Denver Journal of International Law & Policy

Volume 31
Number 1 *Fall*

Article 10

January 2002

Compulsory Inter-State Arbitration of Territorial Disputes

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Keywords

Arbitration, Comparative Law

COMPULSORY INTER-STATE ARBITRATION OF TERRITORIAL DISPUTES

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Just or unjust, the decision of the arbiters will save the credit, the honour, of the contending party. – Jeremy Bentham[1]

I. INTRODUCTION

On June 25, 1991, Slovenia and Croatia declared their independence from Yugoslavia. The two former republics were welcomed as independent states by the international community on January 15, 1992, when the European Community (EC) extended its official recognition.[2] The two richest and most developed former republics followed markedly different paths during the decade following their independence. Slovenia's steady investment in transportation and information infrastructure, modernization of its economy, and rebuilding of its civil society earned it praise as "poster child"[3] of post-Communist development. On the other hand, Croatia, led by President Franjo Tudjman, was economically stagnant and diplomatically isolated following a bloody civil war and its involvement in the Bosnian conflict.

The two neighboring states professed their friendship and closeness during the 1990s, but the regional war and the international ostracism resulting from Croatian government policies had the effect of freezing all negotiations between the two states regarding the final demarcation of their boundary. This diplomatic stalemate resulted in frequent, and sometimes violent, skirmishes between Slovenian fishing boats and the Croatian Navy in the Bay of Piran.

President Tudjman's death in December 1999,[4] was followed by a resounding defeat of his party in the subsequent parliamentary elections. The new coalition government was welcomed with renewed enthusiasm both by the people of Croatia

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1. JEREMY BENTHAM, *A Plan for Universal and Perpetual Peace*, in PRINCIPLES OF INTERNATIONAL LAW (Bowring ed. 1843), *available at* http://www.la.utexas.edu/research/poltheory/bentham/pil/index.html#n01ret (last visited Feb. 5, 2003).

2. Maurizio Ragazzi, *Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising From the Dissolution of Yugoslavia*, 31 I.L.M. 1488, 1490 (1992).

3. According to the U.S. President Bill Clinton. *Going Nordic*, THE ECONOMIST, Jul. 29, 1999.

4. *See, e.g.*, Steven Erlanger, *Snubbed by the West, Tudjman Receives a Posthumous Rebuke*, N.Y. TIMES, Dec. 14, 1999, at A5.

and by the international community.[5] In addition to dealing with a depressed economy and a corrupt civil service, the new government led by President Mesic and Prime Minister Racan immediately sought to re-establish Croatia's ties to Western Europe,[6] and, closer to home, to resolve the outstanding boundary questions with Slovenia, most notably the maritime delimitation of the Bay of Piran (the Bay).[7]

The Bay is located on the extreme northern end of the Adriatic Sea. As the map in the Appendix indicates, the adjacent coasts of the Bay belong to Croatia on the south, and Slovenia on the north. The Bay's small size (it is less than 10 km wide at its mouth) does not reflect its importance in maritime delimitation of the wider geographical area known as the Gulf of Trieste. The peculiar geographic features of the Gulf of Trieste, bounded by Italy, Slovenia, and Croatia, create an unusual triangular problem of maritime delimitation. A straightforward application of the equidistance principle[8] results in enclavement of the Slovenian territorial sea between the territorial waters of Italy and Croatia, leaving Slovenia with no extended economic zone and, more importantly, no direct access to the high seas.

While international law provides for freedom of peaceful navigation and access to the high seas,[9] the government of Slovenia has insisted on a delimitation that would result in its territorial waters directly opening to the high seas. As a small, but commercially active, state,[10] Slovenia views sovereign control over the access to the high seas as both an economic and military necessity. Given the geography of the Gulf of Trieste, the only way to achieve the result desired by Slovenia without disturbing the "external" frontiers of the former Yugoslavia and Italy, is to delimit the Bay so that about twenty percent of its area remains Croatian territorial sea, and the rest of it falls under Slovenian territorial sovereignty. This delimitation would give Slovenia an aperture to the high seas about five kilometers wide.

Recently, the two governments were involved in close consultations on various levels, political and legal, trying to resolve the problem of maritime delimitation. Finally, on July 20, 2001, the prime ministers of the two countries

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5. *See, e.g.*, Steven Erlanger, *Pro-Western Opposition Defeats Croatia's Ruling Nationalists*, N.Y. TIMES, Jan. 5, 2000, at A4.

6. Vinka Drezga, *Pregovori s Unijom do počcetka ljeta? [Negotiations With the Union by This Summer?]*, VJESNIK (Zagreb, Croatia), Mar. 29, 2000, at 1.

7. Saša Vidmajer, *Več Kot le Sosedstvo [More Than Mere Neighbors]*, DELO (Ljubljana, Slovenia), Mar. 21, 2000, at 1; *Mesič: Svi se problemi sa Slovenijom mogu riješiti u obostranom nteresu [Mesic: All Problems With Slovenia Can be Solved To Mutual Satisfaction]*, VJESNIK, Mar. 21, 2000, at 1; *Edgy Start: Croatia's Cautious New Government*, THE ECONOMIST, Apr. 8, 2000.

8. United Nations Convention On The Law Of The Sea, Dec. 10 1982, art. 15, U.N. Doc A/CONF.62/122 [hereinafter UNCLOS].

9. UNCLOS, *supra* note 8, art. 17, protects the right of innocent passage.

10. Slovenia's 2 million inhabitants occupy an area of about 20,000 km^2. *The CIA World Factbook—Slovenia, at* http://www.cia.gov/publications/factbook/goes/si.html (last visited Jan. 28, 2002).

initialed a draft agreement that satisfied Slovenian desires, as described above.[11] While the Parliament of Slovenia immediately ratified the agreement, the Croatian Parliament refused to give its approval, citing abuse of power by the Prime Minister in ceding territory without the constitutionally required procedures. The Croatian government, frustrated with the process, called on the two states to submit to binding third-party arbitration to finally settle the dispute.

Slovenia has, so far, refused the offer to arbitrate, hoping that international pressure on Croatia will lead to its ratification of the agreement. In this paper, the author argues that Slovenia and Croatia, and indeed all states, should accept international arbitration as an effective method for resolving boundary delimitation disputes. The Charter of the United Nations requires that states settle their disputes by peaceful means.[12] The Charter, however, does not place an affirmative duty on states to actually settle their disputes. Keeping in mind the stated goal of the United Nations (UN) to "save succeeding generations from the scourge of war,"[13] and realizing that unresolved territorial disputes tend to lead to armed conflicts, the UN should take affirmative steps to craft an international dispute resolution infrastructure for settling territorial disputes before they threaten international peace and security.

International arbitration has been a successful method for solving territorial disputes for centuries. In Part II of this paper, the author gives an historical overview of arbitral practice, especially as it relates to boundary disputes. In Part III, following a survey of territorial disputes since the Second World War, the author analyzes the aspects of international arbitration that continue to make it a preferred method of territorial dispute resolution, and proposes a multilateral agreement under the auspices of the UN, under which states-parties would agree to compulsory arbitration of their territorial disputes. Finally, the proposed dispute resolution mechanism is put to the test in Part IV where the author applies it to the problem of the delimitation of the Bay.

II. ARBITRATING TERRITORIAL DISPUTES – A HISTORICAL NOTE

The practice of arbitration significantly predates judicial settlement in international relations, as opposed to municipal law. According to Greek mythology, the dispute over possession of the Corinthian territory between Poseidon, god of the sea, and Helios, the sun-god, was settled by Briareus, the hundred-handed giant acting as an impartial arbitrator.[14] With such a distinguished pedigree, international arbitration was relied upon by states for settling their territorial disputes for centuries. Third-party settlement through arbitration is

11. Mihailo Ničota, *Slovenija prvi put dobiva izlaz na otvoreno more [Slovenia Gains Access to the Open Seas For the First Time]*, VJESNIK, July 21, 2001, at 1; Peter Žerjavič, *Racan in Morje [Racan and the Sea]*, DELO, July 20, 2001, at 6.

