*,<sup>185</sup> and its content specified as an alleged undertaking by Croatia to postpone implementation of the Zone, until a consensual solution is found.<sup>186</sup> Full respect for this, in turn, became formulated by the European Commission as a *political criterion* in the 2007 Accession Partnership for Croatia,<sup>187</sup> and was then restated in the Conclusions by the European Council on 10 December 2007.<sup>188</sup> When, on 13 March 2008, the Croatian Parliament finally came to adopt a *decision* in exactly the same wording, the four-year circle was closed.

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<sup>181</sup> 'Speaking points of Commission President José Manuel Barroso following meeting with Croatian PM Sanader', 13 March 2008, at:

[http://ec.europa.eu/commission\\_barroso/president/archives/2008/index\\_en.htm](http://ec.europa.eu/commission_barroso/president/archives/2008/index_en.htm).

<sup>182</sup> Olli Rehn, '2008 a year of benchmarks for Croatia and the former Yugoslav Republic of Macedonia', speech to the European Parliament Plenary Session, Brussels, 9 April 2008 (Speech/08/186); available at:

[ec.europa.eu/commission\\_barroso/rehn/press\\_corner/speeches/index\\_en.htm](http://ec.europa.eu/commission_barroso/rehn/press_corner/speeches/index_en.htm).

<sup>183</sup> See *supra*, note 45 and the accompanying text on the trilateral meetings held in spring 2004.

<sup>184</sup> See *supra*, note 53 and the accompanying text on the agreed minutes from the Brussels meeting.

<sup>185</sup> See *supra*, note 58 and the accompanying text on the European Council Conclusions, 17–18 June 2004.

<sup>186</sup> See, e.g., *supra* note 63 and the accompanying text discussing a note verbale by Slovenia, 30 August 2004.

<sup>187</sup> See *supra* notes 166 and 168 and the accompanying text.

<sup>188</sup> See *supra* notes 2 and 170 and the accompanying text.

In that same four-year period, no progress was made regarding management and conservation measures for the heavily depleted Adriatic fish stocks. Quite the contrary, the *status quo* was maintained: the same harmful fishing practices in the Zone continued without any legal possibility of control by the coastal state. Due to political considerations, advances in measures to combat marine pollution were also limited – even though frequent incidents of illegal oil spills had been proven by research projects conducted under the auspices of the European Commission itself. This is not the place to discuss, but only to remind of, the EU's proclaimed policies and numerous measures adopted with a view to securing sustainable fisheries in general and deterring devastating fishing practices, e.g., illegal, unregulated and unreported (IUU) fishing, in particular. Over the past decade, the EU has also been especially active in developing measures to counter marine pollution from vessels (whether resulting from accidents or from operational oil pollution). The application of coastal state jurisdiction has regularly played a key role in making such proclamations and measures a reality. The Adriatic Sea, however, demonstrates a profoundly different situation.

### 6.3 Credibility and the Rule of Law

It remained vague whether the European Commission, and indeed the Adriatic EU Member States, were referring to the 'agreed minutes' as constituting a legal or a political agreement. Either interpretation presents a fundamental problem in relation to the LOS Convention. If the agreed minutes were regarded as a political agreement, how could they *derogate* from the rights and duties of the parties under the LOS Convention? If, however, the meeting record was understood as a legal agreement, how could it be *reconciled with* the rights and duties of the parties under the LOS Convention? The key legal principle of *pacta sunt servanda* creates a fundamental problem, whatever way the 'agreed minutes' may be understood – due to the relationship to the LOS Convention.

Another aspect has been the state practice so far. A quarter of a century has passed since the LOS Convention was adopted. So far, over 130 states have proclaimed EEZs (or derivatives, like fisheries and other zones) in the world's oceans and seas. Regarding the EU Member States, the current status fully confirms the general trend. As to the two Adriatic Sea EU countries, Italy and Slovenia, their legislation has been described and discussed above. Out of the remaining 25 EU countries, 20 are coastal states. Among those, 19 have an EEZ or a similar ('ecological' or 'fisheries') zone. The single exception is Greece. Some EU countries have recently undertaken changes in the content of their zones: for example, Finland in 2005 expanded its earlier Fisheries Zone in the semi-enclosed

Baltic Sea into an EEZ.<sup>189</sup> There is nothing in EU law that would prevent a coastal state – an EU Member State, or a country aspiring to EU candidacy (like Croatia in 2003), or a membership candidate country (like Croatia since 2004) – from exercising the right to proclaim and accordingly apply an EEZ, fully in accordance with its EU membership rights and duties, once it became an EU Member State.

