

# A new (and questionable) institute to guarantee the right of access to the high seas: the Junction Area established in Croatian territorial sea

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**Abstract:** *Un nuovo (e discutibile) istituto volto a garantire il diritto di accesso all'alto mare: la Junction Area creata nel mare territoriale croato* – This paper analyses the Junction Area created by the Arbitral Tribunal which, in June 2017, released its Final Award on the territorial and maritime dispute between Croatia and Slovenia. Although the Area is established in Croatian territorial sea, all ships and aircraft passing through this zone to go to or come from Slovenia, enjoy some freedoms of communications which are «exercisable as if they were high seas freedoms exercisable in an exclusive economic zone». Firstly, this Junction Area is analysed as an institute aiming to guarantee Slovenia's right of access to and from the high seas: it represents a crucial innovation within the regime of states, such as land-locked and geographically disadvantaged states, having a limited access to the sea, and it might have some meaningful consequences in their future discipline. Secondly, the comparison between the Junction Area and other institutes of the international law of the sea consents to point out some shortcomings of the zone created by the Arbitral Tribunal. As the discipline of the exclusive economic zone represents the main element characterising the regime of this Area, the freedoms of communication recognised within this zone go significantly beyond what is strictly necessary to assure communication between Slovenia's territorial waters and the high seas, and this results in some meaningful restrictions on Croatia's sovereignty.

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## 1. Introduction

On 29 June 2017, an Arbitral Tribunal released its Final Award on the territorial and maritime dispute between Croatia and Slovenia, putting an end to a long-lasting controversy which started after the dissolution of the Socialist Federal Republic of Yugoslavia.<sup>1</sup> The questions at issue concern two different

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<sup>1</sup> *Croatia v. Slovenia*, PCA Case Repository 2012-04, Final Award, (Perm. Ct. Arb. 29 June 2017). For an historical background of the dispute see, among others, G. H. Blake, D. Topalović (eds.), *The Maritime Boundaries of the Adriatic Sea*, 1 *Maritime Briefing* 8, 1996, 19 ff., available at [www.dur.ac.uk/ibru/publications/download/?id=231](http://www.dur.ac.uk/ibru/publications/download/?id=231); M. Avbelj, L. C. Jernej, *The Conundrum of the Piran Bay: Slovenia v. Croatia - The Case of Maritime Delimitation*, in 5 *The University of Pennsylvania Journal of International Law and Policy* 2, 2007, 1-19, available at [ssrn.com/abstract=990183](http://ssrn.com/abstract=990183); T. Scovazzi, *Recent Developments as Regards Maritime Delimitation in The Adriatic Sea*, in R. Lagoni, D. Vignes (eds.), *Maritime Delimitation*, Leiden, 2006, 197; V. Sancin, *Slovenia-Croatia Border Dispute: From »Drnovšek-Račan« to »Pahor-*

aspects: the maritime and land boundary between Croatia and Slovenia, and in particular the status of the Bay of Piran, and the establishment of a Junction Area aiming to assure Slovenia's right of access to and from the high seas. After several useless attempts to solve the controversy, in November 2009, the parties signed an Arbitration Agreement under the auspices of the European Union. According to Article 3 of the Agreement, the Arbitral Tribunal was tasked with defining a) the land and maritime boundary between Croatia and Slovenia, b) Slovenia's junction to the high seas, and c) the regime for the use of the relevant maritime areas. The Tribunal was requested to decide the first question according to the «rules and the principles of international law»; instead, the second and third aspects had to be determined by applying «international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result».<sup>2</sup>

The controversial resolution was particularly troubled because in July 2015 Serbian and Croatian newspapers reported the transcriptions of two telephone conversations between Dr. Sekolec, the arbitrator appointed by Slovenia, and Ms. Drenik, one of the Slovenian agents before the Tribunal; these conversations aimed to disclose some confidential information and discuss the best strategy to influence the other arbitrators in favour of Slovenia. Following the reported *ex parte* communications, both Dr. Sekolec and Ms. Drenik resigned, and Slovenia was invited to appoint another arbitrator. Unsurprisingly, this event has significantly affected the proceedings: in July 2015, Croatia declared that, following the violation of the Arbitral Agreement committed by Slovenia, it would cease to apply the Agreement and take part in the proceedings. Due to Slovenia's objection, the recomposed Tribunal had to decide whether Croatia was entitled to terminate the Arbitration Agreement, in accordance with Article 60, para. 1, of the Vienna Convention on the Law of Treaties. On 30 June 2016, the Tribunal released a Partial Award and stated that, although Slovenia breached the Arbitration Agreement, this violation did not defeat the object and purpose of the Agreement, and so it would not «render[ed] the continuation of the proceedings impossible» under Article 60, para. 1, of the Vienna Convention.<sup>3</sup> Indeed, according to the Tribunal, there were not any doubt about the independence and impartiality of the recomposed Tribunal; moreover, this latter

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*Kosor*« Agreement, in 2 *European Perspectives* 2, 2010, 93-111; T. Bickl, *Reconstructing the Intractable: The Croatia-Slovenia Border Dispute and Its Implications for EU Enlargement*, in 54 *Croatian Political Science Review*, 4, 2017, 7-39, see in particular 11 ff.

<sup>2</sup> See Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, 4 November 2009, Articles 3 and 4; available at [pcacases.com/web/sendAttach/2165](http://pcacases.com/web/sendAttach/2165).

<sup>3</sup> As regards the independence and impartiality of arbitrators see, *inter alia*, F. Bestagno, *Diritti, doveri e responsabilità degli arbitri* in C. Consolo, L. G. Radicati di Brozolo, M. V. Benedettelli, *Commentario breve al diritto dell'arbitrato nazionale ed internazionale*, Padova, 2010, 751-758; S. D. Franck, *The Role of International Arbitrators* in 12 *ILSA Journal of International and Comparative Law* 2, 2005-2006, 499-521; Y. Tanaka, *The Peaceful Settlement of International Disputes*, Cambridge, 2018, 105 ff.; some specific references to the breach of independence and impartiality in the arbitration between Slovenia and Croatia can be found at 112.

carefully reviewed its records, and communicated to the parties the only documents previously submitted to the Tribunal by Dr. Sekolec in collaboration with Ms. Drenik.<sup>4</sup> Despite this decision, Croatia continued not to take part in the proceedings and has not implemented the Final Award of June 2017. This paper will not discuss the rejection of an Arbitral Award by one of the parties,<sup>5</sup> but it will be focused on the substance of the decision, and in particular on the regime established by the Tribunal in the Junction Area.

Unlike the delimitation of land and maritime boundaries and the qualification of the Bay of Piran, in relation to which the Tribunal applied the traditional criteria elaborated in international case-law on land and maritime controversies,<sup>6</sup> the establishment of the Junction Area puts forward some new and interesting aspects.<sup>7</sup> The meaningful side of the Award lies in two different elements. First, the institute of the Junction Area which, while having some features in common with other institutes of the international law of the sea, represents quite a *unicum*, and indeed it is characterised by a *sui generis* regime. Second, the freedoms of communication recognised to vessels and aircraft passing through the Area to go to or come from Slovenia; these freedoms aim to assure the effectiveness of the right to access to and from the high seas and their recognition can have some meaningful implications for the never-ending issue of states having limited or no access to the sea.<sup>8</sup> In the light of this, the analysis of

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<sup>4</sup> *Croatia v. Slovenia*, PCA Case Repository 2012-04, Partial Award (Perm. Ct. Arb. 30 June 2016). As regards this Award, cf. among others, M. Ilić, *Croatia v. Slovenia: the Defiled Proceedings*, in 9 *Arbitration Law Review* 347, 2017, available at [elibrary.law.psu.edu/arbitrationlawreview/vol9/iss1/11/](http://elibrary.law.psu.edu/arbitrationlawreview/vol9/iss1/11/).

<sup>5</sup> As for the compliance with arbitral decisions see, *inter alia*, A. Huneeus, *Compliance with International Court Judgments and Decisions*, in C. Romano, K. Alter, Y. Shany (eds.), *Oxford Handbook of International Adjudication*, Oxford, 2014, 437-463; S. Rosenne, *Interpretation, Revision and Other Recourse from International Judgments and Awards*, Leiden, Boston, 2007; H. D. Phan, L. Nguyen, *The South China Sea Arbitration: Bindingness, Finality, and Compliance with UNCLOS Dispute Settlement Decisions*, in 8 *Asian Journal of International Law* 1, 2018, 36-50; S. Talmon, *The South China Sea Arbitration and the Finality of 'Final' Awards*, in 8 *Journal of International Dispute Settlement* 2, 2017, 388-401.

<sup>6</sup> For a comment about these issues, see, M. Avbelj, J. Letnar Cernic, *cit.*; T. Bickl, *cit.* As regards the delimitation of maritime boundaries in international case-law see, *inter alia*, E. Orihuela Calatayud, *La delimitación de espacios marinos entre Estados y la jurisprudencia internacional* in *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz/Vitoria-Gasteizko Nazioarteko Zuzenbidearen eta Nazioarteko Harremanen Ikastaroak*, 2017, 487-574; S. Fietta, R. Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation*, Oxford, 2016; A. G. Oude Elferink, T. Henriksen, S. V. Busch, *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?*, Cambridge, 2018; J. Shi, *Maritime Delimitation in the Jurisprudence of the International Court of Justice*, in 9 *Chinese Journal of International Law* 2, 2010, 271-291; D. R. Rothwell, T. Stephens, *The International Law of the Sea*, Oxford, Portland, 2010, 483 ff.

<sup>7</sup> Cf. A. Solomou, *A Commentary on the Maritime Delimitation Issues in the Croatia v. Slovenia Final Award*, in *EJIL: Talk!*, 15 September 2017, available at: [www.ejiltalk.org/a-commentary-on-the-maritime-delimitation-issues-in-the-croatia-v-slovenia-final-award/](http://www.ejiltalk.org/a-commentary-on-the-maritime-delimitation-issues-in-the-croatia-v-slovenia-final-award/); according to the Author, the establishment of the Junction Area represents «by far the most interesting aspect of the final award for law of the sea enthusiasts».

<sup>8</sup> In this regard, see International Court of Justice, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*; the judgement of the Court is expected for 1 October 2018.

the arbitral decision continues to be interesting, although the dispute between Slovenia and Croatia seems far from being resolved: indeed, after Croatia's declaration not to accept the arbitration Award, in March 2018 Slovenia initiated proceedings against Croatia under Article 259 of the Treaty on the Functioning of the European Union.<sup>9</sup>

Firstly, the paper will describe the decision of the Arbitral Tribunal on the Junction Area; secondly this Area will be analysed in the framework of the right of land-locked and geographically disadvantaged states to access to the sea, and the added value of the Award in relation to this issue will be emphasised. Thirdly, the paper will discuss the *sui generis* regime of the Junction Area, pointing out its double nature: the focus on the management of living resources and fishing activities in the Area will consent to stress some difficulties characterising the practical implementation of the regime defined by the Arbitral Tribunal in this zone. Finally, the analysis will highlight the differences between the Junction Area and other institutes of international law of the sea, such as high seas corridors and straits used for international navigation. In particular, the analysis will pay a great of attention to the specificities of the transit passage which assures the non-suspendable and expeditious transit through international straits. By discussing enforcement powers of Croatia as regards the carrying out of foreign military activities and the environmental protection within the Junction Area, this paper will try to demonstrate that the adoption of the transit passage regime, along with some correctives, would have led to find a fairer balance between Slovenian and Croatian interests.