12. U.N. CHARTER art. 2, para 3.

13. U.N. CHARTER pmbl.

14. JACKSON H. RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO 153 (1929).

particularly well suited to territorial disputes because the disputants usually have a high incentive to achieve a timely settlement. Certainty and stability of international frontiers is essential for economic development and exploitation of natural resources, and an authoritative decision-making arbitral panel tends to imprint legitimacy on a solution that might otherwise be difficult to achieve in light of domestic political pressures.[15]

While territorial disputes tend to be framed in highly emotional terms, the disputants typically agree on the applicable law, e.g., the colonial principle of *uti possidetis*[16] or the application of the equidistance principle[17] to maritime delimitation. An arbitral tribunal is an excellent medium for taking into account extensive factual evidence, which usually spans centuries, such as maps, treaties, and other ancient documents. Where the states have a different view of the applicable law, as in the dispute between Senegal and Guinea-Bissau, the arbitral tribunal can play only a limited role.[18] On the other hand, several cases involving territorial delimitation in similar circumstances were successfully resolved by arbitration because the disputants were in agreement on the applicability of the *uti possidetis* principle, leaving to the arbitral tribunal the technical task of applying that legal principle to the particular factual context of each dispute.[19] Finally, arbitration by its very nature tends to produce delimitation solutions whereby both sides can feel that they achieved at least some of what they desired, making arbitral solutions an effective way of dealing with domestic political opinion.[20]

A. Early Origins of Inter State Arbitration

Inter-state arbitration was used as a tool for settling territorial disputes since the earliest manifestations of statehood and inter-state relations. The treaty between Sparta and Argos, dating to the fifth century B.C., provided:

> If there should arise a difference between any of the towns of the Peloponesus or beyond, either as to frontiers or any other object, there shall be an arbitration. If among the allied towns they are not able to come to an agreement, the dispute will be brought before a neutral town chosen by common agreement.[21]

The Middle Ages saw the organization of units of governance and territory that may be recognizable as modern states. The disputes that inevitably arose

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15. Christine Gray and Benedict Kingsbury, *Developments in Dispute Settlement: Inter-state Arbitration Since 1945*, 63 BRIT. Y.B. INT'L L. 97, 108 (1992).

16. See *infra* note 149.

17. UNCLOS, *supra* note 8, at art. 15.

18. *See, e.g.*, Arbitration Tribunal for the Determination of the Maritime Boundary between Guinea-Bissau and Senegal (Guinea-Bissau v. Senegal), 1989 I.C.J.126 (July 31, 1989), where Guinea-Bissau denied the applicability of the *uti possidetis* principle to a colonial delimitation in treaty in question.

19. Gray & Kingsbury, *supra* note 15, at 117.

20. *Id.* at 108.

21. RALSTON, *supra* note 14, at 157 (quoting Thucydides).

among them were most often settled by way of Papal arbitration.[22] This arbitral method was heavily influenced by the historical context of the Papacy, which, invested with both divine and sovereign power, often acted without regard for law or justice, having its own interests foremost in mind. Perhaps it is precisely because the Papal arbitration was more likely to be concerned with attaining and maintaining order that the earthly princes of Mediaeval Europe often availed themselves of the dispute resolution mechanism run by the Papacy.[23] One of the more telling illustrations of the power and flexibility of Papal arbitrations is the award by Pope Alexander VI[24] who settled disputed claims in the New World between Spain and Portugal by drawing an imaginary line from one pole to the other, dividing the territory in half.[25]

The 1794 General Treaty of Friendship, Commerce and Navigation between the United States and the United Kingdom (commonly known as the Jay Treaty after John Jay, the U.S. Secretary of State who negotiated it) formalized, perhaps for the first time, arbitration as an accepted method for settling complex disputes among states.[26] One of the issues settled by arbitration under the Jay Treaty was the boundary line between the remaining British possessions and the United States, specifically the exact position and course of the St. Croix River. It is interesting to note that the award was agreed upon by a mixed commission of arbitrators appointed by the states, who then together appointed one neutral commissioner.

The 1814 Treaty of Ghent, ending the War of 1812 between the United States and the United Kingdom, provided that four outstanding territorial questions between the states would be resolved by four separate arbitral panels.[27] The procedural wrinkles in the Treaty of Ghent were slightly different from the Jay Treaty, giving power to settle the matter to a disinterested sovereign in the event the mixed commissions appointed by the parties failed to reach an agreement.[28] This recourse to a more old-fashioned arbitral practice, relying on the authority and putative wisdom of a sovereign, did not prove successful. The question of the northeastern boundary could not be resolved by the commissioners and was referred to the King of the Netherlands for his decision. The United States rejected the King's recommendatory decision that did not follow the terms of the *compromis*, and the parties ended up settling the issue through negotiations and the subsequent Webster-Ashburton Treaty of 1842.[29] This early example, later

22. RALSTON, *supra* note 14, at 174.

23. The Papacy offered "the singular spectacle of conciliation and peace advancing between populations of the most warlike character." RALSTON, *supra* note 14, at 176.

24. Pope Alexander VI, infamous for the deeds of his children, Cesare and Lucrezia Borgia, ascended to the Papacy in 1492. He was the first Pope to send missionaries to the New World. *Catholic Encyclopedia: Pope Alexander VI*, http://www.newadvent.org/cathen/01289a.htm (last visited Jan. 23, 2002).

25. RALSTON, *supra* note 14, at 181.

26. J. L. SIMPSON & HAZEL FOX, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 1 (1959); RALSTON, *supra* note 14, at 191.

27. SIMPSON & FOX, *supra* note 26, at 2; RALSTON, *supra* note 14, at 194.

28. SIMPSON & FOX, *supra* note 26, at 2.

29. *Id.*; RALSTON, *supra* note 14, at 194.

confirmed by modern practice, shows that the success of an arbitral panel largely depends on the ability of the party-appointed arbitrators to reach an agreement without recourse to the neutral member of the panel. Territorial disputes, by their very nature, allow the arbitrators to "temper justice with diplomacy, to give a measure of satisfaction to both sides."[30]

The remainder of the relatively peaceful 19th Century witnessed scores of inter-state arbitrations dealing with state responsibility,[31] injury to aliens, and frequent territorial disputes.[32] Disputes over boundaries were not always referred to mixed expert commissions. States continued to rely on august sovereigns, as in the Bulama Island case[33] and the San Juan de Fuca arbitration.[34] The use of mixed commissions or collegiate courts, however, prevailed towards the end of the century, perhaps because the European sovereigns realized that arbitral decisions should no longer be their personal responsibility. The President of France, for example, having been given broad power by the disputants to resolve the Delagoa Bay issue between Portugal and the United Kingdom, created a commission of respected jurists and signed the award that it produced.[35]

The turn into the 20th Century was marked by two seminal international gatherings at the Hague in 1899 and 1907, both dealing with the issue of peaceful settlement of disputes.[36] The conferences resulted in two Conventions for the Pacific Settlement of International Disputes, which devoted extensive treatment[37] to the arbitral process including the creation of the Permanent Court of Arbitration (PCA), which was supposed to provide the infrastructure for the peaceful world imagined by the conference participants.

After a promising beginning during which several complex cases were referred to the PCA and settled,[38] the institution suffered a steady and well-documented decline into disuse.[39] Interest in arbitrating territorial disputes,

30. SIMPSON & FOX, *supra* note 26, at 3.

31. *See, e.g.*, PETER SEIDEL, *The Alabama*, *in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 97-99 (1992), for a discussion on the Alabama Claim between the United States and the United Kingdom.

32. It has been suggested that frequent recourse to arbitration might have contributed to the relative calm during the 19th Century. *See* Louis B. Sohn, *The Function of International Arbitration Today*, *in* 1963 RECUEIL DES COURS 1, 10 (1963) [hereinafter *International Arbitration Today*].

33. SIMPSON & FOX, *supra* note 26, at 7.

34. *Id.* at 9.

35. *Id.* at 10-11.

36. Each of the two Hague documents is known as the Convention for the Pacific Settlement of International Disputes. For text of the First Hague Convention of July 29, 1899, *see* MAJOR PEACE TREATIES OF MODERN HISTORY 1115 (Fred L. Israel ed., 1967). The Second Hague Convention of October 18, 1907 is available at page 1197 of the same volume.

37. 54 articles out of the 97 comprising the Convention are devoted to arbitration. *See* The Avalon Project – Laws of War, Pacific Settlement of International Disputes, *available at* http://www.yale.edu/lawweb/avalon/lawofwar/pacific.htm (last visited Nov. 11, 2002).

38. The Pious Fund Case (1902), 9 R.I.A.A. 14; Venezuelan Preferential Case (1904), 9 R.I.A.A. 107; Japanese House Tax Case (1905), 11 R.I.A.A. 51.

39. *See, e.g.*, William E. Butler, *The Permanent Court of Arbitration*, *in* INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY 43 (Mark W. Janis ed., 1992).

however, remained strong, both by reference to royal settlement as well as mixed commissions.[40] Such commissions were at times granted permanent existence and jurisdiction over disputes covering specific geographic areas, such as the U.S.-Mexico Boundary Commission.[41]

B. Modern Inter-State Arbitration

The UN Charter expressly provided a place for arbitration among the acceptable methods of peaceful settlement following the Second World War.[42] The total number of inter-state arbitrations, however, declined dramatically compared to the years before the war. A comprehensive survey of inter-state arbitrations since 1900 indicates that 178 disputes were heard before 1945, followed by less than fifty since then.[43] This apparent disfavor of arbitration is confirmed by the caseload of the PCA, which saw only a handful of cases referred to it in the latter part of the 20th Century, following the early flurry of arbitrations in the years leading up to the Second World War.[44]

This minimization of the role of arbitration is particularly telling given the significant increase in the number of states since the war, as well as the "astoundingly high" number of arbitration clauses inserted into bilateral and multilateral treaties.[45] Furthermore, arbitration remains popular in international commercial relations.[46]

The bleak view of inter-state arbitration as a whole, however, does not reflect its continued role in settling territorial disputes. The number of boundary delimitation cases referred to arbitration, as a percentage of all arbitrated disputes, remains steady, accounting for about a quarter of all arbitrations.[47] This phenomenon reflects the fact that territorial sovereignty disputes occur most frequently when new states are emerging, as during the post-Colonial struggles of the early post-War period, and the current territorial issues arising out of the

40. EVAN LUARD, *Frontier Disputes in Modern International Relations, in* THE INTERNATIONAL REGULATION OF FRONTIER DISPUTES 7, 26 (1970).