Unlike the case in most other countries, however, the Croatian Zone was not a technical issue or a matter of regular, routine procedure. Quite the contrary, due to external political pressure it evolved into a top domestic political issue, and has as such become a prime media target for almost five years. The facts – that the Croatian Zone (or for that matter an EEZ) is solidly based on international law, that the practice of establishing such zones by EU countries is widespread, and that there are real resource conservation and marine environmental concerns in the Adriatic Sea – had an important impact in shaping Croatian public opinion. The Zone has been recognised as a necessary legal and legitimate measure.

The importance of a well-preserved coastal and marine Adriatic area for Croatia – a young, small country that owes its worldwide image largely to those features – and the country's maritime profile were additional important factors informing the sentiments of the public. Discontinuation of the application of the Zone in March 2008, while formally Croatia's own decision, in fact meant yielding to external political pressure. That resulted in widespread perceptions among the general public of unequal treatment and deeply unfair conduct, and the one that was contrary to the rule of law.

One could argue (as indeed it has been argued in public debates) that, while Croatia may have the right to an EEZ, no state is legally entitled to join the EU membership, nor is there any obligation for the EU to accept any given state as a member, either. From such a perspective, it could be argued that the EU may deny Croatia an asset – EU membership status – that the Union controls just as legitimately and legally as Croatia controls its decision on an EEZ. There is, however, a fundamental question here: Would it be legitimate for the EU to hamper, or even deny, access to EU membership to a candidate country because the latter had applied international law, such as provisions of the UN Law of the Sea Convention – binding on all EU Member States and the European Community alike? The EU is based on the rule of law – that is one of the main values on which its very foundation rests.<sup>190</sup> The EU's international actions are to

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<sup>189</sup> See Act on the Exclusive Economic Zone of Finland, 26 November 2004 (in force as of 1 February 2005), English translation in *Law of the Sea Bulletin*, No. 57, 2005, pp. 106–115.

<sup>190</sup> See also Article 2 of the Treaty on European Union. Consolidated version published in *Official Journal of the European Union*, C 115, of 9 May 2008, p. 13.

be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world – and these include the rule of law, the principle of equality, and respect for the principles of international law.<sup>191</sup>

Respect for the rule of law, including in this case the LOS Convention – a ‘Constitution for the Oceans’ – is far from being a formal requirement only, devoid of real-life substance. Among the (proclaimed, at least) key purposes of the EU membership for countries in the so-called ‘Western Balkans’ region – the countries that have emerged from the recent war and disintegration of Yugoslavia (minus Slovenia in the north, plus Albania in the south) – is to facilitate the rule of law and political stability.<sup>192</sup> It is difficult to see the developments regarding the Croatian Zone in that light. Quite the contrary, by nurturing widespread disapproval among the domestic population over the conduct of the neighbouring Adriatic EU countries, supported by some key EU policy-makers and facilitated by senior European Commission bureaucrats, the current outcome of the Croatian Zone issue may contain a nucleus of instability. For many, it may be seen as a litmus test, leading to disillusion on such basic EU values as the rule of law and equal treatment. And that may become a major, long-term loss for the role the EU can play in the region – all on account of relatively minor, short-term individual gains by a few of its Member States in their exclusively bilateral relations with Croatia.

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<sup>191</sup> *Ibid.*, Art. 21(1).

<sup>192</sup> See also Art. 2 (‘General principles’) of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part (signed in Luxembourg, 29 October 2001; published in *Official Journal of the European Union*, L 26, of 28 January 2005), stating: ‘Respect for ... international law principles and the rule of law ... shall form the basis of the domestic and external policies of the Parties and constitute essential elements of this Agreement’.