## 2. The identification of a Junction Area between Slovenia's territorial sea and the high seas

The connection between Slovenia and the high seas is assured by establishing a Junction Area of 2.5 nautical miles which is located in Croatia's territorial sea. It stretches from the outer limit of Croatia's territorial sea on one side, and the maritime boundary between Slovenia and Croatia as defined by the Award on the other side; in the longitudinal direction, the Area is adjacent to the boundary between Italy and Croatia as established by the Treaty of Osimo.<sup>10</sup> While being an area of Croatia's territorial sea, the Junction Area is subject to a «special legal regime»<sup>11</sup> specified by the Tribunal in its Award. Its main and essential feature is represented by the freedoms of communication which must be assured «for the purposes of uninterrupted and uninterruptible access to and from Slovenia, including its territorial sea and its airspace».<sup>12</sup> Since this affirmation, the regime defined by the Tribunal for the Junction Area appears to be characterised by a functional

<sup>9</sup> Cf. Government of the Republic of Slovenia, *Arbitration*, available at [www.vlada.si/en/projects/arbitration/](http://www.vlada.si/en/projects/arbitration/); Republic of Slovenia, Ministry on Foreign Affairs, *Oral Hearing on Violations of EU Law due to Croatia's Refusal to Accept the Arbitration Award*, 2 May 2018, available at: [www.mzz.gov.si/en/newsroom/news/39787/](http://www.mzz.gov.si/en/newsroom/news/39787/).

<sup>10</sup> Cf. *Croatia v. Slovenia*, Final Award, *cit.*, Map. VII, 347.

<sup>11</sup> *Ibi*, para. 1081.

<sup>12</sup> *Ibi*, para. 1123 (emphasis added).

vocation: the freedoms recognised in favour of Slovenia in this body of water are functional at implementing Slovenia's right of access to and from the high seas, and at assuring its effectiveness. From a subjective point of view, the freedoms of communication do not only cover Slovenian ships and aircraft, but all vessels and aircraft - both civil and military - which, regardless of their nationality, go to or come from Slovenia's territorial sea.

The regime of the Junction Area lies in a couple of different, while interconnected, elements: the freedoms of communication as such (paras. 1123-1128 Award), and a set of aspects aiming to assure the effectiveness of these freedoms («Guarantees of, and Limitations to, the Freedoms of Communication», paras. 1129-1133 Award); as it will be underlined below, these elements ultimately imply some meaningful limitations on the exercise of Croatia's jurisdiction upon its territorial sea, and in particular upon ships and aircraft passing through the Area. As for the first element characterising the regime created by the Tribunal, namely the freedoms of communication as such, they include

«freedoms of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines» (para. 1123).

However, these freedoms do not cover the exploitation of biological and mineral resources within the Area, the establishment and the use of artificial islands and the carrying out of marine scientific research: these prerogatives are implicitly left to Croatia.<sup>13</sup>

The Tribunal is clear in specifying that the freedoms of communication do not coincide with the innocent passage. The differences, identified by the Award in paragraph 1127, can be classified into two categories. One group covers the nature of the passage which implies first, that the passage through the Junction Area does not need to comply with the criteria of innocence defined by the United Nations Convention on the Law of the Sea (UNCLOS) as regards the innocent passage and second, the absence of submarines' duty to navigate on surface. The second group pertains the limitations placed on controls exercisable by Croatia on the freedoms of communication: these freedoms are not suspendable by Croatia «under any circumstances», and more generally, cannot be subject by Croatia to «any controls or requirements» (para. 1127) beyond those established by UNCLOS in relation to the exclusive economic zone (EEZ). Finally, the Tribunal specifies that the freedoms recognised in the Junction Area are different from the transit passage which characterises the regime of straits used for international navigation. Nevertheless, unlike the difference with the

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<sup>13</sup> *Ibi*, para. 1126: «The freedoms of communication in the Junction Area do not include the freedom to explore, exploit, conserve or manage the natural resources, whether living or non-living, of the waters or the seabed or the subsoil in the Junction Area. Nor do they include the right to establish and use artificial islands, installations or structures, or the right to engage in marine scientific research, or the right to take measures for the protection or preservation of the marine environment».



innocent passage, the difference between the freedoms of communication and the transit passage is not specified by the Tribunal; it merely states:

«Unlike transit passage, the freedoms of communication in the Junction Area are exercisable as if they were high sea freedoms exercisable in an exclusive economic zone» (para. 1128).

With regard to the second element characterising the regime of the Junction Area, namely the aspects assuring the effectiveness of the freedoms of communication, they concern the extent of jurisdiction Croatia is entitled to exercise in the Area in question. The analysis of the Award shows that Croatia's jurisdiction is subject to numerous and meaningful limitations aiming to implement the freedoms of communication. As for the prescriptive jurisdiction, the Tribunal explicitly clarifies that:

«it fair, just, and practical for Croatia to remain entitled to adopt laws and regulations applicable to non-Croatian ships and aircraft in the Junction Area, giving effect to the generally accepted international standards in accordance with UNCLOS Article 39(2) and (3)» (para. 1130).

Certainly, the enforcement jurisdiction suffers more meaningful limitations. Indeed, according to the Award:

«it is necessary that ships and aircraft of all flags and of all kinds, civil and military, exercising the freedom of communication are not subject to boarding, arrest, detention, diversion or any other form of interference by Croatia while in the Junction Area» (para. 1129).

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As specified by the Tribunal, this aspect does not affect Croatia's right to exercise its enforcement jurisdiction «outside the Junction Area» and «in all other areas of its territorial sea and other maritime zones»; and this also implies the right to prosecute violations of law committed in the Area. Nevertheless, it is evident that paragraph 1129 places a great and exceptional limitation on Croatia's jurisdiction: ships and aircraft exercising the freedoms of communication within the Area enjoy a real immunity towards a fundamental element of Croatia's sovereignty, namely its enforcement jurisdiction.

### **3. Freedoms of communication in the framework of the right of access to and from the sea**

As clearly affirmed by the Tribunal, the Junction Area regime aims to assure Slovenia's right of access to and from the high seas. Against this background, the freedoms of communication recognised in this Area can be analysed in the framework of the right of access to and from the sea. In this regard, it can be useful to retrace this issue which is at the heart of claims submitted by land-locked and geographically disadvantaged states. While during the Third United Nations Conference on the Law of the Sea, they converged their interests and joined their negotiating efforts, they represent two different categories of states, not only from a definitional (and geographical) point of view, but also in the light of different set of rights recognised them by UNCLOS.

### **3.1. The land-locked states' right of access to and from the sea**

The definition of land-locked states does not arise particular problems. Article 124, para. 1, UNCLOS formalises the traditional notion, according to which land-locked states are states not having «sea-coast». Due to their location, they do not have a direct access to and from the sea but depend upon the chance to pass through one or more transit states.<sup>14</sup> As underlined by several Authors, the category of land-locked states gathers states having different features, especially from the economic point of view; the only element they share is the lack of direct access to the sea.<sup>15</sup> The origin of the right to access to the sea traces back to natural law. The access to the sea represents an element of the wider question of transit of persons, commodities and means of transportation: according to principles of natural law defined by Grotius and de Vattel, the right of transit across foreign territories «remain[s] to all nations».<sup>16</sup> More recently, several Authors have justified the right of access to the sea as the necessary element assuring the effectiveness of the freedoms of the high seas<sup>17</sup> or as the object of an international servitude.<sup>18</sup>

As historically the right of access to the sea was an element of the freedom of transit and for many centuries rivers represented the main transport route, the necessity to assure access to the sea has started to be recognised by bilateral and multilateral agreements assuring freedoms of navigation of international

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<sup>14</sup> A transit state is defined by Article 124.1(b) UNCLOS as «a state, with or without a sea-coast, situated between a land-locked state and the sea, through whose territory traffic in transit passes». The strategic position of transit states and the role they can play to condition the chance of land-locked states to have access to the sea are widely stressed by A. Mpazi Sinjela, *Freedom of Transit and the Right of Access for Land-Locked States: The Evolution of Principle and Law*, in 12 *Georgia Journal of International and Comparative Law* 31, 1982, 31-32.

<sup>15</sup> S.C. Vasciannie, *Land-locked and Geographically Disadvantaged States in the International Law of the Sea*, Oxford, 1990, 4 ff.; J. L. Kateka, *Landlocked and Geographically Disadvantaged States*, in D. Attard, M. Fitzmaurice, N. A. Martinez Gutiérrez (eds.), *The IMLI Manual on International Maritime Law. Volume I: The Law of the Sea*, Oxford, 2014, 431-441.

<sup>16</sup> E. de Vattel, *Le droit des gens, ou Principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des Souverains*, Londres, 1758, 149. Similarly, H. Grotius, *De iure belli ac pacis*, Paris, 1625.

<sup>17</sup> Cf. A. Mpazi Sinjela, *cit.*, 32; N. J.G. Pounds, *A Free and Secure Access to the Sea*, in 49 *The Annals of the American Association of Geographers* 3, 1959, 257; M. Sibert, *Traité de Droit International Public*, Vol. 1, Paris, 1956, 660; G. Scelles, *Manuel de Droit International Public*, Paris, 1964, 382; according to the Author: «the high seas - a public international domain - comes only under the jurisdiction of international law. The sea - *res communis* - is for the common use of all navigators of the international community. One of the consequences is that it is accessible for navigation, even for nationals of an enclave state». For a comprehensive description of different theories elaborated by Authors to justify the right of access to the sea, cf. K. Uprety, *The Transit Regime for Landlocked States: International Law and Development Perspectives*, Law, justice, and development series, Washington DC, 2006, 28 ff.

<sup>18</sup> P. Labrousse, *Des Servitudes en Droit International*, Bordeaux, 1911, p. 316 ; G. Scelles, *cit.*, 389. As regards international servitudes, cf. among others, P. B. Potter, *The Doctrine of Servitudes in International Law*, in 9 *The American Journal of International Law* 3, 1915, 627-641; S. Marchisio, *Servitudes*, in *Max Planck Encyclopaedia of Public International Law*, Heidelberg, 2012.

rivers.<sup>19</sup> The freedom of transit emerged as an international issue in the aftermath of the First World War: in 1919 it found a significant recognition both by Versailles Treaty<sup>20</sup> and the Covenant of the League of Nations.<sup>21</sup> These references paved the way for the adoption of some Treaties which, while being affected by significant shortcomings, gave a meaningful recognition to the freedom of transit. In this regard, it is necessary to recall the Barcelona Convention and its Statute on the Freedom of Transit (1921)<sup>22</sup>, the General Agreement on Tariffs and Trade (1947)<sup>23</sup>, and the New York Convention on the Transit Trade of Land-Locked States (1965).<sup>24</sup> By confirming the approach defined by the earlier instruments, this latter Convention recognises a transit regime which, on the one hand, must be free and non-discriminatory, but on the other, is based on a principle of reciprocity and is defined in its concrete modalities by agreements between land-locked states and transit states. Like the Barcelona Convention, the New York Convention aims to guarantee the legitimate interests of transit states by empowering them both to restrict the freedom of transit on grounds of public health, security, and protection of

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<sup>19</sup> As regards the recognition of freedom of river navigation, cf. K. Uprety, *cit.*, 37 ff.

<sup>20</sup> Peace Treaty of Versailles (1919), Part. XII; see in particular Article 321: «Germany undertakes to grant freedom of transit through her territories on the routes most convenient for international transit, either by rail, navigable waterway, or canal, to persons, goods, vessels, carriages, wagons and mails coming from or going to the territories of any of the Allied and Associated Powers (whether contiguous or not); for this purpose the crossing of territorial waters shall be allowed. Such persons, goods, vessels, carriages, wagons, and mails shall not be subjected to any transit duty or to any undue delays or restrictions, and shall be entitled in Germany to national treatment as regards charges, facilities, and all other matters».

<sup>21</sup> Covenant of the League of Nations (1919), Article 23(e): «Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League [...] will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League».

<sup>22</sup> According to Article 2 of the Statute on Freedom of Transit, the states party to the Convention «shall facilitate free transit by rail or waterway on routes in use convenient for international transit». For a more detailed description of the Barcelona Convention, cf. K. Uprety, *cit.*, 48 ff.; A. Mpazi Sinjela, *cit.*, 35 ff.