41. The Chamizal Case (1911), 11 R.I.A.A. 316.

42. The Charter lists negotiation, enquiry, mediation, conciliation, arbitration, and judicial settlement. U.N. CHARTER art. 33, para. 1.

43. Gray & Kingsbury, *supra* note 15, at 98; A. M. STUYT, SURVEY OF INTERNATIONAL ARBITRATIONS 1794-1989 (1990).

44. "Of the twenty-five cases considered by [the PCA . . .], twenty-one were disposed of within its first three decades (1902-1932), one in 1935, and others successively in 1940, 1956, and the last in 1970." Butler, *supra* note 39, at 43-44.

45. *See* Gray & Kingsbury *supra* note 15, at 99. About two hundred bilateral dispute resolution treaties are listed in UN Secretariat, *Systematic Survey of Treaties for the Pacific Settlement of International Disputes*, 1928-1948, U.N. Sales No. 1949.v.3. (1949). *See also* H. SMIT & V. PECHOTA, INTERNATIONAL ARBITRATION TREATIES (1998).

46. *See, e.g.*, Butler, *supra* note 39, at 44; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 [hereinafter The New York Convention]; United Nations: U.N. Commission On International Trade Law Decision On Arbitration Rules And The Text Of The Rules, 15 I.L.M. 701 (1976).

47. Gray & Kingsbury, *supra* note 15, at 108.

breakdown of the communist states of Eastern Europe.[48]

One of the first and most notable territorial disputes settled by arbitration in the latter part of the 20th Century was the Western Boundary dispute between India and Pakistan, better known as the Rann of Kutch Arbitration.[49] The tribunal was asked to delimit the Rann, a marine feature particular to the area, characterized by varying degrees of salt-water flooding during the course of each year. India and Pakistan, which became independent states in 1947 under the provisions of the British Parliament's Indian Independence Act, abut either side of the Rann in the old British Dominion of Kutch, near the Arabian Sea. The dispute over the delimitation of the Rann led to armed hostilities in April, 1965, one of several transgressions of peace between the parties in the latter part of the century. The arbitration *compromis* of June 30, 1965, is notable not only for specifying a flexible and efficient procedure of settling the dispute, but also for containing within itself explicit cease-fire provisions ending the hostilities and recognizing the desires of the disputants to settle their differences amicably.[50] The tribunal's award, issued on February 19, 1968, was largely respected by India and Pakistan, notwithstanding their continued differences over territorial delimitation in Kashmir.

Relying on a somewhat more historic form, Chile and Argentina referred their territorial dispute to arbitration by Queen Elizabeth II in 1966,[51] and again in 1971 when she was asked to intervene in the recurring problem of the delimitation of the islands of the Beagle Channel.[52] Recent years saw the creation of a number of *ad hoc* tribunals tasked with resolving territorial disputes, most notably the maritime delimitation between Guinea and Guinea-Bissau in 1985,[53] the 1988 boundary award concerning the Taba area between Egypt and Israel,[54] the dispute over St. Pierre and Miquelon between Canada and France settled in 1992,[55] and most recently, the proceedings under the auspices of the PCA delimiting the maritime boundary between Yemen and Eritrea.[56]

48. LUARD, *supra* note 40, at 10.

49. The Indo-Pakistan Western Boundary Case Tribunal, 17 R.I.A.A. 1 (1968).

50. *Id.* at 7.

51. Hazel Fox, *Arbitration, in* THE INTERNATIONAL REGULATION OF FRONTIER DISPUTES 168, 172 (Evan Luard ed., 1970).

52. In the latter case, Her Britannic Majesty referred the dispute to arbitration by five former ICJ judges, headed by Judge Fitzmaurice. She ratified their unanimous decision in 1977 which was not accepted by the parties until 1984 under diplomatic mediation by the Vatican. *See* FRIEDRICH KRATOCHWIL ET AL., PEACE AND DISPUTED SOVEREIGNTY 75 (1985).

53. Guinea/Guinea-Bissau: Dispute Concerning Delimitation of the Maritime Boundary, Feb. 14, 1985, 25 I.L.M. 251.

54. Egypt-Israel Arbitration Tribunal: Award in Boundary Dispute Concerning the Taba Area, Sept. 29, 1988, 27 I.L.M. 1421.

55. Court of Arbitration for the Delimitation of Maritime Areas Between Canada and France: Decision in Case Concerning Delimitation of Maritime Areas, June 10, 1992, 31 I.L.M. 1145.

56. Eritrea–Yemen Arbitration (Maritime Delimitation), Dec. 17, 1999, 40 I.L.M. 983.

C. Arbitration and Judicial Settlement

It has been suggested that "no intellectually persuasive distinction can be made" between modern arbitration and judicial settlement.[57] Proponents of this position point to the relatively recent willingness of the International Court of Justice (ICJ) to temper the "ultra-positivist," strict and literal interpretation of international law for which it was widely criticized.[58] Any distinction between arbitration and adjudication, it is argued, is blurred by the ICJ's increased reliance on policy-based weighing and equity, along with the relaxation of ICJ Chambers procedures.[59]

Inter-state arbitration and adjudication by the ICJ share many similarities. On the surface, the procedure followed by the ICJ in the cases of joint notification closely resembles the arbitral procedure provided by the Hague Conventions.[60] In both instances, proceedings are initiated by a *compromis*, a treaty between the disputants that defines the subject of the dispute, lists relevant facts, and specifies other procedural details. Arbitral tribunals and the ICJ both enjoy the *compétence de la compétence*, i.e., the presumption that each body has jurisdiction to decide whether it is competent to hear the case presented to it by the *compromis* of the parties.[61] Both situations typically involve presentation of arguments in two phases – written pleadings and oral arguments.[62]

The composition of arbitral panels may closely resemble a Chamber of the ICJ. For example, the five-member panel arbitrating the Beagle Channel dispute between Argentina and Chile was composed entirely of the ICJ judges.[63] Furthermore, the principles of international law relied upon by the ICJ will necessarily be reflected in any arbitral decision.

The degree of similarity between arbitration and adjudication, however, should not mask several important distinctions that may make arbitration the preferred method for resolving most territorial disputes. Chief among those factors are secrecy, inability of third parties to intervene, and the flexibility with respect to the issues to be resolved, the applicable law, the composition of the panel, and other procedural aspects of an arbitral proceeding.

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57. Edward McWhinney, *The International Court as Constitutional Court and the Blurring of the Arbitral/Judicial Processes*, *in* THE FLAME REKINDLED: NEW HOPES FOR INTERNATIONAL ARBITRATION 81, 85 (Sam Muller & Wim Mijs eds., 1993); Professor Brownlie calls the distinction "formal." IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 705 (5th ed.,1998).

58. *See* McWhinney, *supra* note 57, at 85, especially referring to the South West Africa Case (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6 (Judgment of July 18).

59. The United States and Canada relied on the permissive, although inconclusive, language of Article 17(2) of the ICJ Rules to select the judges for the Chamber hearing the Gulf of Maine Case, *infra* note 91. *See, e.g.*, Shigeru Oda, *Further Thoughts on the Chambers Procedure of the International Court of Justice*, 82 AM. J. INT'L L. 556 (1988); Steven M. Schwebel, *Ad Hoc Chambers of the International Court of Justice*, 81 AM. J. INT'L L. 831 (1987).

60. *See* Second Hague Convention, *supra* note 36, at Part IV, Chapter III.

