

Consequences of the Ex Parte Communications in the Arbitration between Croatia and Slovenia

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Public disclosure of the ex parte communications in the arbitration between Croatia and Slovenia has given rise to a situation without precedent in the history of international arbitration. This article analyzes from the international law point of view the consequences of the telephone conversations between Dr. Sekolec, the arbitrator appointed by Slovenia and Ms. Simona Drenik, Agent of Slovenia. There is no doubt that the fundamental principles of the arbitration process, including due process, procedural fairness, impartiality and independence have been violated in the arbitration between Croatia and Slovenia to the prejudice of Croatia. Considering the essential importance that those principles have in the international arbitral proceedings and rendering a fair and just award, as well as political connotations of the ex parte communication, this article argues that the proceedings should have been terminated. In addition, this article argues that Slovenia's actions, i.e. the ex parte communication constitute a material breach of the Arbitration Agreement because they defeated one of the objects and purposes of the Arbitration Agreement – the settlement of the maritime and land boundary dispute between Croatia and Slovenia in accordance with the rules and principles of international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result. Therefore, Croatia was entitled to terminate the Arbitration Agreement under Article 60, paragraph 1 of the Vienna Convention on the Law of Treaties.

Key words: ex parte communication, international arbitration, unilateral withdrawal, Arbitration Agreement, material breach, termination.

1. Introduction

The arbitration between Croatia and Slovenia, concerning the delimitation of the maritime and land boundary between the two States, has again turned the attention of practitioners and scholars to the question of ex parte communication in international arbitration. While there is no generally accepted definition of ex parte communication, it is usually defined as “a communication between counsel and the court when opposing counsel is not present”.¹ It is precisely this type of conduct

¹ See A. G. Bryan, *Black's Law Dictionary*, 9th edn., West Group, Eagan 2009, p. 316. See also L. W. Abramson, *The Judicial Ethics of Ex Parte and Other Communications*, *Houston Law Review*, Vol. 36, 2000, p. 1343; P. S. Wall., *Guide to Ethics of Ex Parte Communications*, *Journal of Business Ethics*, Vol. 81, 2008, p. 555; R. M. Mosk & T. Ginsburg, *Becoming an International Arbitrator: Qualifications, Disclosures, Conduct, and Removal*, in R. Chernick, D. M. Kolkey & B. Reeves Neal (Eds.), *Practitioner's Handbook on International Arbitration and Mediation*, 3rd edn., JurisNet, LLC, Huntington 2012, p. 405. International Bar Association (IBA) defines ex parte communications as “oral or written communications between a party representative and an arbitrator or prospective arbitrator without the presence or knowledge

that occurred during the arbitration proceeding between Croatia and Slovenia – communication between one of the arbitrators and the Slovenian agent without presence of the Croatian representative. Although *ex parte* communication does not represent nothing new in the world of international arbitration,² in other words it is as old as international arbitration itself,³ the fact is that the arbitration between Croatia and Slovenia is one of the rare cases in international arbitration in which a public disclosure of *ex parte* communication occurred.⁴ The scandal is even bigger given that the *ex parte* communication has occurred in an important inter-state arbitration concerning border dispute which the two countries had been trying to resolve for nearly a quarter of a century.⁵ Moreover, the high political tensions that preceded the arbitration, because of which even the European Union had to mediate, have culminated with the disclosure of the *ex parte* communication. The consequences of this scandal are multiple, as well as the numerous legal issues related to them.

Part 1 of this article gives an overview of the existing rules of major international arbitral institutions relating to *ex parte* communication, and thus provides a comprehensive view of the existing legal framework for *ex parte* communication in international arbitration. Part 2 looks into the most prominent soft law rules of arbitral institutions and bar associations that also address the issue of *ex parte* communication in international arbitration. Part 3 describes the *ex parte* communication that occurred in the arbitration between Croatia and Slovenia including the events that preceded the public disclosure of the *ex parte* communication. In addition, this part examines the legal rules regarding the *ex parte* communication that were applicable in the arbitration between Croatia and Slovenia. Part 4 of this article considers the consequences of the *ex parte* communication in the arbitration between Croatia and Slovenia. First of all, it describes the events that immediately followed the public disclosure of *ex parte* communication. Further, this part analyzes from the legal point of view Croatia's unilateral withdrawal from the arbitration, as well as Croatia's purported termination of the Arbitration Agreement. This Part also examines the question of jurisdiction of the Arbitral Tribunal to decide on the validity of the termination of the Arbitration Agreement by Croatia. Finally, Part 5 discusses the Arbitral Tribunal's Partial Award, in the parts relating to the previous questions, as well as the events that followed after the Arbitral Tribunal rendered its Final Award, including Slovenia's lawsuit against Croatia before the Court of Justice of the European Union because of Croatia's rejection of the arbitral award and its implementation.