<sup>23</sup> General Agreement on Tariffs and Trade (1947), Article 5: «Freedom of Transit. 1. Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this article “traffic in transit”. 2. There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport». An identical provision is enshrined in Article 5 of the General Agreement on Tariffs and Trade (1994).

<sup>24</sup> It must be also recalled the Charter adopted in Havana in 1945 by the United Nations Conference on Trade and Development; the Charter, which never entered into force, included a provision (Article 33) identical to Article 5 of the General Agreement on Tariffs and Trade.



intellectual property (Article 11) and to temporarily suspend it in case of emergency (Article 12).<sup>25</sup> Despite these prerogatives recognised to transit states and the low rate of ratification, the New York Convention had the merit to go beyond its predecessors: unlike the previous treaties, it does not cover the freedom of transit in general, but specifically deals with the transit of land-locked states and, indeed, in its Preamble it explicitly recognises the «right of each land-locked state of free access to the sea» (Principle I).<sup>26</sup>

This explicit reference to access to the sea is not surprising as before the New York Convention, in 1958 the Geneva Convention on the high seas was adopted. The Fifth Committee of the First UN Conference on the Law of the Sea was characterised by a «passionate confrontation»<sup>27</sup> on the right of access to the sea: on the one side, land-locked states contented that their access to the sea was not a mere favour depending on transit states' will, but a real right recognised as a principle of international law; on the other side, transit states argued that the right of access to the sea was subordinate to the sovereignty of coastal states.<sup>28</sup> In the end, the Conference came to reach consensus on the provision which would become the Article 3 of the Geneva Convention: this represents the first multilateral agreement recognising to land-locked states the freedom of access to the sea «in order to enjoy the freedom of the seas on equal terms with coastal states».<sup>29</sup> Nevertheless, this recognition was more moral than actual and ended up privileging transit states.<sup>30</sup> The freedom of access to the sea is not qualified as

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<sup>25</sup> The New York Convention recognises the interests of transit states in a more significant way than the Barcelona Convention: indeed, beginning with the Preamble, the New York Convention states that «The state of transit, while maintaining full sovereignty over its territory, shall have right to take all indispensable measures to ensure that the exercise of the right of free and unrestricted transit shall in no way infringe its legitimate interests of any kind» (Principle V).

<sup>26</sup> K. Uprety, *cit.*, 75: «even though it has a few weak elements as a result of the intransigence of transit states, the New York Convention does attempt to deal specifically with the transit problems of states deprived of access to the sea». For a more comprehensive illustration of the New York Convention, cf. K. Uprety, *cit.*, 66 ff.; A. Mpazi Sinjela, *cit.*, 40 ff.; S. C. Vasciannie, *cit.*, 186-7.

<sup>27</sup> K. Uprety, *cit.*, 63.

<sup>28</sup> For a detailed description of the debate arisen in the Fifth Committee, *Ibi*, 63 ff.

<sup>29</sup> Convention on the high seas (1958), Article 3: «In order to enjoy the freedom of the seas on equal terms with coastal states, states having no sea-coast should have free access to the sea. To this end states situated between the sea and a state having no sea-coast shall have by common agreement with the latter and in conformity with existing international conventions accord: (a) To the state having no sea-coast, on a basis of reciprocity, free transit through their territory; and (b) To ships flying the flag of that state treatment equal to that accorded to their own ships, or to the ships of any other states, as regards access to seaports and the use of such ports. 2. States situated between the sea and a state having no sea-coast shall settle, by mutual agreement with the latter, and taking into account the rights of the coastal state or state of transit and the special conditions of the state having no sea-coast, all matters relating to freedom of transit and equal treatment in ports, in case such states are not already parties to existing international conventions».

<sup>30</sup> S. C. Vasciannie, *cit.*, 186: «Article 3 was the first multilateral treaty provision to highlight the position of a single class of countries in respect of transit, and as such, it represented a notable moral victory for the land-locked states. Nevertheless, [...] Article 3 fell short of their basic aspirations».

a right – and in this regard, it is possible to grasp the added value of the New York Convention –; it is a mere «faculty» or «possibility»<sup>31</sup> the recognition of which depends upon an agreement between land-locked states and transit states, and which is assured on a reciprocal basis. The lack of normative language («should have free access to the sea»), along with the no provision of obligations for transit states, give the impression that Article 3 of the Geneva Convention, while recognising the freedom of access to the sea, it is not able to assure its prescriptive nature.

The confrontation between land-locked states and transit states as regards the possibility to qualify the right of access to the sea as a principle of international law was at the centre of negotiation during the Third UN Conference on the Law of the Sea, too.<sup>32</sup> During the negotiation, land-locked states were backed by geographically disadvantaged states: these two groups of states joined their forces formalising their claims in the Kampala Declaration.<sup>33</sup> The Declaration recognises that both land-locked and geographically disadvantaged states have «the right to free and unrestricted access to and from the sea as one of the cardinal rights recognised by international law»,<sup>34</sup> and the right to exploit the resources of the sea in areas beyond the territorial sea.<sup>35</sup> The whole Part X UNCLOS is devoted to land-locked states: their status is based upon the recognition of the right of access to and from the sea (Article 125.1). This right is necessary to assure the effectiveness of the rights secured by the Convention, and in particular freedoms of the high seas.<sup>36</sup> Against this background, the exercise of the right of access to and from the sea supposes the right to transit through the territory of transit states. While Article 125, para. 1, explicitly recognises to land-locked states the right of access to and from the sea, along with the right to transit, paragraph 2 clarifies that these rights are not automatically recognised: indeed, the concrete terms and modalities of the right to transit must be defined by specific agreements between land-locked states and the states concerned. Through this provision, UNCLOS strikes a balance between the recognition of land-locked states' right of access to and from the sea and the protection of transit states' sovereignty.<sup>37</sup> As for the recognition of the

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<sup>31</sup> K. Uprety, *cit.*, 66.

<sup>32</sup> *Ibi*, 79 ff. As regards the negotiation during the Third UN Conference on the Law of the Sea, see more generally B. H. Oxman, *The Third UN Conference on the Law of the Sea: The Seventh Session (1978)*, in 73 *American Journal of International Law* 1, 1979, 1-41; R.-J. Dupuy, D. Vignes, *A Handbook on the New Law of the Sea*, Dordrecht, 1991.

<sup>33</sup> Official Records of the Third United Nations Conference on the Law of the Sea, Volume III (Documents of the Conference, First and Second Sessions), The Kampala Declaration, 1974, UN Doc. A/CONF.62/23.

<sup>34</sup> *Ibi*, paras. 1-2.

<sup>35</sup> *Ibi*, para. 8.

<sup>36</sup> UNCLOS, Article 125.1: «Land-locked states shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of mankind. To this end, land-locked states shall enjoy freedom of transit through the territory of transit states by all means of transport».

<sup>37</sup> The protection of transit states' sovereignty emerges also from Article 125.3 which recognises to these states «right to take all measures necessary to ensure that the rights and

right to access to the sea and freedom of transit, it can be affirmed that UNCLOS, with the great exception of the principle of reciprocity, does not go beyond its predecessors.<sup>38</sup>

The opinions about the status recognised to land-locked states by UNCLOS are different both among states and commentators.<sup>39</sup> As argued by some Authors, the freedoms of the high seas and the principle of equality of states entail that land-locked states must be entitled to a free access to the sea: indeed, the non-recognition of this latter would compromise the effectiveness of the two former principles.<sup>40</sup> Yet, the practice does not allow to affirm the existence of a principle of customary law recognising to land-locked states a right to access to the sea.<sup>41</sup>

### ***3.2. The right of geographically disadvantaged states to access to living resources***

Geographically disadvantaged states are specifically defined<sup>42</sup> by the UNCLOS as

«coastal states, including states bordering enclosed or semi-enclosed seas, whose geographical situation makes them dependent upon the exploitation of the living resources of the exclusive economic zones of other states in the subregion or region for adequate supplies of fish for the nutritional purposes of their populations or parts thereof, and coastal states which can claim no exclusive economic zones of their own» (Article 70.2).

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The rights of geographically disadvantaged states are specifically recognised by UNCLOS in its Part V ruling the management of living resources in the EEZ. The EEZ system is based upon the recognition of coastal state's sovereign rights on living resources. This principle, sanctioned by Article 56, para. 1(a), is specified by the following provisions according to which a coastal state must determine its capacity to harvest the living resources in its EEZ, and if it is not able to harvest the entire allowable catch, it must assure to other states to have access to the surplus of the allowable catch, taking into particular account the rights of land-locked and geographically disadvantaged states

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facilities provided for in this Part for land-locked states shall in no way infringe their legitimate interests».

<sup>38</sup> K. Uprety, *cit.*, 93 ff.; according to the Author, land-locked states «went through a long and difficult period of negotiation merely for a renewal of previously recognized rights» (95).

<sup>39</sup> In this regard, cf. J. Symonides, *Geographically Disadvantaged States under the 1982 Convention on the Law of the Sea*, Academy of International Law, Recueil des Cours, 208, Leiden, Boston, 1988, 380 ff.; K. Uprety, *cit.*, 93 ff.

<sup>40</sup> Cf. K. Uprety, *cit.*, 30-31.

<sup>41</sup> In this sense D. R. Rothwell, T. Stephens, *cit.*, 196.

<sup>42</sup> As for the definition of geographically disadvantaged states, cf. J. Symonides, *cit.*, 293 ff.; S. C. Vasciannie, *cit.*, 7 ff.; L. Caflisch, *What is a geographically disadvantaged state?*, in 87 *Ocean development and international law* 6, 1987, 641-663.

(Article 62).<sup>43</sup> UNCLOS recognises the right of land-locked (Article 69) and geographically disadvantaged states (Article 70)

«to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the EEZs of coastal states of the same subregion or region».

Like the right of access to the high seas, the “right” to participate in the exploitation of exceeding living resources is regulated by bilateral, sub-regional or regional agreements: in other words, it is not automatically recognised, but it depends on coastal states’ will.

With specific regard to the position assured to geographically disadvantaged states by UNCLOS, the Convention has certainly the merit of recognising the specific condition of this category of states. Nevertheless, it must be pointed out that the position granted in their favour is less meaningful compared to the status assured to land-locked states. Indeed, the interests of geographically disadvantaged states are only recognised as regards the access to living resources; instead, unlike the land-locked states, the UNCLOS does not assure any recognition to the right of geographically disadvantaged states to access to and from the sea.

### ***3.3. The added value of the Arbitral Award as regards the interests of geographically disadvantaged states***

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After analysing the rights traditionally recognised to geographically disadvantaged and land-locked states, it is interesting to point out how the Arbitral decision between Slovenia and Croatia innovates this issue, by adding some new elements of consideration. In this regard, it must be remarked that in its 1993 Memorandum on the Bay of Piran, Slovenia claimed to be a geographically disadvantaged state because its geographical position prevents it from declaring an EEZ.<sup>44</sup> The Tribunal does not qualify Slovenia as a geographically disadvantaged state and does not identify this aspect as a foundational element of its decision. Nevertheless, when it recalls «the vital interests of the Parties» as one of the elements which must be taken into account to «to reach “a fair and just result”» (para. 1079), it makes also reference to Slovenia’s right of access to and from the high seas. In order words, the combined provisions of paragraphs 1079 and 1080 consent to affirm that this right is – implicitly – qualified by the Tribunal as a “vital interest”.<sup>45</sup> This fact

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<sup>43</sup> See also Article 61 ruling the conservation and management measures coastal states are requested to adopt.

<sup>44</sup> Memorandum on the Bay of Piran, Ljubljana, 7 April 1993, 5, Annex SI-272: «The Republic of Slovenia undoubtedly meets the requirements for the application of this institute, since it belongs to the group of the so-called geographically disadvantaged states which, due to their geographic position, cannot declare their exclusive economic zone».