61. I.C.J. STATUTE, art. 36, para. 6; Second Hague Convention, *supra* note 36, at art. 73.

62. I.C.J. STATUTE, art. 43, para. 1; Second Hague Convention, *supra* note 36, at art. 63.

63. Beagle Channel Arbitration (Arg. v. Chile), Award of Apr. 18, 1977, 17 I.L.M. 634 (1978).

The Statute and the Rules of the ICJ do not allow for complete secrecy in its proceedings. To the contrary, the founding documents of the ICJ require that any *compromis* and all judgments must be made available to the public and circulated to all Members of the United Nations.[64] While it is possible, in principle, to arrange for private written pleadings and oral arguments, this discretion has not been exercised by the ICJ, and it is not likely that it will be in the future, save in extraordinary circumstances.[65] On the other hand, arbitral proceedings conducted confidentially allow the disputants to raise arguments free from fear that these may be cited against them by another state in a later proceeding. The concern about playing to domestic political pressures is also diminished if all proceedings are carried out in secrecy.[66]

The ICJ Statute expressly permits intervention by third states where the interests of the intervening state may be affected by the Court's decision.[67] This procedural aspect of the ICJ, while ensuring that the Court's proceedings are detailed and meticulous, may have the effect of further complicating and drawing out the dispute. For example, the boundary dispute between Cameroon and Nigeria was submitted to the ICJ in March, 1994 and the Court finally decided the case on October 10, 2002. The delay was caused, in no small part, by the intervention of Equatorial Guinea whose potential interests in the broader dispute between Nigeria and Cameroon are relatively minor.[68]

The key feature of arbitration that makes it suitable for resolving territorial disputes is its flexibility in choosing the panel of arbitrators. The freedom to select the arbitrators in territorial disputes is not a mere formality meant to give the parties confidence that the panel will act impartially. It allows states to constitute a panel that will have the requisite technical expertise, knowledge of the area in dispute, and appreciation of local culture and customs.[69] Since most territorial disputes are deeply rooted in local history and involve neighboring states, an arbitral panel that appreciates such local circumstances will be more likely to utilize the particular legal and cultural norms observed in the area in order to craft an imaginative solution that would not be evident to a panel comprised of jurists without such local knowledge.[70] Furthermore, the ICJ has been criticized for basing its judgments largely upon uncontested facts. In fact, the ICJ has used its power to empanel special fact-finding commissions only in the Corfu Channel Case,[71] and visits by judges to relevant sites are quite infrequent.[72]

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64. I.C.J. STATUTE art. 58, art. 40, para. 3; I.C.J. RULES arts. 42, 93.

65. Gray & Kingsbury, *supra* note 15, at 110.

66. *Id.* at 111.

67. I.C.J. STATUTE, art. 62.

68. *See* Land and Maritime Boundary Between Cameroon and Nigeria (Camer. v. Niger.; Eq. Guinea intervening). *See* http://www.icj-cij.org/icjwww/idocket/icn/icnjudgment/icn_ijudgment_20021010.PDF (last visited Oct. 10, 2002).

69. *See, e.g.*, Giorgio Bernini, *Cultural Neutrality: A Prerequisite to Arbitral Justice*, 10 MICH. J. INT'L L. 39 (1989).

70. For example, Judge Koo's culturally sensitive dissent in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thail.), 1962 I.C.J. 6, 75 (Judgment of June 15).

71. Corfu Channel Case (Merits) (U.K. v. Alb.), 1949 I.C.J. 4, 9 (Judgment of Apr. 9); *see also*

The ICJ has undoubtedly played a significant role in promoting international law and "civilized methods of settling disputes," but its contribution to attaining and maintaining peace are not notable.[73] The relative merits of numerous scholarly opinions of the jurisprudence of the ICJ are beyond the scope of this paper. Suffice it to say that arbitrating territorial disputes should be preferred over their reference to the ICJ precisely because the ICJ does, as it must, take into account its own standing and reputation whenever it issues a decision. Such concerns typically do not surround arbitral tribunals, since their life-span is, by definition, finite. Perhaps it is the whiff of permanent existence that made the PCA so under-utilized that it has been called "the sleeping beauty of the peace palace."[74]

III. INTER-STATE ARBITRATION: AN EFFECTIVE TOOL FOR PEACEFUL SETTLEMENT OF TERRITORIAL DISPUTES

A. Boundary Disputes as Threats to International Peace and Security

In 1907, Lord Curzon called boundaries "the razor's edge on which hang suspended the modern issues of war and peace, of life or death to nations."[75] The creation of new states during much of the 20th Century as a result of de-colonization and the fall of communism has only reiterated the importance of boundaries in international relations. The increased number of states resulted in a relatively large number of territorial disputes, many of which led to armed conflict. An empirical study of international relations between 1945 and 1974 found 66 disputes having a clear boundary component, of which 24 involved some military action.[76]

The most recent territorial disputes that directly threatened international peace and security were the dispute between Argentina and the United Kingdom over the Falkland Islands, the recent war between Eritrea and Ethiopia, and the continuing dispute over Kashmir between Pakistan and India. Far more frequently, however, territorial conflicts remain out of sight of the international community, in a state of low-level animosity that threatens to escalate into a full scale conflict. For example, the long-standing dispute between Japan and Russia involving the Habomai Islands continues to be the source of skirmishes,[77] as does the delimitation between the two Koreas,[78] the Aegean Sea delimitation between Turkey and Greece,[79] and the land and maritime boundary dispute between Nigeria

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I.C.J. STATUTE art. 50.

72. Gray & Kingsbury, *supra* note 15, at 117.

73. BROWNLIE, *supra* note 57, at 728.

74. SAM MULLER & WIM MIJS, *The Flame Rekindled, in* THE FLAME REKINDLED: NEW HOPES FOR INTERNATIONAL ARBITRATION 5, 6 (1993).

75. KRATOCHWIL ET AL., *supra* note 52, at 3.

76. *Id.* at 26.

77. BORDER AND TERRITORIAL DISPUTES 302 (Alan J. Day ed., 1982).

78. *Id.* at 320.

79. KRATOCHWIL ET AL., *supra* note 52, at 93-95.

and Cameroon, which was decided by the ICJ in October 2002.[80]

Studies show that territorial disputes that flare up into armed conflict tend to be of considerable duration, yet they produce relatively few casualties.[81] It is this smoldering feature that gives boundary disputes such potential for disturbing international peace. Another feature of boundary disputes is that the parties have conflicting as well as common interests, making a zero-sum solution impracticable.[82] Because the cliché is accurate that boundaries join as well as divide – they "mediate social relationships and exchanges"[83] – it is often the case that an armed resolution to a boundary problem does not end the dispute. A territorial settlement that is imposed or not fully embraced by both parties will inevitably resurface, perhaps in an even more violent form, as was the case with the dispute over the Shatt al-Arab waterway between Iran and Iraq. The two states reached an agreement regarding the delimitation in the area in 1975 only to see it abrogated by an Iraqi invasion in 1980.[84]

Territorial disputes, even when they are of a low intensity, continue to represent a significant threat to the international peace and security. The international community should strive to settle boundary disputes in their germinal stages, before they blossom into open hostilities. In order to achieve a stable settlement, the disputants should be encouraged to engage in a process whereby their entire relationship is reconstituted and the expectations of normal relations are established.[85]

B. Compulsory Arbitration of Territorial Disputes

The preceding section discusses the potential for boundary disputes erupting into conflicts that threaten international peace and security. This is particularly true of those conflicts that remain unresolved for a long time, allowing the factual, rational bases of settlement to give way to emotional posturing. The UN should engage itself more actively in the process of international dispute resolution by making recourse to arbitration a compulsory first step in dealing with any dispute involving territorial sovereignty or boundary delimitation.

Proposals for such a "third Hague Conference"[86] were made previously, often coming from Asian and African nations, which were largely unrepresented during the first two Hague meetings.[87] Yet the general tenor underlying such proposals is the creation of a universally acceptable mandatory dispute resolution mechanism that would be applicable to all states and all disputes. However, as Judge De

80. Land and Maritime Boundary Between Cameroon and Nigeria, *supra* note 68.

81. KRATOCHWIL ET AL., *supra* note 52, at 27.

82. *Id.* at 31.

83. *Id.*

84. BORDER AND TERRITORIAL DISPUTES, *supra* note 77, at 218.

85. KRATOCHWIL ET AL., *supra* note 52, at 31.

86. M.C.W. Pinto, *Structure, Process, Outcome: Thoughts on the 'Essence' of International Arbitration*, *in* 6 LEIDEN J. INT'L L. 241, 241 (1993).

87. *Id.*

Visscher noted, such universal proposals are doomed to failure because they ignore the "order of importance of the interests involved."[88] While arbitration is, in principle, suitable for resolving a wide range of inter-state disputes, defining the range of disputes that are well-suited to the process is essential if the arbitration is to be successful.[89]

Inter-state arbitration proved itself as an effective method for settling boundary disputes because its salient characteristics are well-suited to the very nature of territorial disputes: every case of delimitation is a *unicum*,[90] governed only by "a few basic legal principles"[91] of international law which must be weighed against "physical, mathematical, historical, political, economic or other facts."[92]

Therefore, the UN should formalize the requirement to arbitrate territorial disputes, either through a General Assembly Resolution, or through a widely-attended treaty-making conference. Such an effort would create a tangible requirement for states to submit their territorial disputes to arbitral decision, subject to review of procedural issues by the ICJ. Any compulsory international settlement procedure is vulnerable to criticism that it violates state sovereignty because it dispenses with the requirement of express consent of states.[93] The geopolitical reality, however, is that a dispute involving a state that is predisposed to belligerent posture will not be solved by peaceful means, no matter what form is adopted. For the vast majority of remaining disputes, the compulsory referral to arbitration hinges on a "sufficient moral community between the contracting parties, and, on the other hand, on the condition of general political relations between them."[94] As Professor Sohn has noted:

> Effective legal procedures for dispute settlement are especially important for small countries and for economically weak States. While larger and more powerful nations can apply extra-legal, political and economic pressures, it is safer for smaller and weaker ones to have the dispute directed into legal channels where the principle of equality before the law prevails.[95]

The Hague Convention for the Pacific Settlement of International Disputes of

88. Charles De Visscher, *Reflections on the Present prospects of International Adjudication*, 50 AM. J. INT'L L. 467, 468-69 (1956).