## 7 Concluding remarks

The entire ‘episode’ of the Croatian Zone raises some fundamental questions, far beyond regional or national confines. EU policy-makers and bodies have increasingly been favouring the political avenue for handling matters of international law – which is what application of an EEZ regime amounts to. In order for the Adriatic Sea Zone proclaimed by Croatia to become applicable to the EU countries (and in practice to neighbouring Italy and Slovenia), an additional ‘common agreement in the EU spirit’ has been sought. That trend, while perhaps not quite crystallized in the early phase (before and immediately following the proclamation of the Zone in 2003), has become evident since the spring of 2004 onwards. Indeed, as the European Commission clearly stated in its Opinion of April 2004, the purpose of the trilateral meetings was to find a *political* agreement.<sup>193</sup>

However, the international law framework cannot be dismissed as entirely irrelevant. Moreover, as to political aspects, it should be noted that a political agreement on the EEZ regime had already been reached by all the countries involved, and expressed in legal form, a full 25 years ago – today contained in the provisions of the LOS Convention. That is in no contradiction with EU law: quite the contrary, all the current 27 EU Member States, as well as the European Community itself, are also parties to the LOS Convention.

A related important consideration has been formulated by the UN Secretary-General:

Views have been expressed that in some regions, the proclamation of certain maritime zones foreseen by UNCLOS would be contrary to certain general obligations under international law. It is the Secretary-General’s belief that the rights and obligations under UNCLOS should not be region-dependent and that *no additional conditions* on the enjoyment by States parties of rights provided by UNCLOS should be imposed.<sup>194</sup>

In addition to the right of any coastal state that can lawfully proclaim an EEZ to apply that regime in accordance with the Convention, some core principles of the law of the sea have been undergoing testing in the Adriatic Sea. Most importantly, these include the basic axiom that the land dominates the sea in determining maritime areas under sovereignty and the sovereign rights of coastal states. Reasons for this principle, based on an objective geographic criterion and sovereignty over the coast, relate to the core functions of international law. By enabling a good

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<sup>193</sup> Commission of the European Communities, *Opinion on Croatia’s Application for Membership of the European Union*, *op. cit.*, *supra* note 47 at p. 36.

<sup>194</sup> *Oceans and the law of the sea: Report of the Secretary-General*, *op. cit.*, *supra* note 95, para. 41 (emphasis added).

measure of predictability, such objective criteria facilitate the stability of the international order. Disregarding such an important principle of international law of the sea may, in the context of maritime delimitation, seriously hamper the potential for peaceful settlement of international disputes. Although related to a rather regional, if not a local, case only, the matter thus deserves a far broader attention.

The vicissitudes of Croatia's Zone raise considerations not only of legality under international law, but also those of legitimacy. Problems surrounding the Zone seem deeply rooted in the imbalances that today characterise the Adriatic Sea. A coastal state of a small relative political strength (re-emerged in that space after the dissolution of a larger state, Yugoslavia, yet retaining most of the former Yugoslavia's coastline) is geographically placed so as to be entitled, by the current rules of international law, to govern a considerable share of the Adriatic marine area and resources. Notwithstanding the rules of international law, such a division may appear at odds with the decidedly asymmetric bargaining power of the nations involved. Some important stakeholders probably oppose the EEZ as a step towards consolidating this imbalance between law and political might.

The need to conserve the marine resources and prevent environmental degradation of the Adriatic Sea speaks strongly in favour of the adoption and implementation of all measures available, including an EEZ. There is, however, no more than international law to support this line of action. Powerful economic and political interests, both on the Adriatic regional and the broader Eurasian strategic level, seem to favour maintaining the *status quo* in the overall picture of Adriatic Sea jurisdiction.

To achieve that, only two avenues remain open. One is to change the current law of the sea, as codified in the LOS Convention – and that is hardly a feasible or desirable option, at least in the short run. The other is to persuade Croatia, a country that became renowned primarily due to its well-preserved Adriatic coastal and maritime area, *not* to use its rights based on the LOS Convention.

And that brings us back to the beginning of our story when, on 10 December 2007, the European Council opted to mark the 25<sup>th</sup> anniversary of the LOS Convention in a very special way.

The Fridtjof Nansen Institute is a non-profit, independent research institute focusing on international environmental, energy, and resource management. The institute has a multi-disciplinary approach, with main emphasis on political science, economics, and international law. It collaborates extensively with other research institutions in Norway and abroad.

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