<sup>45</sup> Recalling the Arbitration Agreement, the Tribunal affirms that the achievement of «a fair and just result» requires to take into account «all relevant circumstances», and this notion includes «the vital interests of the Parties» (para. 1079); in paragraph 1180 it recalls that

makes it interesting to analyse the Award in the framework of the land-locked and geographically disadvantaged states positions: in this regard, the Award's contribution lies in two different elements.

First, the innovative character of the Award lies in the recognition made with regard to the interests of geographically disadvantaged states. As underlined above, the right of access to and from the sea is only recognised by UNCLOS in favour of land-locked states. This right is not secured to geographically disadvantaged states, in relation to which the Convention guarantees no more than the participation in the exploitation of living resources. In this regard, the Award goes significantly beyond the UNCLOS as it acknowledges that access to the high seas can be a critical issue not only for land-locked states, but also for geographically disadvantaged states<sup>46</sup>: indeed, Slovenia's right of access to and from the high seas is qualified as «a vital interest[s]».

Second, as highlighted above, the qualification of the right to access to the sea as a principle of customary law is highly debated by commentators and, although with some exceptions, most of the Authors deny this possibility.<sup>47</sup> The Award between Slovenia and Croatia confirms this thesis: indeed, the Tribunal does not recall the existence of a supposed principle of customary law to argue the necessity to recognise the freedoms of communication between Slovenia and the high seas.<sup>48</sup> In this regard, it is necessary to specify that on the one side, it is really difficult to affirm the existence of a principle of customary law recognising the *right* of land-locked and geographically disadvantaged states to access to the sea: indeed, this norm would imply the enforceable obligation of coastal and transit states to assure the implementation of this right. On the other side, the high number of ratifications of UNCLOS, along with the numerous bilateral and multilateral treaties ruling the freedom of transit, allow to sustain the existence of a principle of customary international law recognising the *legitimate interest* of land-locked states to have access to the sea as a necessary corollary of the freedoms of the high seas. Certainly, this interest cannot be qualified as an enforceable right, but it must be mitigated with legitimate interests of transit states. The Arbitral decision in *Croatia v. Slovenia* case is really meaningful in this regard. It qualifies Slovenia's access to the high seas as a *vital interest*, and in doing so it proves the general recognition of this interest by international law; at the same time, the Tribunal does not qualify even this interest as a principle of customary law.

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«The Tribunal has taken into account all the “relevant circumstances” submitted by the Parties, and has noted in particular the importance attached by both Parties to the question of rights of access to and from Slovenia by sea and by air, and of the exercise of jurisdiction over ships and aircraft exercising that right, viewed in the context of the geography of the northern Adriatic Sea».

<sup>46</sup> As recalled above, this aspect was already recognised by the Kampala Declaration.

<sup>47</sup> See in particular the detailed analysis made by S. C., Vasciannie, *cit.*, 197 ff.

<sup>48</sup> For a similar position, cf. International Court of Justice, *Right of Passage over Indian Territory (Portugal v India)*, Merits, Judgment, [1960] ICJ Rep 6, ICGJ 174 (ICJ 1960), 12 April 1960.



In order words, it can be argued that the Award confirms the framework defined by Article 125 UNCLOS – which, however, only concerns land-locked states – : the access to the sea is a conditional right, the implementation of which supposes the agreement of transit states. In this regard, the Award fully confirms the necessity to guarantee the territorial sovereignty of Croatia and, more generally, of transit states. However, at the same time, it fully innovates the issue of access to the sea. After explicitly qualifying the access to and from the high seas as a «vital interest», the Award creates an institute – the Junction Area – which is functional to implement this interest. Moreover, it is really significant to stress that the discipline defined by the Tribunal for this Area goes greatly beyond the traditional transit regime. As the analysis of treaties on the freedom of transit shows, the content of this freedom is dual: first, it implies the free and non-discriminatory transit across the territory of a foreign states (according to the concrete modalities defined by agreements between the states concerned), and second, it entails the non-submission of traffic in transit to any customs duties, taxes or other comparable charges. However, the transit state is fully entitled to exercise its prescriptive and enforcement jurisdiction on ships, vessels, aircraft, vehicles, persons and commodities in transit, with the only exceptions defined by the agreement. The regime defined by the Arbitral Tribunal is significantly different in this regard insofar as it implies some meaningful restrictions on Croatia's sovereignty, especially in relation to its jurisdiction. As already recalled above, some Authors have made reference to the controversial notion of international servitude to justify the right of access to the sea. Leaving aside the highly debated possibility to admit the existence of international servitudes, it is clear that the regime defined by the Tribunal with regard to the Junction Area significantly restricts Croatia's territorial sovereignty: by borrowing Claus's words and transposing them to this case, the Area is «a part of the whole of the territory of one state [which] is made to serve the economic needs of another».<sup>49</sup>

#### **4. The double nature of the Junction Area: some difficulties resulting from its practical implementation**

The reading of the Award's paragraphs concerning the regime of the Junction Area consents to grasp its original and unique nature. In this regard, it is possible to make a clear distinction between the original nature of the Area and its fictitious nature. From a geographical point of view, this zone is established in a body of water which, according to UNCLOS, must be qualified as Croatia's territorial waters. However, due to the necessity to find a balance between Croatia's sovereignty and the effectiveness of freedoms of communication of vessels and aircraft going to and coming from Slovenia, the Tribunal created a fictitious discipline; this latter regime largely reproduces the typical regulation of the EEZ. Indeed, on the one hand, the freedoms characterising the Junction Area

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<sup>49</sup> H. Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration*, London, New York, 1927, 121.

include the freedoms of navigation, overflight, and laying submarines cables and pipelines; on the other hand, the freedoms of communication do not cover the exploitation of biological and mineral resources of the Area, the creation of artificial islands, and the carrying out of marine scientific research which are typical prerogatives of the coastal states, and indeed, they are left to Croatia.<sup>50</sup>

The difference existing between the original and the fictitious nature of the Junction Area implies that, at the end of the day, this Area is characterised by a “variable geometry regime”: its regulation changes according to the direction of ships and aircraft to which it is applied. As for ships and aircraft going to and coming from Slovenia, Croatia must assure the implementation of the regime defined by the Tribunal for the Area. But, as for all others ships and aircraft, the original nature of the Junction Area re-emerges: in other words, it goes back to being a body of Croatia’s territorial waters which implies the application of its corresponding UNCLOS regulation. The following paragraphs will discuss the regime of living marine resources within the Junction Area: this analysis will allow to underline the practical difficulties deriving from the double nature characterising the regime defined by the Arbitral Tribunal.

#### **4.1. Management of living marine resources in the Junction Area**

The management of living marine resources in the Junction Area is of utmost importance, not only due the obvious role played by fishing activities for economic system of all coastal states, but also as fishing is one of the most important issues in relation to which the confrontation between Croatia and Slovenia has come to light.<sup>51</sup> Moreover, the fishing regime is particularly interesting as it is paradigmatic of the *sui generis* nature of the Area and the difficulties resulting from its implementation.

The fishing regime is different depending on the nature of ships to which it is applied; in this regard, it is possible to identify two categories of ships:

- a) Ships which pass through the Junction Area but do not go nor come from Slovenia: these ships will be subject to the regime characterising Croatia’s territorial waters. In this regard, according to Article 21 UNCLOS, Croatia has sovereign rights as regards living resources in its territorial sea: it may exercise its prescriptive and enforcement jurisdiction with regard to the conservation of living resources of the sea, and the infringement of its fisheries laws and regulations.<sup>52</sup> Moreover, when ships not going to or

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<sup>50</sup> Cf. *Croatia v. Slovenia*, Final Award, *cit.*, para. 1123: this paragraph reproduces Article 58 UNCLOS.

<sup>51</sup> Actually, fishing issue between Croatia and Slovenia has come into light in particular as regards fishing activities in the disputed Bay of Piran; indeed, according to Slovenia, Croatia would have sent its police to guard Croatian fishermen into contested waters of the Bay of Piran, violating the EU Common Fisheries Policy: cf. Kait Bolongaro, *Slovenia ups stakes in Adriatic border dispute A legal tussle with Croatia over the Bay of Piran bodes ill for deeper Balkan integration*, in *Politico*, 21 February 2018, available at [www.politico.eu/article/slovenia-croatia-border-piran-ups-stakes-in-adriatic-fishing-dispute/](http://www.politico.eu/article/slovenia-croatia-border-piran-ups-stakes-in-adriatic-fishing-dispute/).

<sup>52</sup> Article 21.1(d) and (e), UNCLOS.

coming from Slovenia exercise their innocent passage, they must abstain from engaging in fishing activities.<sup>53</sup> However, in this case, it is necessary to take also into account the EU law and in particular the Regulation 1380/2013.<sup>54</sup> The founding principle of the Regulation is the access to waters and resources in all Union waters by fishing vessels flying the flag of a EU member state (Union fishing vessels).<sup>55</sup> However, this principle does not apply to the waters up to 12 nautical miles from the baselines under the EU member states sovereignty; and so the body of water covered by the Junction Area is excluded from the application of this principle. According to the Regulation, until 31 December 2022, EU member states may allow fishing activities only to fishing vessels that «traditionally fish in those waters from ports on the adjacent coast»; however, these restrictions must comply with the provisions of Annex I of the Regulation which defines «for each member state the geographical zones within the coastal bands of other member states where fishing activities are pursued and the species concerned». In order words, until 31 December 2022, Croatia may regulate fishing activities in waters included in the Junction Area, placing some exceptions on the principle of equal access to its Union waters by Union fishing vessels; however, these exceptions must comply with Annex I of the Regulation which, indeed, recognises some fishing rights to Slovenia.<sup>56</sup>

- b) Ships passing through the Junction Area and exercising the freedoms of communication: the Award is clear in specifying that the freedoms of communication do not include the access to living resources. As known, the UNCLOS devotes a great deal of attention to the management of living resources in the EEZ: the system defined by the Convention is based upon the recognition of coastal state's sovereign rights on living resources. As recalled above, this principle, sanctioned by Article 56, para. 1(a), is specified by Article 62, para. 1, according to which every coastal state must determine its capacity to harvest the living resources in its EEZ and if it is not able to harvest the entire allowable catch, it must assure to other states to have access to the surplus.<sup>57</sup> Although coastal states must guarantee access to other states to exceeding living resources, they keep their sovereign rights in this regard: indeed, fishing activities in EEZ must be carried out by complying

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<sup>53</sup> Article 19.2(i) UNCLOS: the carrying out of fishing activities qualifies the passage as offensive.

<sup>54</sup> Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC.

<sup>55</sup> *Ibi*, Articles 4-5; this principle does not apply to measures aiming to assure the conservation and sustainable exploitation of marine biological resources regulated by Part III of the Regulation.

<sup>56</sup> *Ibi*, Annex I: in Croatia's coastal waters, and so also in the Junction Area, Slovenian vessels are allowed to fish up to 100 tonnes of demersal and small pelagic species for a maximum number of 25 fishing vessels, including 5 fishing vessels equipped with trawl nets.

<sup>57</sup> See also Article 61 UNCLOS ruling the conservation and management measures coastal states are requested to adopt.

with the conservation measures and all terms and conditions defined by the coastal state.<sup>58</sup>

As, on the one hand, the freedoms of communication do not include the exploitation of living resources and, on the other, the Award establishes in the Junction Area the typical regime of the EEZ, it is worth asking if the system defined by Article 62 UNCLOS finds application in the Area: does Croatia have to guarantee to other states access to the surplus of the allowable catch of this zone? The reference made by the Award to the «high seas freedoms exercisable in an EEZ» is not enough to entail the transposition of EEZ regime as regards fishing activities carried out by ships exercising their freedoms of communication. Otherwise, the EEZ regime would be only applied to ships passing through the Junction Area, which represent an undefined category of vessels.