89. HELEN MAY CORY, COMPULSORY ARBITRATION OF INTERNATIONAL DISPUTES 105 (1932).

90. Guinea/Guinea-Bissau: Dispute Concerning Delimitation of Maritime Boundary, *supra* note 53, at 289-90.

91. Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can.v. U.S.), 1984 I.C.J 246, 290 (Judgment of Oct. 12).

92. Guinea/Guinea-Bissau: Dispute Concerning Delimitation of Maritime Boundary, *supra* note 53, at 289.

93. "Every recourse of states to international adjudication proceeds from their free will." De Visscher, *supra* note 88, at 467. "The authority to decide whether or not to submit a dispute to international arbitration is an incident of party autonomy and, in the case of inter-state disputes, of state sovereignty." Pinto, *supra* note 86, at 260.

94. De Visscher, *supra* note 88, at 469.

95. Louis B. Sohn, *The Role of Arbitration in Recent International Multilateral Treaties*, 23 VA. J. INT'L L. 171, 171-72 (1983) [hereinafter *The Role of Arbitration*].

1907 devoted fifty-four of its ninety-seven articles to a section entitled International Arbitration.[96] Besides creating the PCA, the treaty dealt with such procedural minutiae as whether the arbitral panel may ask questions of the agents and the counsel,[97] and the choice of language.[98] The compulsory nature of the mechanism proposed in this paper should only describe the "manner in which the decisions of states to have recourse to arbitration are taken,"[99] having due regard for the fact that flexibility is the chief advantage of arbitration over other methods of dispute resolution. Judge De Visscher stated the principle most succinctly:

> To plug up all the openings and to foresee every loophole, in a word, to enclose arbitration within a rigid framework, runs the risk of hindering its development. As the Netherlands Government observed, perfectionist aspirations threaten to end up by 'petrifying' the evolution of arbitral practice.[100]

The Model Rules on Arbitral Procedure,[101] promulgated by the International Law Commission in 1958, repeated this error by regulating every aspect of the arbitral procedure, from a comprehensive *compromis*, through the provisions regulating the composition of the panel, to the strict regulation of the sources of law available to the arbitrators. While the Model Rules are hailed as "the high watermark of legal scholarship"[102] and were supported by the United States and a few other Western European states, they were rejected by the majority of General Assembly Members because they took away the autonomy and flexibility of the parties in crafting a settlement mechanism that is suitable for them.[103] Naturally, the autonomy of the parties must be bounded by the intrinsic requirements of the process, viz. the "freedom to *negotiate agreement* on aspects of the process, not the freedom to introduce into it any element that serves its own interests or conforms to its special view of arbitration."[104]

It is beyond the scope of this proposal to suggest detailed provisions that may or must be included in any *compromis* of arbitration, or to apologize for a particular choice of procedural approaches.[105] Similarly, it would be futile to attempt to discuss all potential obstacles and problems surrounding inter-state arbitration as they have been thoroughly treated elsewhere.[106] The remainder of this paper discusses only some of the issues that should guide the UN in preparing the proposed territorial dispute arbitration document: selection of arbitrators, role

96. *See* Avalon Project, *supra* note 37.
97. Second Hague Convention, *supra* note 36, at art. 72.
98. *Id.* at art. 61.
99. CORY, *supra* note 89, at ix.
100. De Visscher, *supra* note 88, at 469-70.
101. International Law Commission, *Model Rules on Arbitral Procedure*, 2 Y.B. I.L.C. 12 (1958).
102. Pinto, *supra* note 86, at 252.
103. *Id.* at 253.
104. *Id.* at 261.
105. Extremely detailed arbitration proposals have been suggested, even ones which "could be immediately used in practice." Kenneth S. Carlston, *Codification of International Arbitral Procedure*, 47 AM. J. INT'L L., NO. 2, 203, 205 (1953).
106. STEVEN M. SCHWEBEL, INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS (1987); *International Arbitration Today*, *supra* note 32.

of equity, and enforcement and control.

1. Composition of the Panels

The right of states to choose their own arbitrators has been hailed as "a right which is of the very essence of arbitral justice."[107] Corresponding to the practice of appointing ad hoc judges in the ICJ,[108] it gives confidence to the disputants that the proceedings of the arbitral panel will not be unfair or prejudicial, and that the interests and concerns of a particular party will be vigorously represented before the panel.[109] This confidence is likely to translate into respect for the decision rendered by the panel, even if it is not completely favorable to a particular party.

The need for respecting the wishes of the parties in appointing their own arbitrators must be weighed against the requirement that the panel must not appear to be partial or incompetent.[110] As U.S. Supreme Court Justice Black noted, albeit in a municipal context, one should be "even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review."[111] Impartiality, however, must not be confused with neutrality. Neutrality refers to an objective determination of an arbitrator's conduct with respect to the parties during the proceedings, whereas partiality is a subjective relationship between the arbitrator and each individual party.[112] Therefore, an arbitrator can be impartial without being neutral, while no arbitrator can be considered neutral if he or she acts partially.[113] Arbitrators appointed by a party do not necessarily have to be citizens of that state. In the Rann of Kutch case, for example, India appointed a Constitutional Court Judge from Yugoslavia, whereas Pakistan was represented by an Iranian diplomat.[114] Furthermore, recent history of inter-state arbitrations indicates that party-appointed arbitrators have, on occasion, voted against the positions taken by their own state.[115]

While territorial disputes have been successfully settled by a single arbitrator, the preceding section makes it plain that states should prefer to empanel a tribunal consisting of an equal number of party-appointed arbitrators, along with one or more neutral members. The most successful and frequently followed method has been to allow the party-appointed arbitrators to select the neutral members, although this task could be delegated to an individual or an organization external to the dispute.

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107. Pinto, *supra* note 86, at 245, quoting Leon Bourgeois, the President of the Second Hague Conference [emphasis omitted].

108. I.C.J. STATUTE art. 31.

109. Gray & Kingsbury, *supra* note 15, at 111.

110. Henry P. de Vries, *Practical Aspects of International Litigation – Arbitration*, 64 AM. J. INT'L L., NO. 4, at 251 (1970).

111. Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 149 (1968).

112. Bernini, *supra* note 69, at 39.

113. *Id.*

114. Indo-Pakistan Western Boundary Case (Rann of Kutch), 17 R.I.A.A. 9 (1968).

115. *See, e.g.*, Spanish arbitrator's vote in the Lac Lanoux Case (1957), 12 R.I.A.A. 281.

The power of the disputants to appoint the arbitrators may turn into the "vice" of the process as it may paralyze or frustrate the establishment of the tribunal.[116] Previous dispute resolution proposals have spent much ink on detailed provisions that would ensure the cooperation of the parties in selecting the arbitrators.[117] Any modern dispute resolution agreement should reject such formalism because the proposed compulsory arbitration of territorial disputes must be founded on the *a priori* consent and belief of the parties that this particular class of disputes can, should, and must be resolved early, privately, and equitably. A process of international settlement has not been invented that would compel a party unwilling to resolve a dispute amicably to do so. Such a state may frustrate the process by declining to negotiate a *compromis*, delaying the appointment of its own arbitrator, refusing to agree on a neutral member, or by ignoring the award.

A state may, however, have a good-faith objection to the selection of an arbitrator. In light of the need for expediency and efficiency in settling territorial disputes, the parties should be given some time, e.g., six months, to agree on the arbitrators. Failing such an agreement, the proposed dispute resolution procedure should provide for an external appointment of one or more neutral panelists by a joint decision of the President of the ICJ and the Secretary General of the UN.

No special requirements should be placed on the qualifications of the arbitrators. The Hague Convention, for example, required arbitrators to be of "known competency in questions of international law," and of "highest moral reputation."[118] Others have suggested that arbitrators should be "jurists of repute."[119] Such requirements are hortatory at best, meaningless in practice, and at their worst may be too restrictive and inflexible, causing further frustration of the process. The parties should be given the complete freedom to agree on an arbitral panel subject to the appointing authority of the President of the ICJ and the Secretary General of the UN discussed above.

2. Role of Equity

The parties involved in a territorial dispute must be given broad latitude in crafting the arbitration *compromis* as it relates to the choice of law that the tribunal may rely upon. It would be perfectly acceptable, although not advisable in most cases, that the parties restrict the tribunal to reliance only on treaty provisions binding on both parties, or on established principles of international law. In most successful arbitrations, however, the parties gave the tribunal some degree of discretion to take into account principles of equity and justice.[120]

The subject of equity in international dispute settlement is rich, complex, and controversial both in jurisprudence and academy. The aim of this section is merely

116. SIMPSON & FOX, *supra* note 26, at 82.

117. *See id.* at 83 (providing an excellent overview).

118. Second Hague Convention, *supra* note 36, at art. 44.

119. Carlston, *supra* note 105, at 209.

120. *See* MASAHIRO MIYOSHI, CONSIDERATIONS OF EQUITY IN THE SETTLEMENT OF TERRITORIAL AND BOUNDARY DISPUTES (1993).

to raise the awareness of the issue of equity in resolving territorial disputes through arbitration. It is suggested that an arbitration panel given broad powers to decide equitably is only suited to decided non-legal, political disputes.[121] While a purely political dispute can be resolved only by recourse to an *amiable compositeur*,[122] or an umpire not bound by any legal considerations, the modern scholarly view holds that "equity is built into the legal system."[123] Especially in territorial disputes, equity should not be viewed as giving "a blank cheque to be filled in by judges."[124] On the contrary, a legal resolution of any boundary dispute must be informed by the particular context in which it arose.[125] As Judge Lachs noted:

> Equity aims at proper application of law in a particular case in order to avoid decisions that are a reflection of abstract principles detached from the circumstances that a tribunal may face.[126]

In the specific context of a delimitation dispute, the ICJ has noted that reliance of equity is not merely a matter of "abstract justice, but of applying a rule of law which itself requires the application of equitable principles."[127] This view was applied consistently in the modern practice of territorial delimitation where equity is considered to be "nothing more than the taking into account of complex historical and geographical circumstances the consideration of which does not diminish justice but, on the contrary, enriches it."[128] Equity can play such a role by "tempering the rigors of strict law," or by giving due regard to "considerations of fairness, reasonableness and good faith."[129]

In a recent arbitral delimitation of territory under the Dayton Peace Agreement,[130] the tribunal suggested the following non-exhaustive list of equitable principles that should inform a fair, just, and reasonable award in a territorial dispute:

> (1) the consideration of the factual context of the dispute – the unique political, economic, historical and geographical circumstances surrounding the dispute [. . .] and (2) a set of equitable doctrines associated with fairness, such as the doctrine of

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121. *International Arbitration Today*, *supra* note 32, at 24.

122. RALSTON, *supra* note 14, at 23.

123. Manfred Lachs, *Equity in Arbitration and in Judicial Settlement of Disputes*, *in* THE FLAME REKINDLED: NEW HOPES FOR INTERNATIONAL ARBITRATION 125, 127 (Sam Muller & Wim Mijs eds., 1993).

124. HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 317 (1973).

125. "It is needles to say that each territorial or boundary arbitration, like any other kind of arbitration, is sui generis with its own peculiarities of historical, political, economic, and cultural backgrounds and implications." MIYOSHI, *supra* note 120, at 99.

126. Lachs, *supra* note 123, at 127.

127. North Sea Continental Shelf (F.R.G./Den.), 1969 I.C.J. 3, 47 (Judgment of Feb. 20).

128. Case Concerning the Continental Shelf (Tunis./Libya), 1982 I.C.J. 18, 106. (Judgment of Feb. 24, Arechaga, J, Sep. Op.).

129. Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38, 613 (Judgment of June 14, J. Weeramantry, Sep. Op.).

130. *Bosnia and Herzegovina-Croatia-Yugoslavia: General Framework Agreement for Peace in Bosnia and Herzegovina*, 35 I. L. M. 75 (1996) [citations omitted].

> unclean hands, by which the inequitable conduct of one of the parties may be taken into account in the decision.[131]

Since most disputes over territory will not be suitable for a strict legal determination or for an award that completely ignores legal principles, arbitration *compromis* should give the tribunals broad flexibility to rely on equitable criteria in applying the legal principles that govern territorial delimitation. [132]

3. Enforcement and Control

It should be emphasized that this section deals with control and enforcement of awards concerning parties that were willing and active participants in the underlying arbitral process. Therefore, the focus is not on ensuring compliance or participation by an unwilling disputant, but, rather, maintenance of a fair and impartial process with the view of establishing an international dispute mechanism in which all states can have full confidence. Maintaining some control over the process is especially important where, as here, a compulsory framework is proposed. As Professor Reisman has noted, "[l]egal decision without control runs the danger of reducing predictability, and rational actors are unlikely to submit matters that are important to them to a voluntary dispute system that ranges from uncertain to capricious."[133]

The most basic, yet often overlooked, aspect of control is ensuring full domestic support for arbitration and its outcome, whatever it may be. This is particularly important in territorial disputes, which often involve emotional issues such as possible cession of territory to an erstwhile enemy, or the loss of control over historically significant areas. Furthermore, many states, under their municipal laws, require that any changes in boundaries be supported by super-majority votes in their parliaments.[134] To that end, states should seek ratification of the arbitration *compromis* by the same method as is required for modification of boundaries or cession of territory.

The essential feature of arbitration is that it produces an award that is final and binding.[135] Especially in the case of compulsory arbitration, however, this rule is subject to the condition that the award is within the parameters prescribed by the parties in the *compromis*, and that the tribunal followed procedure that was fundamentally fair. If either of the two conditions is not met, the disputants may consider the award a nullity and ignore the award.

The first requirement reflects the classical maxim, *arbiter nihil extra compromissum facere potest*, according to which an arbitrator must respect the

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131. *Award in the Republika Srpska v. The Federation of Bosnia and Herzegovina (Control over the Brcko Corridor)*, 36 I. L. M. 396, 427 (Feb. 14, 1997).

132. *See* MIYOSHI, *supra* note 120, at 103 (discussing the possible ramifications of the exact provision chosen).

133. W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION 7 (1992).

134. *See, e.g.*, CROAT. CONST. art. 8.

135. SIMPSON & FOX, *supra* note 26, at 250.

agreement of the parties as to the scope of the award.[136] This doctrine of *excès de pouvoir* was raised, for example, by the United States in the Northeastern Boundary Award by the King of the Netherlands who was given the power to choose between two delimitation lines proposed by the parties, yet he drew a boundary line of his own.[137]

The second defense by a "losing" party rests on the objections to the procedural aspects of the arbitral proceedings. Sometimes referred to as denial of justice, this doctrine specifies that an award is void if it resulted from a procedure that lacked the aspects of fundamental fairness "inherent in the judicial process, or which are generally recognized by civilized nations."[138] Procedural objections may be raised, for example, where the tribunal fails to observe the rule of *audi alteram partem*, i.e., fails to afford each party equal opportunity to be heard during all stages of the proceedings.[139] This objection strikes not only at the procedural fairness of the arbitration, but also at the capacity of the tribunal to render a fully informed judicial determination.[140] In order to avoid even an appearance of denial of justice, arbitral tribunals should, furthermore, be required to clearly state the reasons for the award.[141]

The doctrines of nullity give states some potential for abuse of the international arbitration process. A state unhappy with an award may unilaterally claim that the award reaches beyond the *compromis* or that it was procured unfairly. To ensure that such a state is not "simultaneously prosecutor, judge and jury *in sua causa*,"[142] claims of nullity must be referred to the ICJ for final determination. Professor Reisman draws a distinction between appeal and control, noting that appeal is concerned with a wide range of issues directly affecting the parties in questions, whereas control systems are meant to preserve the underlying process itself.[143] While the proposed reference of nullity disputes to the ICJ may be framed in the form of an appeal, the ICJ should be given only the power to determine whether the claims of nullity may be sustained, without performing any true appellate review of the substantive issues between the parties.

This "reviewing" function is not new to the ICJ, which has on numerous occasions dealt successfully with the issue of the obligation of states to submit to arbitration, as well as the determination of the validity or nullity of an award.[144] It has been noted that the ICJ "has been scrupulous in maintaining the sharp

136. REISMAN, *supra* note 133, at 6.

137. SIMPSON & FOX, *supra* note 26, at 250.

138. *Id.* at 252-3.

139. *Id.* at 253.

140. Eastern Carelia Case, 1923 P. C. I. J., SER. B., NO. 5, at 28-9.

141. It was not customary for heads of states to give reasons for their arbitral awards. Modern arbitrators, however, should be required to either signify their assent to the decision or to issue their own separate or dissenting views, as is the case with the ICJ. I.C.J. STATUTE art. 56.

142. REISMAN, *supra* note 133, at 6.

143. *Id.* at 8.