To conclude, in relation to living resources, the Area established by the Arbitral Tribunal keeps its original nature of territorial waters which does not allow foreign ships to carry out fishing activities, without prejudice for the applicability of the EU Regulation 1380/2013.

## **5. The *unicum* regime characterising the Junction Area**

After underlining the double nature of the Junction Area, it is necessary to look into its regime. The analysis of the Award allows to grasp the similarities existing between this Area and other institutes of the international law of the sea, such as high seas corridors and international straits. The following paragraphs will describe these institutes, making a comparison between them and the Junction Area.

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### ***5.1. Differences between the Junction Area and high seas corridors***

It is interesting to note that in its Memorial, Slovenia sustained that its right of access to and from the high seas could have been assured by establishing a high seas corridor in Croatia's territorial sea: this would consent to respect the rights of Croatia. Indeed, according to Slovenia, the 12 nautical miles limit represents the maximum extension of territorial sea, which cannot be claimed by a state where some «special circumstances» exists. The presence of such circumstances, and in particular the vital interest of a state, implies the necessity to limit the territorial sea extension of another neighbouring state. This Slovenian assertion is supported by referring to some examples provided by international practice; in particular, Slovenia recalled the maritime delimitation agreement between France and Monaco,<sup>59</sup> and the national laws of some states, such as Finland and

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<sup>58</sup> Article 62.4 UNCLOS.

<sup>59</sup> Convention on Maritime Delimitation between the Government of His Most Serene Highness the Prince of Monaco and the Government of the French Republic, 16 February 1984, available online at

Japan, limiting the extension of their territorial seas.<sup>60</sup> These latter examples are extremely meaningful as they concern the establishment of some high seas corridors. For example, Japanese Law on the Territorial Sea (1977) extends the limit of Japan's territorial sea from 3 to 12 nautical miles; however, the Law maintains the limit of 3 nautical miles in five international straits (namely, Soya Strait, Osumi Strait, Tsugaru Strait, East and West Tsushima Straits) to assure the presence of a high seas corridor in which all vessels and aircraft can enjoy their freedoms of navigation and overflight.<sup>61</sup> Similarly, South Korea in its Territorial Sea Law (1977) defines a territorial sea of 12 nautical miles, but in the Western Channel of the Korean strait, the Law limits Korean territorial waters to 3 miles: this limit, along with the 3 nautical miles stretch of Japanese territorial waters in the West Tsushima Strait, allow the existence of a high seas corridor in the Korean Strait between Korea and Japan.<sup>62</sup>

These high seas corridors fall under the scope of application of Article 36 UNCLOS, and consequently they are not covered by the regime of international straits defined by Part III of the Convention.<sup>63</sup> It is worth remarking the double difference existing between these corridors and the Junction Area defined by the Tribunal in *Croatia v. Slovenia* case. First, in Japanese and Korean cases, the establishment of high seas corridors lies in national laws: the limitation of territorial seas' extension was decided by the states themselves, although in some cases these decisions have been motivated by political reasons. Differently, the Junction Area was created by an Arbitral Award: while the Tribunal's decision is rooted in will expressed by the parties concerned, it is the result of the assessment made by the Tribunal which, as the position expressed by Croatia shows, is not fully respondent to the parties' position. Second, - and certainly this is the most relevant difference - the high seas corridors' regime is not comparable to the Area established by the Arbitral Tribunal in the arbitration *Croatia v. Slovenia*: in the cases recalled, the creation of a high seas corridor restricts the extension of territorial sea, but it does not affect the sovereignty and jurisdiction of coastal states in their territorial waters. Differently, the Junction Area does not affect Croatia's territorial sea from the extent point of view;

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[www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/MCO-FRA1984MD.PDF](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/MCO-FRA1984MD.PDF).

<sup>60</sup> Cf. *Croatia v. Slovenia*, Final Award, *cit.*, paras. 1057-1058: here, the Award recalls paragraphs 10.85-10.86 of Slovenia's Memorial.

<sup>61</sup> Cf. T. Kuribayashi, *The New Ocean Regime and Japan*, in 11 *Ocean Development and International Law* 1-2, 1982, 95-124; S. K. Kim, *Maritime disputes in northeast Asia: Regional Challenges and Cooperation*, Leiden, 2017, 46; as underlined by the Author, this decision was adopted to assure freedoms of navigation to foreign (and in particular US) nuclear warships; indeed, their passage into Japanese territorial waters would have been contrary to the three non-nuclear principles of not possessing, not producing and not permitting the introduction of nuclear weapons in Japanese territory.

<sup>62</sup> Cf. C.-H. Park, *East Asia and the Law of the Sea*, Seoul, 1983, 144; as reported by the Author, the Korean decision rooted in the fear of possible dispute with the Soviet Union whose warships used to pass through the Korean strait going to and coming from Vladivostok.

<sup>63</sup> Cf. A. XM Ntovas, *Straits used for international navigation* in D. Attard, M. Fitzmaurice, N. A. Martínez Gutiérrez (eds.), *cit.*, 2014, 79-80.



however, the Tribunal establishes in the Area a *sui generis* regime which meaningfully impacts the powers Croatia is entitled to exercise in this zone.

### ***5.2. Differences between the Junction Area and international straits***

Insofar as the Junction Area aims at making possible an «uninterrupted and unintermittible» link between Slovenia's territorial sea and the high seas, the freedoms of communication seems widely comparable to the transit passage characterising the straits used for international navigation. As known, in its Part III, the UNCLOS devotes a great deal of attention to straits used for international navigation, and it defines different kinds of straits and regimes. According to their geomorphological features,<sup>64</sup> it is possible to distinguish four categories of straits:

- straits linking two parts of EEZs or high seas: this kind of straits is characterised by the transit passage regime (Articles 38-44);
- straits in which a route through the high seas or EEZ of similar convenience exists: they are not ruled by the transit passage regime, but by the other relevant Parts of UNCLOS (Article 36);
- straits between an island and the mainland in which a route through the high seas or EEZ of similar convenience exists: these straits are only characterised by non-suspendable innocent passage (Articles 45 (a) and 38.1);
- straits connecting a part of the high seas or an EEZ and the territorial sea of a foreign state: like the previous category, also these straits are only characterised by non-suspendable innocent passage (Article 45(b)).

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Although, strictly speaking, the Junction Area cannot be qualified as an international strait, from a geographical point of view, it can be compared to the latter kind of strait: indeed, it links Slovenia's territorial sea with the high seas. However, the legal regime defined by the Tribunal makes the Area more comparable to straits governed by the transit passage; indeed, this regime has the objective to assure the «continuous and expeditious transit of the strait» through freedoms of navigation and overflight, and includes the passage allowing ships and aircraft to enter, leave, and return from a state bordering the strait (Article 38). As affirmed by the International Court of Justice in the *Corfu Channel* case, straits are «international highways»<sup>65</sup> aiming to guarantee the effectiveness of freedoms of navigation and overflight through a body of water. These references to international straits consent to grasp the similarities existing between the transit regime and freedoms of communication, first of all, from a functional point of view. These similarities can also be seen considering that these institutes share the same rationale. As underlined by several

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<sup>64</sup> The UNCLOS makes also reference to straits which are, in whole or in part, regulated by long-standing international conventions specifically concerning these straits; this category of straits is ruled by these conventions, and not by UNCLOS (Article 35(c) UNCLOS).

<sup>65</sup> International Court of Justice, *Corfu Channel (United Kingdom v Albania)*, Judgment, Merits, ICJ GL No 1, [1949] ICJ Rep 4, ICGJ 199 (ICJ 1949), 9 April 1949, 29.

commentators, the idea of transit passage was proposed by the United Kingdom during the Third Law of the Sea Conference, and then formalized by UNCLOS, in order to strike a balance between the interests of maritime nations and nations bordering straits. The former wanted to preserve their possibility to freely and unimpededly pass through international straits and were concerned about any restrictions on their freedoms of navigation; the latter were deeply worried about the environmental and security threats deriving from the presence of foreign ships within straits close to their territorial seas.<sup>66</sup> The regime of the Junction Area is based upon a similar compromise pursued by the Tribunal in order to «guarantee both the integrity of Croatia's territorial sea and Slovenia's freedoms of communication» (para. 1123).

The similarities existing between the Area created in Croatia's territorial sea and international straits is implicitly confirmed by the Tribunal itself, when it feels the necessity to specify that the freedoms of communication are different from the transit passage characterising the regime of international straits under UNCLOS. Another explicit reference to straits' regime is made by the Tribunal when it specifies that Croatia keeps jurisdiction upon non-Croatian ships and aircraft in the Junction Area «giving effect to the generally accepted international standards in accordance with UNCLOS Article 39(2) and (3)» (para. 1130), which rules the duties of ships and aircraft during transit passage. As already recalled, the Award does not clarify the elements in which the freedoms of communication differ from the transit passage. In the light of this lack of specifications, it can be useful to make some references to the transit passage regime and clarify the differences and similarities existing between this regime and the freedoms of communication.

### 5.2.1. *Freedoms of communications versus transit passage regime*

A general overview of the transit passage regime consents to see that it is characterised by some additional freedoms to the regime of innocent passage. The differences existing between the regime of transit passage and innocent passage concern two main aspects: first, the transit passage also entails the freedom of overflight; second, it cannot be subject to any limitations and impeded by coastal states. As all these elements characterise the Junction Area, it is possible to argue that the freedoms of communication assured in this Area are more similar to the transit passage than the innocent passage. Moreover, while being a high-debated issue by commentators,<sup>67</sup> some scholars argue that, unlike

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<sup>66</sup> D. R. Rothwell, T. Stephens, *cit.*, 240; K. M. Burke, A. DeLeo, *Innocent Passage and Transit Passage in the United Nations Convention on the Law of the Sea*, in 9 *Yale Journal of International Law* 7, 1983, 399 ff. As for the debate during the Third United Nations Conference on the Law of the Sea, cf. H. B. Robertson, *Passage through International Straits: a Right Preserved in the Third United Nations Conference on the Law of the Sea*, in 20 *Virginia Journal of International Law* 4, 1980, 819 ff.

<sup>67</sup> R. Lapidoth, *International Straits*, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of International Law*, Vol. IX, Oxford, 2006, 621; H. B. Robertson, *cit.*, 843-4. Lapidoth and Robertson argue that the right of transit passage includes the submarines' right to submerged navigation; contra W. M. Reisman, *The Regime of International Straits and*

the regime of innocent passage, the transit regime does not imply the submarines' duty to navigate on the surface. As already recalled, this duty does not characterise the Junction Area and so, also in this regard, it is possible to see a similarity between this zone and the transit passage.

According to Article 38, para. 2, UNCLOS the transit passage can be defined as the

«the exercise in accordance with this Part of freedoms of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait».

In other words, the elements qualifying the transit passage are the continuity and expeditiousness of the passage; this implies the inadmissibility of any activity not having these characteristics during the exercise of the transit passage (Article 39.1(c)), the duty of ships and aircraft to «proceed without delay» (Article 39.1(a)), and to abstain from «any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress» (Article 39.1(c)).<sup>68</sup> These elements do not apply to the freedoms of communication in the Junction Area because they «are exercisable as if they were high seas freedoms exercisable in an exclusive economic zone» (para. 1128). This implies that the freedoms of communication are wider than freedoms of navigation characterising the transit passage: indeed, the freedoms of communication do not only cover freedoms which are strictly functional and necessary to have access to Slovenia's territorial sea; they also include all high seas freedoms characterising the EEZ regime. It implies that for example, within some limits which will be specified below, ships and aircraft exercising the freedoms of communication can carry out military activities.

Continuing with the analysis of the straits regime, as specified by Article 39, ships and aircraft in transit must refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of states bordering straits or violating the principles of international law enshrined in the UN Charter (Article 39.1(b)). There is no doubt about the applicability of these duties to the Junction Area; indeed, they represent some norms of customary law<sup>69</sup> which certainly prevail on the freedoms of communication.