144. *See, e.g.*, Concerning the Arbitral Award made by the King of Spain on December 23, 1906 (Hond. v. Nicar.), 1960 I.C.J. 192 (Nov. 18); Concerning the Arbitral Award of July 31, 1989 (Guinea-Bissau v. Sen), 1991 I.C.J. 53 (Nov. 12).

distinction between its own functions in the concrete case brought before it, and those of the organ in question."[145] While it may be difficult to separate the question of validity of an award from the underlying substantive issues about which the ICJ must not trespass upon the province of the arbitral tribunal, the ICJ has shown, e.g., in the Ambatielos Case, that it is capable of the requisite finesse.[146]

As with any international judgment, the question of its enforcement is quickly raised, usually by those with little faith in the efficacy of international law. While the detailed treatment that this subject deserves is beyond the scope of this work, it should be noted that a functioning international community is predicated on some degree of self-policing. As Secretary-General Kofi Annan has recently noted, "[r]espect for international legal obligations is an indispensable core of the system we seek."[147] It is noteworthy that the very same sentiment was echoed in the beginning of the 20th Century by Professor Ralston, who wrote:

> The great interest of every state internationally is to stand well with its fellows, and any departure from a course of conduct sanctioned by mankind generally carries punishment of some sort. There is further much greater reason for observing an award than there is for paying obeisance to an abstract principle of law.[148]

IV. ARBITRAL SOLUTION OF MARITIME DELIMITATION BETWEEN CROATIA AND SLOVENIA

The maritime boundary between Croatia and Slovenia has a colorful history. After their secession from Yugoslavia in January, 1992, they established a land boundary that followed the internal, administrative boundaries of the former Yugoslavia, under the principle of *uti possidetis*, as required by the EC as a condition of its recognition of the new governments in Zagreb and Ljubljana.[149] The internal boundaries of the former Yugoslavia were established during the Second World War and immediately thereafter, largely following the boundaries between wartime partisan administrative units.[150]

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145. Shabtai Rosenne, *The International Court of Justice and International Arbitration, in* THE FLAME REKINDLED: NEW HOPES FOR INTERNATIONAL ARBITRATION 122 (Sam Muller & Wim Mijs eds., 1993).

146. *See* Ambatielos Case (Greece v. U.K.), 1953 I.C.J. 14 (July 1); *see also* SIMPSON & FOX, *supra* note 26, at 77.

147. Kofi Annan, *The Effectiveness of the International Rule of Law in Maintaining International Peace and Security*, in INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION: PAST, PRESENT AND FUTURE 158 (Int'l Bureau of the PCA ed., 2000).

148. RALSTON, *supra* note 14, at 108.

149. Under the *uti possidetis* approach, colonial demarcations are preserved where colonial entities emerge as new States. *See, e.g.*, Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, 565-7;Dec. 20); see *also Conference on Yugoslavia Arbitration Commission Opinion No 3*, 31 I. L. M. 1488, 1499 (Jan. 11, 1992) (Discussing the direct applicability of *uti possidetis* to Yugoslavia); BROWNLIE, *supra* note 57, at 133.

150. VLADIMIR DEDIJER, HISTORY OF YUGOSLAVIA (1974).

Unfortunately, this principle could not be applied to maritime delimitation as the dominion over the territorial seas before the break-up of Yugoslavia was reserved as a federal issue, hence the boundary between the former republics on the sea never existed. During the 1990s, Slovenia and Croatia put forth conflicting claims over the Bay, leading to occasional localized armed hostilities. The chief difficulty in delimiting the Bay is its peculiar position within the greater context of the Gulf of Trieste, and the inviolability of the previous "external" maritime boundary between Yugoslavia and Italy. This maritime boundary was established by the 1975 Treaty of Osimo, which finally settled the post-war dispute over the land and maritime areas in the Northern Adriatic.[151]

Following a decade of intermittent negotiations, the two governments reached an agreement about the delimitation of the Bay on July 20, 2001. As the map in the Appendix shows, the Croatian cabinet was willing not only to eschew the equidistance principle of maritime delimitation, but also to reclassify a corridor of Croatian territorial waters as open sea, creating a direct connection between Slovenian territory and the high seas. While this agreement was immediately accepted by Slovenia, it was met with harsh and widespread criticism in Croatia, by the opposition parties, legal and political scholars,[152] as well as the general public. The widely held view in Croatia is that the government gave away too much, giving up about 20 km^2 of its territory in exchange, as is believed, for Slovenia's concessions regarding several outstanding issues, as well as Slovenia's support for Croatia's own desires to more closely integrate itself with the West.

Furthermore, the opponents of the agreement claim that the government of Prime Minister Racan overstepped its authority by ceding territory without the constitutionally required parliamentary super-majority vote. The only solution, the opponents claim, is to submit the dispute to international arbitration where the strict application of the equidistance method, a legal phrase that has entered into the every-day Croatian lexicon, would divide the Bay in half, leaving Slovenian territorial waters without direct contact with the high seas. Slovenian politicians and pundits reject arbitration, claiming that Croatia should honor the agreement reached by the two governments. A frequently heard explanation in Slovenia is that the two states should strive to reach an agreement without external influence to show the international community they are mature participants in the community of nations and that they are capable of resolving their differences amicably. The undertone to the discussion, however, seems to be that Slovenia is not prepared to submit the dispute to binding arbitration for fear the award would not address its principal concern – access to the open seas.

Had there existed a UN-administered obligation to submit territorial disputes to arbitration ten years ago, it is likely that the dispute between Slovenia and Croatia would have been settled early and quietly, and that the delimitation reached by an arbitral tribunal would closely resemble that negotiated by the two

151. *See, e.g.*, DAY, *supra* note 77, 73-4; *25th Anniversary of the Osimo Agreements, available at* http://www.uvi.si/eng/new/background-information/osimo (last visited Jan. 28, 2002).

152. For the views of one Croatian legal scholar, *see, Law of the Sea & Maritime Law, at* http://www.lawofthesea.net/piranski_zaljev.htm (last visited Jan. 29, 2002).

Governments in July, 2001. In fact, having in mind the salient features of inter-state arbitration of boundary disputes discussed in this paper, Slovenia should consider acquiescing to the popular opposition in Croatia and submit the dispute to binding arbitration. It is likely that arbitration would result in an equitable result giving Slovenia sovereign access to the high seas. The alternative is to continue negotiations in an emotionally charged atmosphere, keeping in mind the volatility and unpredictability of the Croatian political landscape.

Slovenia and Croatia should negotiate a flexible arbitration *compromis* that would provide for secret proceedings before a tribunal that is empowered to delimit the maritime boundary between the two states in the Bay according to legal and equitable principles. Secrecy in these proceedings would be of the utmost importance, as Croatia must be given the flexibility to advance positions that may be prejudicial to its other outstanding maritime delimitation questions, viz. those with Montenegro and Bosnia and Herzegovina.[153]

The principal question before the tribunal would be whether there exist sufficient historical, geographical, economical, cultural, or political circumstances that would support Slovenia's contention that the Bay should not be delimited according to the principle of equidistance. A similar situation was presented to the arbitral tribunal in the Maritime Delimitation Case between Guinea and Guinea-Bissau where the tribunal pointed out that:

> [it] considers that the equidistance method is just one among many and that there is no obligation to use it or give it priority, even though it is recognized as having a certain intrinsic value because of its scientific character and the relative ease with which it can be applied.[154]

Another tribunal tasked with drawing a maritime boundary between French island possessions and Canada noted that while "geographical features are at the heart of the delimitation process," they "do not, in themselves, determine the line to be drawn."[155] Finally, the ICJ has also recognized that strict application of the equidistance principle "leads unquestionably to inequity" in a number of cases where the underlying geographical features are unusual.[156]

Both the Guinea/Guinea-Bissau and the France/Canada tribunals rejected blind applications of the equidistance principle where it would lead to a cut-off effect or enclavement.[157] In the case of the Bay, however, Croatia may distinguish the situation by pointing out that there is no internationally recognized right that a state's territorial sea should abut the high seas. Furthermore, it could be argued, Croatia must, as a party to the 1982 Convention on the Law of the Sea, respect the

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153. The Central Adriatic town of Neum belongs to Bosnia and Herzegovina. It is not inconceivable that Bosnia and Herzegovina might demand from Croatia a sovereign channel to the high seas if such a concession is made to Slovenia.

154. Guinea/Guinea-Bissau Maritime Delimitation, *supra* note 53, at 294.

155. Canada/France Maritime Delimitation, *supra* note 55, at 1160.

156. North Sea Continental Shelf (F.R.G./Den.; F.R.G./Neth.), 1969 I.C.J. 3, 49 (Feb. 20).

157. Guinea/Guinea-Bissau Maritime Delimitation, *supra* note 53, at 298; Canada/France Maritime Delimitation, *supra* note 55, at 1170.

right of Slovenian vessels to free navigation to the open seas.[158] The interest of Slovenia for a sovereign access to the high seas, however, has both a commercial[159] and a military component, the latter stemming from Slovenia's desire to join NATO. If the Bay were delimited according to the equidistance principle, the Government of Croatia would be in the position to control access to Slovenian ports by NATO's warships.[160]

Of the equities working in Croatia's favor, the strongest are its desire to maintain a territorial boundary with Italy and the historical fishing rights of Croatian fishermen in the Bay. The delimitation negotiated by the two governments (shown in the Appendix) contemplates a sliver of Croatian territorial sea between the territorial waters of Italy and the corridor of Croatian waters that would be internationalized. Maintaining direct contact with Italy is important due to the historical, cultural, and economic ties between the two Adriatic nations.[161] Following the break-up of Yugoslavia, Croatia's only boundary with Italy is in the Gulf of Trieste and Croatia is keen to keep it.