The provisions of Article 39, paras. 2 and 3, are extremely important because, as specified by the Award, Croatia keeps the right to adopt laws and regulations to implement the «generally accepted international standards in accordance with UNCLOS Article 39(2) and (3)» (para. 1130). According to Article 39, para. 2 (a), ships in transit must comply with «generally accepted

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*National Security: an Appraisal of International Lawmaking*, in 74 *American Journal of International Law* 48, 1980, 71; cf. K. M. Burke, A. DeLeo, *cit.*, 403-4.

<sup>68</sup> With specific regard to the notion of «normal modes of continuous and expeditious transit», cf. A. XM Ntovas, *cit.*, 85-86.

<sup>69</sup> Cf. T. Scovazzi, *Management regimes and responsibility for international straits. With special reference to the Mediterranean Straits*, in 19 *Marine Policy* 2, 1995, 140.

international regulations, procedures and practices for safety at sea». While UNCLOS only explicitly recalls the International Regulations for Preventing Collisions at Sea<sup>70</sup>, the International Maritime Organisation (IMO) interprets the expression «generally accepted international regulations, procedures and practices» in a broader way, including also non-binding instruments<sup>71</sup> and the International Convention for the Safety of Life at Sea.<sup>72</sup> Article 39, para. 2 (a), must be read in conjunction with Article 41 allowing bordering states to define sea lanes and traffic separation schemes for navigation in straits in order to promote navigation safety. The prescription of these routes must comply with generally accepted international regulations,<sup>73</sup> and bordering states must involve the IMO in the adoption process.<sup>74</sup> As Article 41 concerns the implementation of generally accepted international standards of navigation security ruled by Article 39, para. 2(a), and this latter provision is recalled by the Award, it can be argued that Croatia may prescribe sea lanes and traffic separation schemes in the Junction Area, in conformity with Article 41.

As regards Article 39, para. 2 (b), it stipulates that ships in transit must comply with «generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships». This expression makes reference to the International Convention for the Prevention of Pollution from Ships,<sup>75</sup> and the International Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter.<sup>76</sup> Finally, as prescribed by Article 39, para. 3, aircraft overflying international straits must observe the Rules of the Air defined by the International Civil Aviation Organization, and the other measures assuring the security of navigation.<sup>77</sup>

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<sup>70</sup> The International Regulations for Preventing Collisions at Sea (COLREG) were adopted by IMO in 1972.

<sup>71</sup> Secretariat of the International Maritime Organization, *Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization*, 30 January 2014, LEG/MISC.8, 18. As regards the notion of generally accepted international regulations recalled by UNCLOS, see also M. Fornari, *Il regime giuridico degli stretti utilizzati per la navigazione internazionale*, Milano, 2010, 134.

<sup>72</sup> The International Convention for the Safety of Life at Sea (SOLAS) was adopted by IMO in 1974.

<sup>73</sup> As specified by IMO, the generally accepted international regulations include the SOLAS and COLREGs Conventions, and the IMO General Provisions on Ships' Routing (IMO Resolution A.572(14), 1985); see Secretariat of the International Maritime Organization, *cit.*, 32-33.

<sup>74</sup> See in particular Article 41.4 UNCLOS: «Before designating or substituting sea lanes or prescribing or substituting traffic separation schemes, states bordering straits shall refer proposals to the competent international organization with a view to their adoption. The organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the states bordering the straits, after which the states may designate, prescribe or substitute them».

<sup>75</sup> The International Convention for the Prevention of Pollution from Ships (MARPOL) was adopted by IMO in 1973.

<sup>76</sup> The International Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter was adopted by IMO in 1972.

<sup>77</sup> Article 39.3 UNCLOS: «Aircraft in transit passage shall: (a) observe the Rules of the Air established by the International Civil Aviation Organization as they apply to civil aircraft; state aircraft will normally comply with such safety measures and will at all times operate

Article 42, para. 1, UNCLOS enables coastal states to regulate (a) the safety of navigation and regulation of maritime traffic, (b) the prevention, reduction and control of pollution to implement international regulations on the discharge of oil, oily wastes and other noxious substances in the strait (c), fishing activities, and (d) the loading and unloading of commodities, currencies and persons in violation of their customs, fiscal, immigration and sanitary laws and regulations. It is worth considering whether and to what extent Croatia is entitled to exercise its jurisdiction in the Junction Area as regards the fields covered by Article 42; indeed, the necessity to find a balance between freedoms of navigation through straits and interests of coastal states to regulate some issues impacting their national interests, does not only underlie Article 42<sup>78</sup>, but finds a match in the competing interests of Slovenia and Croatia in the zone established by the Arbitral Tribunal. It is reasonable to suppose that Croatia is empowered to enact laws and regulations concerning the safety of navigation (article 41.1(a)) and the prevention, reduction and control of pollution (41.1(b)); indeed, these areas correspond to those covered by Article 39(2) and (3) UNCLOS, in relation to which, according to paragraph 1130 of the Award, Croatia keeps its jurisdiction. However, as for safety of navigation and pollution issues, the prescriptive jurisdiction of coastal state (*rectius* of Croatia) cannot be unilaterally exercised but must comply with generally accepted international regulations.

The Award is clear in not empowering Croatia to rule as regards other areas. On account of this, it must be excluded that Croatia can exercise its jurisdiction with regard to loading and unloading of commodities, currencies and persons (Article 42.1(d)); this exclusion can be justified as, unlike the other areas, the prescriptive jurisdiction of coastal states (*rectius* of Croatia) in this regard does not find a limit in international standards.<sup>79</sup>

### ***5.3. A comparison between the Junction Area and international straits as regards some “sensitive” issues***

The following paragraphs will aim at analysing the regime of the Junction Area in relation to some issues, such as the control of foreign military activities and the protection of marine environment, which can really concern coastal states. In this regard, the question arises as how to find a fair balance between the exercise of coastal states’ jurisdiction and freedoms of navigation of third states. A comparison between the Junction Area discipline and the regime of international straits will be useful to point out the different solutions adopted to strike a right balance between the competing interests at stake.

#### ***5.3.1. Legitimacy and control of foreign military activities in the Junction Area***

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with due regard for the safety of navigation; (b) at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency».

<sup>78</sup> In this regard, cf. A. XM Ntovas, *cit.*, 90 ff.

<sup>79</sup> The only limit defined by Article 42 is represented by the principle of non-discrimination among foreign ships.



It is worth making some references to the admissibility of military activities in the Junction Area. In spite of the practical feasibility of this kind of activities in this zone, and more generally in the Mediterranean Sea,<sup>80</sup> the question can acquire some importance because, unlike the innocent passage, the freedoms of communication cannot be suspended under any circumstances and are recognised regardless their innocent nature. Clearly, these elements can significantly impact on Croatia's national security as, under the normal regime of innocent passage, the suspension power recognised to coastal state for essential security reasons (Article 25.3), and the innocent condition of passage play a crucial role in allowing coastal state to assure security within its territorial sea.

With regard to the admissibility of military manoeuvres, it is necessary to take into account that as specified by the Award, the freedoms of communication cover the freedoms of navigation and overflight, and «other internationally lawful uses of the sea related to these freedoms», and certainly this reference can include the carrying out of some (and legitimate) military activities. The admissibility of military activities undertaken by warships and aircraft in the EEZs of other states is highly debated, especially in the light of recent practice of some states.<sup>81</sup> However, most of the Authors argue that, without prejudice of customary rule prohibiting the threat or the use of force, the military activities in foreign EEZs are legitimate, and do not need to be previously notified and authorised by the coastal state.<sup>82</sup>

<sup>80</sup> In this sense, cf. G. D'Agosto, *Attività militari e zona economica esclusiva*, in U. Leanza, L. Sico, *Zona economica esclusiva e Mare Mediterraneo*, Napoli, 1989, 89 ff.

<sup>81</sup> In this regard, it is worth recalling the incidents occurred between China and USA in South China Sea: China argued that foreign vessels and aircraft are not allowed to carry out military operations within Chinese EEZ without the prior authorisation of Chinese Government; cf., *inter alia*, R. P. Pedrozo, *Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone*, in 9 *Chinese Journal of International Law* 1, 2010, 9-29; H. Zhang, *Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States? Comments on Raul (Pete) Pedrozo's Article on Military Activities in the EEZ*, in 9 *Chinese Journal of International Law* 1, 2010, 31-47; J. M. van Dyke, *Balancing Navigational Freedom with Environmental and Security Concerns*, in 15 *Colorado Journal of International Environmental Law and Policy* 19, 2003, 19-28; Id., *Military Ships and Planes Operating in the Exclusive Economic Zone of Another Country*, in 28 *Marine Policy* 1, 2004, 29-39; see also S. B. Kaye, *Freedom of navigation in a post 9/11 world: security and creeping jurisdiction*, in D. Freestone, R. Barnes, D. Ong (eds.), *The Law of the Sea Progress and Prospects*, Oxford, 2006, 347-364.

<sup>82</sup> See, *inter alia*, R. P. Pedrozo, *cit.*; J. M. van Dyke, *Balancing Navigational Freedom with Environmental and Security Concerns, cit.*; U. Leanza, M. C. Caracciolo, *The Exclusive Economic Zone*, in D. Attard, M. Fitzmaurice, N. A. Martínez Gutiérrez (eds.), *cit.*, 192 ff.; G. D'Agosto, *cit.*, 67 ff.; B.A. Hamzah, *Unauthorised Manoeuvres in Waters: US Chides M'sia Restrictions*, in *RSIS Commentary*, 9 May 2017, available at [www.rsis.edu.sg/wp-content/uploads/2017/05/CO17088.pdf](http://www.rsis.edu.sg/wp-content/uploads/2017/05/CO17088.pdf); G. V. Galdorisi, A. G. Kaufman, *Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict*, in 32 *California Western International Law* 2, 2001-2002, 253-301; J. Geng, *The Legality of Foreign Military Activities in the Exclusive Economic Zone under UNCLOS*, in 28 *Utrecht Journal of International and European Law* 74, 2012, 22-30, available at [doi.org/10.5334/ujiel.ax](https://doi.org/10.5334/ujiel.ax); M. Hayashi, *Military Activities in the Exclusive Economic Zones of Foreign Coastal States* in D. Freestone (ed.), *The 1982 Law of the Sea Convention At 30: Successes, Challenges and New Agendas*, Leiden, Boston, 2013, 121-129.

In this regard, it is worth recalling that the freedoms of communication are not suspendable by Croatia «under any circumstances», and more generally, cannot be subject to «any controls or requirements» beyond those established by UNCLOS in the EEZ. This specification is of utmost importance as it categorically excludes any possibilities to limit the number of foreign warships exercising their freedoms in the Junction Area and to ask them a prior notification of their passage. It is necessary to take into account that Croatia has placed some limitations on innocent passage of warship in its territorial sea.<sup>83</sup> Indeed, when Croatia decided to be considered a party to the UNCLOS, succeeding to the Socialist Federal Republic of Yugoslavia, it declared that no peremptory norm of general international law prevents coastal states from limiting the number of foreign warships entitled to contemporaneously exercise their innocent passage, and from consenting their passage upon a previous notification.<sup>84</sup> Indeed, the Croatian Maritime Code stipulates that no later 24 hours before the passage of a foreign warship, its flag state must inform Croatian Minister of Foreign Affairs about its intention of innocent passage;<sup>85</sup> moreover, according to the Code, navigation in Croatian territorial sea is not allowed to more than three foreign warships having same nationality, except in cases of special permission granted by the Minister of Defence.<sup>86</sup> This background allows to grasp the meaningfulness of the specification made by the Tribunal according to which the freedoms of communication in the Junction Area

«are not subject to [...] any coastal state controls or requirements other than those permitted under the legal regime of the EEZ established by UNCLOS» (para. 1127).