Furthermore, the rich waters of the Bay were fished for generations both by Slovenian and Croatian fishermen.[162] While Croatia has a long and beautiful coast,[163] the interests of the fishing communities on the Croatian side of the Bay must be taken into account locally. The proposed delimitation of the Bay, where only twenty percent of its area would remain Croatian, would be unpopular at best with the local population, and it may endanger the very survival of the traditional fishing culture in the area.

The settlement negotiated by the two governments appears, on its face, to be too one-sided, giving Slovenia everything that it asked for, and leaving Croatia virtually nothing in return, at least not in the area of the Bay.[164] A legal and equitable solution to the delimitation problem must, if possible, address the

158. UNCLOS, *supra* note 8, at Part II, sect. 3.

159. Slovenia's strategic position makes it an important transportation hub of Central Europe. The Port of Koper handles much of Austrian and Hungarian trade, and Ljubljana, the capital city, is located on the crossroads of two major motorways planned by the EU. *Going Nordic*, *supra* note 3.

160. Article 19(2) of the UNCLOS, *supra* note 8, lists situations in which the coast state has the right to deny passage through its territorial sea. Furthermore, a significant number of states require prior authorization for the passage of warships. BROWNLIE, *supra* note 57, at 194.

161. The Treaty of Osimo, besides setting the boundary in the Gulf of Trieste, contains detailed provisions regarding the treatment of ethnic minorities that were separated from their nations as a result of the delimitation.

162. *See Darja Mihelic, The Bay of Piran: Towards the Tradition of Fishing and Fishing Rights*, 14 ANNALS FOR ISTRIAN AND MEDITERRANEAN STUDIES 7 (1998), *at* http://www.zrs-kp.si/Zaloznistvo/annales/anali14/mihelic.htm#eng (last visited Jan. 28, 2002).

163. Croatia's mainland coastline stretches for almost 1,800 km. *See The CIA World Factbook*, *at* http://www.cia.gov/publications/factbook (last visited Jan. 28, 2002).

164. It has been speculated that Prime Minister Racan acquiesced to the Bay of Piran delimitation in exchange for a promise, or perhaps even a commitment, for Slovenian concessions regarding other open questions between the two states, such as the jointly-built nuclear power plant at Krsko and the status of the Croatian deposits in Slovenian banks. Marko Barisic, *Sto Dobiva Hrvatska u Zamjenu za Odricanje od Dijela Svoga Teritorija [What is Croatia Getting in Return for Ceding a Part of its Territory]*, VJESNIK, July 21, 2001, at 1.

interests of both sides. To that end, an arbitral tribunal in this case might delimit the Bay exactly as is shown in the Appendix, but on the condition that certain economic concessions are made. For example, the arbitral award may require Slovenia to respect the historical fishing rights of Croatian fishermen in the entire Bay. Furthermore, Slovenia would be required to give up any further economic claims with respect to the delimitation of the Gulf of Trieste, viz. it would not seek any further rights to the continental shelf, or establishment of special contiguous or exclusive economic zones in the Northern Adriatic.[165]

V. CONCLUSION

The UN Charter demands that states settle their disputes peacefully, but the UN has not been sufficiently active in encouraging states to take affirmative steps towards settling their differences. This passive approach is especially counterproductive in territorial delimitation disputes, which have a great potential to threaten the international peace and security if they are not identified and settled early.

The UN should consider convening a multilateral treaty-making conference with the goal of setting up a new regime of recourse to inter-state arbitration as a compulsory first step in resolving any outstanding territorial sovereignty or boundary delimitation dispute. The compulsory nature of the process would ensure that those states that are ready to settle their disputes peacefully would have an internationally sanctioned outlet to do so, along with a shield against domestic political forces that might prefer diplomatic or even hostile posturing over amicable settlement.

Disputants should retain broad flexibility in the selection of the arbitration panel and the choice of applicable law. The proposed dispute resolution mechanism should include the right to appeal to the ICJ for final and binding determination of all procedural aspects, such as the existence of the obligation to arbitrate and the validity of the award.

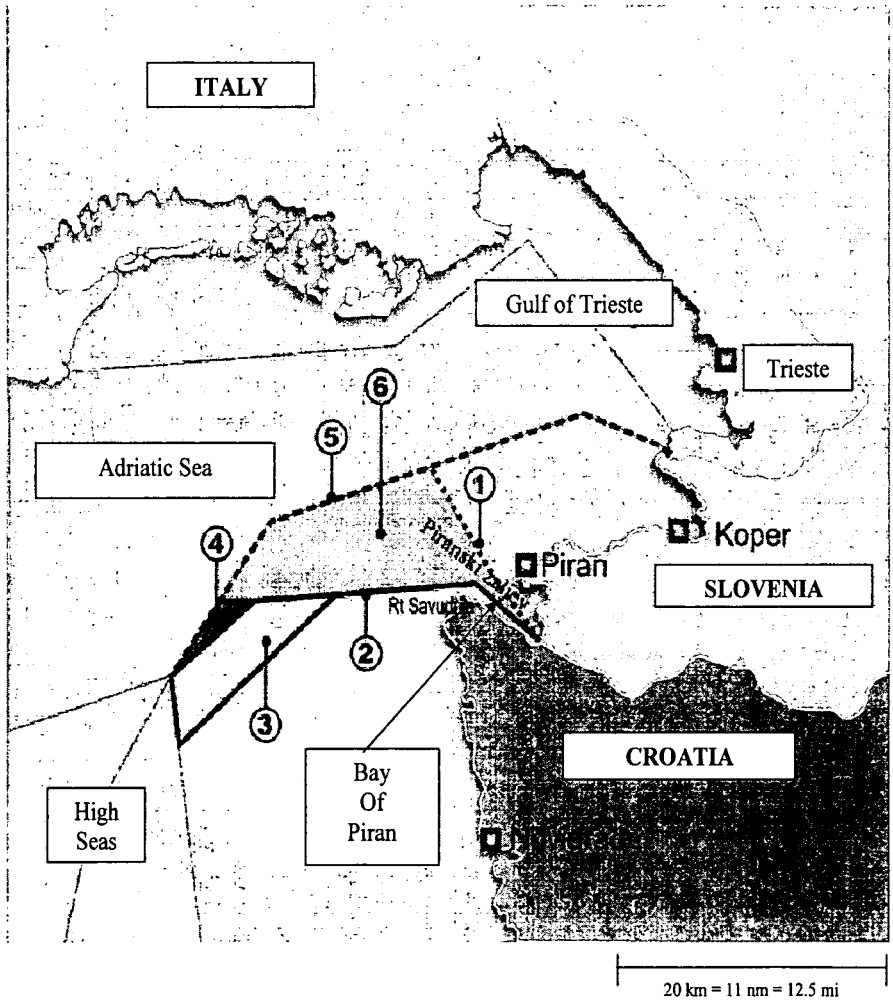
The maritime delimitation dispute over the Bay of Piran was an uncomfortable distraction to the diplomacies of both Slovenia and Croatia for over ten years. While this particular dispute has not resulted in any significant military conflagrations, it has seen its share of emotional flare-ups. More importantly, perhaps, the dispute will continue to be a diplomatic obstacle for both emerging nations in their attempts to join the European integration processes.

The settlement that was negotiated in July, 2001 serves as a suitable starting point, but it will, in its present form, not be politically acceptable in Croatia. The best course of action would undoubtedly be for the two neighbors and friends to reach a solution on their own by negotiation. If, however, it becomes apparent that this cannot be accomplished in a relatively short time, recourse should be taken to an arbitral tribunal whose final and binding award would, if constituted and carried out properly, carry the weight and moral authority of international law. As such, it

165. *See, e.g.*, UNCLOS, *supra* note 8, at Part II, sect. 4; Part V.

would, almost certainly, be acceptable both to Croatia and Slovenia, popularly and politically.

APPENDIX – MAP OF THE BAY OF PIRAN



1 – Equidistance line of delimitation of the Bay of Piran.

2 – Delimitation line agreed by the two Governments on July 20, 2001.

3 – Corridor of Croatian territorial sea that is to be internationalized.

4 – Sliver of Croatian territorial sea maintaining direct boundary with Italy.

5 – "External" maritime boundary according to the 1975 Treaty of Osimo.

6 – Area of the Bay of Piran that would become Slovenian territorial sea.

(Adapted by author from map appearing in VJESNIK, Sept. 24, 2001 at 5, *available at* http://www.lawofthesea.net/images/m_granica.jpg)