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This clarification makes clear that, in the Area established by the Arbitral Tribunal, Croatia is not entitled to apply the limitations defined by its Maritime Code as regards the exercise of innocent passage by warships.

Another different, albeit connected, problem arises as whether and to what extent Croatia keeps power to control and limit freedoms of navigation for security reasons in the Junction Area. In the last few years, the necessity to

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<sup>83</sup> As regards the debate on the admissibility of these limitations, cf. W. K. Agyebeng, *Theory in Search of Practice: The Right of Innocent Passage in the Territorial Sea*, in 39 *Cornell International Law Journal* 2, 2006, 371-399, see in particular 391 ff.; D.G. Stephens, *The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations*, in 29 *California Western International Law Journal*, 1998, 283-311, see in particular 305 ff.; D. R. Rothwell, T. Stephens, *cit.*, 268 ff.

<sup>84</sup> United Nations Treaty Collection, *United Nation Convention on the Law of the Sea*, Declaration of Croatia: «The Republic of Croatia considers that, in accordance with article 53 the Vienna Convention on the Law of Treaties of 29 May 1969, there is no peremptory norm of general international law, which would forbid a coastal state to request by its laws and regulations foreign warships to notify their intention of innocent passage through its territorial waters, and to limit the number of warships allowed to exercise the right of innocent passage at the same time (Articles 17-32 of the Convention)».

<sup>85</sup> Croatian Maritime Code, 8 December 2004, available at [www.csamarenostrom.hr/userfiles/files/Nacion%20zakon%20engl/MARITIME%20CODE.pdf](http://www.csamarenostrom.hr/userfiles/files/Nacion%20zakon%20engl/MARITIME%20CODE.pdf), Article 22.

<sup>86</sup> *Ibi*, Article 26.

assure maritime security against weapon trafficking and terrorist attacks has acquired a new relevance in the international scene: this scenario has led to several initiatives put in place by some states to exercise jurisdiction in their EEZs.<sup>87</sup> As these initiatives affect the freedom to carry out military activities in EEZ, their admissibility has been highly debated by commentators. It is worth retracing the framework defined by UNCLOS in this regard. First, Article 56, para. 1, grants to coastal states «sovereign rights» in their EEZs as regards the exploration, exploitation, conservation and management of natural resources, both living and non-living, and with regard to other activities of economic exploitation and exploration, such as the production of energy. Second, according to Article 56, para. 2, coastal states are entitled to exercise their jurisdiction in respect of artificial islands, installations and similar structures, marine scientific research, and protection and preservation of the marine environment.<sup>88</sup> Third, Article 73 UNCLOS clearly defines the scope of application of prescriptive and enforcement jurisdiction recognised to coastal

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<sup>87</sup> See for example the Proliferation Security Initiative (PSI), announced in May 2003 by US President George W. Bush, as a means to fight against proliferation of weapons of mass destruction; this initiative was formalised in PSI Statement of Interdiction Principles adopted in September 2003, and then endorsed by 105 nations around the world (cf. US Department of State, Statement of Interdiction Principles, 4 September 2003, available at [www.state.gov/t/isn/c27726.htm](http://www.state.gov/t/isn/c27726.htm)). This initiative implies naval operations to search and stop vessels suspected of carrying nuclear materials; see in particular US Department of State, Statement of Interdiction Principles, *cit.*, principle 4(d): PSI participants are committed «To take appropriate actions to (1) stop and/or search in their internal waters, territorial seas, or contiguous zones (when declared) vessels that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and to seize such cargoes that are identified; and (2) to enforce conditions on vessels entering or leaving their ports, internal waters or territorial seas that are reasonably suspected of carrying such cargoes, such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry». As regards the PSI and its interplay with freedoms of navigation, cf. among others Y.-H. Song, *The U.S.-Led Proliferation Security Initiative and UNCLOS: Legality, Implementation, and an Assessment*, in 38 *Ocean Development and International Law* 1-2, 2007, 101-145; M. Byers, *Policing the High Seas: The Proliferation Security Initiative*, in 98 *The American Journal of International Law* 3, 2004, 526-545; A. Dunne, *The Proliferation Security Initiative. Legal Considerations and Operational Realities*, SIPRI, Policy Paper, Solna, May 2013, available at [www.sipri.org/sites/default/files/files/PP/SIPRI36.pdf](http://www.sipri.org/sites/default/files/files/PP/SIPRI36.pdf); D. Guilfoyle, *The Proliferation Security Initiative: Interdicting Vessels in International Waters to Prevent the Spread of Weapons of Mass Destruction?*, in 29 *Melbourne University Law Review* 3, 2005, 733-764, available at [law.unimelb.edu.au/data/assets/pdf\\_file/0007/1707982/29\\_3\\_4.pdf](http://law.unimelb.edu.au/data/assets/pdf_file/0007/1707982/29_3_4.pdf). In 2004, Australia announced its wish to create a Maritime Identification Zone, extending 1000 nautical miles from Australian coastline: in order to improve the maritime security, all vessels intending to enter Australian ports, would be required to provide some comprehensive information, such as their identity, crew, location, speed and intended port of arrival; cf. Australian Government, Department of the Prime Minister and Cabinet, *Strengthening Offshore Maritime Security*, Media Release, 15 December 2004, available at [pmtranscripts.pmc.gov.au/release/transcript-21554](http://pmtranscripts.pmc.gov.au/release/transcript-21554). For a comment see, *inter alia*, N. Klein, *Legal Implications of Australia's Maritime Identification System*, in 55 *The International and Comparative Law Quarterly* 2, 2006, 337-368.

<sup>88</sup> These three fields are further ruled by other UNCLOS provisions: see Article 60 on artificial islands, installations and similar structures; Article 246 on marine scientific research; and Articles 208-210-211-220 on pollution.

states' in their EEZs, restricting it to exploration, exploitation, conservation and management of living resources. In the light of this, there is no doubts about the economic vocation characterising the EEZ and underlying the jurisdiction granted to coastal states in this zone. Against this background, as underlined by some Authors, the control of military activities in EEZ is admissible insofar as it concerns fields in relation to which the UNCLOS grants jurisdiction to coastal states.<sup>89</sup>

Finally, it is necessary to take into account Article 59 dealing with cases in which coastal states and other states have competing interests in an EEZ. The provision identifies the basis for resolution in equity and all relevant circumstances, and in particular «the respective importance of the interests involved to the parties as well as to the international community as a whole». While being really vague, the open formulation<sup>90</sup> of this provision consents to elaborate an evolutionary interpretation about the jurisdiction coastal states are entitled to exercise in their EEZ.<sup>91</sup> In the light of this, as authoritatively argued by a commentator, coastal states' claim to extend their jurisdiction within the EEZs for security reasons must be assessed taking also into account that fight against terrorism and pursuing of maritime security can be qualified as interests of international community as a whole.<sup>92</sup> Without underestimating the developing role which can be played by Article 59 UNCLOS, and without definitely excluding the possibility to recognise a broader jurisdiction to coastal states, at the moment, it seems difficult to recognise the legitimacy of security powers claimed by coastal states in their EEZs. Indeed, these powers appear more functional to assure national security and military interests of coastal states than the international fight against terrorism.

Turning now to consider the specific case of Croatia's jurisdiction in the Junction Area, it is necessary to recall the distinction, identified by the Tribunal, between the prescriptive and enforcement jurisdiction of Croatia in this zone. As already recalled, Croatia keeps the right to adopt laws and regulations to implement the «generally accepted international standards in accordance with UNCLOS Article 39(2) and (3)». These provisions make reference to rules aiming to assure the navigation safety and the control and reduction of pollution.

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<sup>89</sup> Cf. N. Klein, *cit.*, see in particular 356: «The enforcement of law relating to the protection of the offshore maritime security of a coastal state stands on less sure footing». See also R. P. Pedrozo, *Military Activities in the Exclusive Economic Zone: East Asia Focus*, in 90 *International Law Studies* 514, 2014, 514-543: the functional nature of the EEZ emerges as a criterion to identify admissible limitations adopted by coastal states on military activities carried out in their EEZ at 524 ff.

<sup>90</sup> As regards this provision and its open formulation, cf. among others, Center for Oceans Law and Policy, University of Virginia, *United Nations Convention on the Law of the Sea*, vol. 2, Leiden, Boston, 2013, 569; D. R. Rothwell, T. Stephens, *cit.*, 87.

<sup>91</sup> In this sense, cf. N. Klein, *cit.*, 360: as underlined by the Author, «the Convention has anticipated that the needs of the various actors in the international system may vary over time».

<sup>92</sup> *Ibi*, 359-360; in the same sense, D. R. Rothwell, T. Stephens, *cit.*, 96.

Although the notion of navigation safety is not specified by Article 39, it seems possible to adopt a broad interpretation, including the maritime security.<sup>93</sup>

As for the enforcement jurisdiction, the Award is clear in specifying that Croatia has the right to take enforcement actions only outside the Junction Area. So, *quid iuris* about Croatian enforcement actions in respect of its laws and regulations aiming to assure maritime security in the Junction Area: are these actions absolutely inadmissible or might they be admitted in some exceptional circumstances? Certainly, the enforcement actions in the Area are explicitly excluded by the Award to assure the freedoms of communication. Moreover, the EEZ regime artificially established does not consent to admit any exception because, as recalled above, the jurisdiction of coastal states must be completely excluded in relation to military activities carried out in EEZ by foreign states. So, a literal and restrictive interpretation of the Award would lead to exclude the admissibility of Croatian enforcement actions in relation to military activities carried out in the Junction Area.

However, a more respectful interpretation of Croatia's sovereignty might be adopted taking into account that, as specified by the Award, the regime established must be fulfilled in «good faith and in a reasonable manner» (para. 1133). In this regard, it is necessary to recall some meaningful elements. First, the difference between the original nature of the Junction Area and its fictitious nature: this zone is a body of Croatia's territorial sea in which the Tribunal has introduced the typical regime of an EEZ. Second, although – as underlined by the Tribunal – this zone is small, and Croatia keeps its enforcement jurisdiction outside of this Area, it is also true that the body of territorial sea dividing the Junction Area and Croatian territory is extremely narrow, especially at the North-east end. Third, the freedoms of communication cannot be suspended under any circumstances and are recognised regardless their innocent nature. In the light of the above, a “reasonable” interpretation of the Award might lead to retain that Croatia keeps the right to intervene in the Junction Area for security reasons in two exceptional circumstances. First, when ships or aircraft exercise their freedoms of communication in the Area in a manner amounting to a use or a threat of force: this attitude would not only be contrary to the principle of the use of high seas for peaceful purposes (Article 88 UNCLOS), but would also violate the customary norm prohibiting the use or threat of force. Second, when ships or aircraft exercise their freedoms in a manner which, while not amounting to a use or threat of force, poses a serious threat to maritime security: in these cases, Croatia's enforcement actions can be exceptionally admitted also in the Junction Area, when the implementation of enforcement measures outside the Area would not be enough to successfully contain the threat. It must be recognised that this interpretation, while based upon the good faith and reasonableness criteria recalled by the Award, risks to be too stretched and it might arise several objections. The case of military activities exemplifies that the

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<sup>93</sup> In this regard, see the International Convention for the Safety of Life at Sea which, after the amendment introduced in 2002, rules some «Special measures to enhance maritime safety» (Chapter XI).



EEZ regime, characterising the Junction Area, is not always able to find a fair balance between the competing interests at stake; indeed, a broad (and stretched) interpretation of the Award represents the only chance to reach a really fair solution.

In this regard, it can be useful to recall the regulation of international straits under UNCLOS, and point out the difference from the regime created by the Arbitral Tribunal. Clarifying that «all ships» are entitled to exercise the transit passage (Article 38.1), the Convention does not leave any doubt about the warships' right to transit through international straits. Like other vessels, warships are requested to comply with duties defined by Article 39, and in particular with the duty to abstain from any threat or use of force against the sovereignty, territorial integrity or political independence of states bordering the strait, and to «refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress». A question can arise as how to specifically define the “normal mode” characterising the transit of warships; however, without a shadow of doubt, the carrying out of military manoeuvres cannot be qualified as a normal mode of transit, and so it is not allowed in international straits.<sup>94</sup>

### *5.3.2. Protection of marine environment in the Junction Area*

Another “sensitive” issue in relation to which the balance between the freedoms of navigation and interests of bordering states can arise some questions, is the protection of marine environment and in particular the extent of jurisdiction bordering states are entitled to exercise in this regard.

A coastal state keeps jurisdiction with regard to the protection and preservation of the marine environment in its EEZ (Article 56.1.b(iii) UNCLOS); and foreign states exercising their rights in the EEZ must comply with the laws and regulations adopted by the coastal state (Article 58.3). These provisions are completed by the enforcement side of jurisdiction: indeed, according to Article 73, the exercise of coastal states' sovereignty in their EEZs entails that they have the right to take all necessary measures - including boarding, inspection, arrest and judicial proceedings - to enforce laws and regulations ruling the EEZ.<sup>95</sup> However, as regards the protection of marine environment in the Junction Area, the Award excludes the application of the EEZ regime. Indeed, as specified by the Award, in this Area Croatia keeps its prescriptive jurisdiction to implement the generally accepted international standards in the field of navigation safety and prevention, reduction and control of pollution; at the same time, the Award does not recognise any enforcement power to Croatia, even in relation to marine environment. Against this background, a literal interpretation of the Arbitral decision leads to conclude that Croatia does not have any right to enforce its environmental protection law in the Junction Area. Like for the control of military activities, one might sustain the possibility to adopt a less restrictive interpretation, based upon good faith and reasonable criteria. This interpretation

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<sup>94</sup> In this sense, D. R. Rothwell and T. Stephens, *cit.*, 272-273.

<sup>95</sup> The enforcement powers of coastal states are further detailed by Article 220 UNCLOS.

might lead to admit that, given the importance recognised by international law to environmental protection, Croatia can take enforcement actions towards vessels violating generally accepted international standards in some exceptional cases, and in particular when the violation poses a serious threat to maritime environment, and the exercise of enforcement actions outside the Junction Area would not be enough to assure an effective protection.

At the same time, it is worth analysing the regime of international straits defined by UNCLOS. The enforcement powers of bordering states are not explicitly ruled by the Convention; on this account, as underlined by some commentators, the question remains whether or not coastal states are entitled to enforce laws and regulations adopted under Article 42.<sup>96</sup> Nevertheless, the environmental protection is the only area in relation to which UNCLOS explicitly recognises the enforcement jurisdiction of bordering states: it is significant in this regard Article 233 included in Part XII on the protection of marine environment. According to this provision, merchant vessels in transit which, following a violation of laws and regulations adopted by bordering states to assure navigation safety and prevent, reduce and control pollution, cause or threat «major damage to the marine environment of the straits», may be subject to «appropriate enforcement measures» by bordering states. The protection of marine environment is of such importance that bordering states are -explicitly- allowed to exercise their enforcement jurisdiction in relation to this field; however, the enforcement actions are limited to cases where a major damage to the marine environment has been realized or threatened.

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Also as regards this issue, the regime of international straits proves to be able to balance the competing interests at stake. On the one hand, the bordering states' interests to protect their marine environment is secured by recognising them the right to enforce their environmental laws; and, as underlined by some commentators, the enforcement measures can also include the stopping of transit.<sup>97</sup> On the other hand, freedoms of navigations of other states are assured by limiting the enforcement actions of coastal states to only cases in which a major damage to environment has been realized or threatened.

## 6. Concluding remarks

Based on the foregoing analysis, it is possible to affirm that the Junction Area regime, on the one hand, combines different elements typical of the EEZ regime and of straits used for international navigation; on the other, this regime is characterised by some specific features. In particular, these three components can be traced in the following way. First, the interplay between the exploitation of maritime resources and freedoms of navigation is regulated by adopting the EEZ regime. Second, the prescriptive jurisdiction is defined by applying a modified version of straits regime: indeed, unlike states bordering straits, Croatia cannot

<sup>96</sup> As for this lack of clarity, cf. D. R. Rothwell, T. Stephens, *cit.*, 243; R. Lapidoth, *cit.*, 621.

<sup>97</sup> In this sense, cf. B.B. Jia, *The Regime of Straits in International Law*, New York, 1998, 154; D. R. Rothwell, T. Stephens, *cit.*, 243.

enact laws and regulations in relation to the loading and unloading of commodities, currencies and persons in the Area established by the Tribunal. Third, according to a restrictive and literal interpretation of the Award, Croatia's enforcement jurisdiction must be completely excluded in this zone; and this certainly represents quite a *unicum* within the international law of the sea.<sup>98</sup> In conclusion, the Junction Area is characterised by a *sui generis* nature the main element of which is the EEZ regime: indeed, the criterion defining the extent of the freedoms of navigation in the Area is represented by «high seas freedoms exercisable in an exclusive economic zone» (para. 1128).

As regards the specific nature of the freedoms of communication, as described by the Award, they seem to become more and more wide, and consequently they imply increasing restrictions on Croatia's sovereignty. The analysis of paragraphs 1123-1128 of the Award shows that some elements of these freedoms, namely the freedoms of navigation, overflight and laying of submarine cables and pipelines (para. 1123), and their non-suspendability, are reasonably necessary to assure their substance and effectiveness. Moreover, the Tribunal is able to fairly weigh the competing interests at stake when it specifies that the freedoms of communication do not entail the freedom to exploit, conserve and manage biological and mineral resources, the right to establish and use artificial islands and installations, the right to carry out marine scientific research, and the right to take measures for the protection or preservation of the marine environment (para. 1126). Thereafter, when the Tribunal does not impose the innocence nature of the passage and the submarines' duty to navigate on the surface, the balance starts to weigh in favour of Slovenian position: indeed, while these two aspects make the exercise of the freedoms of communication easier and more feasible, their non-provision would not have compromised their essence; on the contrary, it would have been more respectful of Croatia's sovereignty in its territorial waters. The balance of interests at stake ends up being definitely resolved in favour of Slovenia when the freedoms of communication are compared to the «high sea freedoms exercisable in an EEZ» (para. 1127-8); and consequently, the EEZ regime becomes the main element characterising this *sui generis* Junction Area.

Insofar as this Area is, to a large extent, assimilated to an EEZ, its regime must be defined by applying the UNCLOS provisions regulating this zone. This mechanism implies that the Junction Area is characterised by a discipline which aims at assuring the freedoms of navigation and consequently, entails some meaningful limitations on the sovereignty of coastal state. The point is that this kind of regime is "artificially" transposed by the Tribunal in an area placed within 12 nautical miles from Croatia's costs and which, from a natural point of view, is part of its territorial sea. The necessity to assure Slovenia's access to and

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<sup>98</sup> As recalled by the Arbitral Tribunal, a similar regime can be found in the Treaty on the Redemption of the Sound Dues between Denmark and Sweden, signed at Copenhagen on 14 March 1857; according to Article 1 of the Treaty: «Aucun navire quelconque ne pourra désormais, sous quelque prétexte que ce soit, être assujetti, au passage du Sund ou des Belt, à une détention ou entrave quelconque». As regards the Danish strait see, among others, B.B. Jia, *cit.*, 115 ff.; M. Fornari, *cit.*, 292 ff.

from the high seas leads the Tribunal to apply in the Junction Area the regime of a zone, such as the EEZ, which was created to balance the economical exploitation of maritime resources and freedoms of high seas; instead, the Tribunal excludes to adopt the transit passage regime, which was created to assure «an international highway» between two different maritime areas. As already recalled, the Junction Area and transit passage in international straits share a similar rationale: they aim at assuring the freedoms of navigation in a narrow body of the sea and guaranteeing the sovereignty of states bordering the sea area in question. At the same time, the transit passage and the Area created by the Arbitral Tribunal are characterised by some differences; they mainly concern three aspects: the prescriptive jurisdiction, the enforcement jurisdiction, and the freedoms of navigation/freedoms of communication.

As for international straits, bordering states can exercise their prescriptive jurisdiction in relation to some areas (fishing activities; navigation security; loading and unloading of commodities, currencies and persons; and environmental protection) by implementing generally accepted standards, and not by applying more restrictive regulations in a unilateral manner; their enforcement actions are excluded with the great exception of violations causing or threatening a major damage to marine environment. As for the Junction Area, the prescriptive jurisdiction is similar to that recognised to states bordering international straits, although with exceptions in some meaningful areas, such as loading and unloading of commodities, currencies and persons; and the enforcement jurisdiction is completely excluded.

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With regard to the freedoms of navigation through straits and freedoms of communication in the Junction Area, they share their non-suspendable nature; indeed, freedoms of navigation are guaranteed by securing a transit which cannot be suspended nor impaired; similarly, the freedoms of communication cannot be suspended «under any circumstances» and cannot be subject to «any controls or requirements». Besides this significant similarity, their main difference lies in the content characterising these freedoms: the transit through straits must be «continuous and expeditious». Instead, the freedoms of communication «are exercisable as if they were high seas freedoms exercisable in an exclusive economic zone».

This focus on the differences between the regime of international straits and the Junction Area, and in particular on the different extent of freedoms of navigation and freedoms of communication, allows to grasp the contradiction affecting these latter institute. As underlined above, freedoms of communication are assured «for the purposes of uninterrupted and uninterruptible access to and from Slovenia», and seems to be characterised by a strong functional vocation. Nevertheless, since the high seas freedoms exercisable in an EEZ become the parameter to define the extent of freedoms in the Junction Area, this Area misses the original aim underlying its creation. The military activities are paradigmatic in this regard. As the analysis showed, the content of freedoms of navigation characterising the EEZ is much wider than freedoms of communication, and

goes significantly beyond what would be strictly necessary to assure an «uninterrupted and uninterruptible access to and from Slovenia».

More generally, the analysis made on military activities and on protection of marine environment proves that a fair balance between the interests at stake in the Junction Area can only be reached by applying some good faith and reasonable criteria which, however, risk to lead towards a too stretched and questionable interpretation. Instead, in the light of the same rationale characterising the transit passage and the Junction Area, the application of international straits regime, along with some corrective elements, would have made it possible to find a fairer balance of the competing interests involved. On the one hand, it would have created an “international highway” joining Slovenia with the high seas; at the same time, the continuity and expeditiousness of the transit would have allowed the only passages strictly functional to the exercise of the freedoms of communication, without widening it beyond what is necessary. On the other hand, transit passage regime would have prevented Croatia from limiting communications beyond what is necessary to assure the navigation security and protection of environment.

In spite of these shortcomings, it cannot be denied the pioneering character of the Award adopted in the case *Croatia v. Slovenia*. The creation of a Junction Area between Slovenia’s territorial sea and the high seas represents a crucial innovation within the regime of states, such as geographically disadvantaged states, having a limited access to the high seas, and it might have some meaningful consequences in their future discipline. The establishment of the Junction Area is based upon the recognition that the right of access to and from the sea can be qualified as a “vital interest” of a state. This interest is so vital that its implementation legitimates some meaningful restrictions on the sovereignty and jurisdiction of its neighbouring state(s). As underlined above, the reasoning of the Tribunal confirms that the access to the sea has not acquired (yet) the status of a principle of customary law, and in this regard, it does not innovate the status of land-locked and geographically disadvantaged states under international law of the sea. Yet, the crucial importance recognised to the access to the high seas – along with the consequent restrictions placed on Croatia’s sovereignty – constitutes an important precedent and might be recalled in the future by land-locked and geographically disadvantaged states to strengthen their claims.