2. Rules of International Arbitral Institutions Governing *Ex Parte* Communication in International Arbitration

Existing rules of major international arbitral institutions in different ways govern the issue of *ex parte* communication between one party and an arbitrator in international arbitration. However, as a general rule, it is well accepted that *ex parte* communication is prohibited in international arbi-

of the opposing party or parties." See International Bar Association, IBA Guidelines on Party Representation in International Arbitration, International Bar Association, London 2013, p. 3, https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (20 June 2019).

² See e.g. A. Sarvarian, *Professional Ethics at the International Bar*, Oxford University Press, Oxford 2012, p. 100.

³ The arbitration as a method of peaceful settlement of international disputes traces its roots back to the Greek city-states. In its modern form, international arbitration began with the Jay Treaty of 1794 between the United States and Great Britain. See e.g. C. F. Amerasinghe, *International Arbitral Jurisdiction*, Martinus Nijhoff Publishers, Leiden 2011, pp. 4-7; see also J. H. Ralston, *International Arbitration from Athens to Locarno*, Stanford University Press, Stanford 1929, pp. 152-194.

⁴ As examples of *ex parte* communications in international arbitration can be mentioned two cases similar to the arbitration between Croatia and Slovenia. The first case is the *Buraimi Oasis Arbitration (Saudi Arabia v. United Kingdom) of 1955*; see R. Goy, *L'Affaire de l'Oasis de Buraimi*, *Annuaire Français de Droit International*, Vol. 3, 1957, pp. 188-205; J. B. Kelly, *The Buraimi Oasis Dispute, International Affairs*, Vol. 32, 1956, pp. 318-326. The second case is the *Victor Pey Casado et al. v. Chile* case; see *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award of 8 May 2008, paras. 34-43; C. Schreuer, *Victor Pey Casado and President Allende Foundation v. Republic of Chile: Barely an Annulment*, *ICSID Review - Foreign Investment Law Journal*, Vol. 29, 2014, pp. 321-327.

⁵ See also M. Avbelj & J. Letnar Čermeč, *The Conundrum Of The Piran Bay: Slovenia V. Croatia – The Case Of Maritime Delimitation*, *Journal of International Law & Policy*, Vol. V, 2007, pp. 1-19; T. Bickl, *Reconstructing the Intractable: The Croatia-Slovenia Border Dispute and Its Implications for EU Enlargement*, *Croatian Political Science Review*, Vol. 54, 2017, pp. 7-39; S. F. Gagno, *Border Dispute in the Adriatic Sea between Croatia and Slovenia*, *Acta Universitatis Danubius Juridica*, Vol. 9, 2013, pp. 5-17; Z. Gržetić, V. Barić Punda & V. Filipović, *Boundaries In The Northern Adriatic 1948-2009: With Particular Emphasis On Chronological Cartographical Analysis*, *Comparative Maritime Law*, Vol. 49, 2010, pp. 19-72; V. Sancin, *Slovenia-Croatia Border Dispute: From "Drnovšek-Račan" to "Pahor-Kosor" Agreement*, *European Perspectives – Journal of European Perspectives of the Western Balkans*, Vol. 2, 2010, pp. 93-111.

tration.⁶ In other words, *ex parte* communication can not be tolerated in international arbitration except in certain limited circumstances explicitly provided by the rules of international arbitral institutions.

The Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States (hereinafter “PCA Optional Rules”), which were applicable in the arbitration between Croatia and Slovenia,⁷ in Article 15(3) clearly state that “all documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party and a copy shall be filed with the International Bureau”.⁸

Given that the PCA Optional Rules are based on the Arbitration Rules of the United Commission on International Trade Law (UNCITRAL), Article 17(4) of the UNCITRAL Arbitration Rules states similarly: “All communications to the arbitral tribunal by one party shall be communicated by that party to all other parties. Such communications shall be made at the same time, except as otherwise permitted by the arbitral tribunal if it may do so under applicable law.”⁹

Rules of other arbitral institutions contain similar provisions regarding communication between parties and arbitrators. The Arbitration Rules of the International Chamber of Commerce (ICC) in Article 3(1) provide that “all pleadings and other written communications submitted by any party, as well as all documents annexed thereto, shall be supplied in a number of copies sufficient to provide one copy for each party, plus one for each arbitrator, and one for the Secretariat. A copy of any notification or communication from the arbitral tribunal to the parties shall be sent to the Secretariat.”¹⁰ Moreover, the Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration is explicit regarding *ex parte* communications. The Note states, in Section IV(34), as follows: “An arbitrator or prospective arbitrator shall not engage in *ex parte* communications with a party or party representative concerning the arbitration.”¹¹

Likewise, explicit prohibition of *ex parte* communication, with certain limited exceptions, can be found in the International Arbitration Rules of the International Centre for Dispute Resolution (ICDR) in Article 13(6): “No party or anyone acting on its behalf shall have any *ex parte* communication relating to the case with any arbitrator, or with any candidate for party-appointed arbitrator, except to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate’s qualifications, availability, or impartiality and independence in relation to the parties, or to discuss the suitability of candidates for selection as a presiding arbitrator where the parties or party-appointed arbitrators are to participate in that selection. No party or anyone acting on its behalf shall have any *ex parte* communication relating to the case with any candidate for presiding arbitrator.”¹² An almost identical provision regarding the explicit prohibition of *ex parte* communication can be found in the Administered Arbitration Rules of the Hong Kong International Arbitration Centre in Article 11(5),¹³ as well as in the Arbitration Rules of

⁶ See Mosk & Ginsburg 2012, p. 410; M. F. Gusy, J. M. Hosking & F. T. Schwarz, *A Guide to the ICDR International Arbitration Rules*, Oxford University Press, Oxford 2011, p. 98; D. Bishop & M. Stevens, *The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy*, in A. J. Berg, van den (Ed.), *Arbitration Advocacy in Changing Times*, Kluwer Law International, Alphen aan den Rijn 2011, p. 395.

⁷ Art. 6(2) of the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia (hereinafter “the Arbitration Agreement”) provides: “Unless envisaged otherwise, the Arbitral Tribunal shall conduct the proceedings according to the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States.” See 2009 Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, 2748 UNTS 3

⁸ See Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States (1992) (hereinafter “PCA Optional Rules”), available at <https://pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules-2012/> (20 June 2019).

⁹ See United Nations Commission on International Trade Law, *UNCITRAL Arbitration Rules, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, United Nations, New York 2014, available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf> (20 June 2019).

¹⁰ See International Chamber of Commerce, *Arbitration Rules, Mediation Rules*, International Chamber of Commerce, Paris 2017, available at <https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf> (20 June 2019).

¹¹ See International Chamber of Commerce, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, 30 October 2017, available at <https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf> (20 June 2019).

¹² See International Centre for Dispute Resolution, *International Dispute Resolution Procedures*, 2016, available at https://www.icdr.org/sites/default/files/documentrepository/International_Dispute_Resolution_Procedures_En_english.pdf (20 June 2019).

¹³ See Hong Kong International Arbitration Centre, Administered Arbitration Rules, 1 November 2013, available at http://www.hkiac.org/sites/default/files/ck_fileb

the Singapore International Arbitration Centre in Article 13(6).¹⁴ Similarly, the Arbitration Rules of the World Intellectual Property Organization (WIPO) state in Article 45: “Except as otherwise provided in these Rules or permitted by the Tribunal, no party or anyone acting on its behalf may have any ex parte communication with any arbitrator with respect to any matter of substance relating to the arbitration, it being understood that nothing in this paragraph shall prohibit ex parte communications which concern matters of a purely organizational nature, such as the physical facilities, place, date or time of the hearings.”¹⁵

Another important arbitral institution – the International Centre for Settlement of Investment Disputes (ICSID), also deals with ex parte communication in its arbitral rules. Administrative and Financial Regulations of the ICSID provide, in Regulation 24, that during the pendency of any proceeding the Secretary-General shall be the official channel of written communications among the parties and arbitrators.¹⁶

The London Court of International Arbitration (LCIA) has similar rules. The LCIA Arbitration Rules, in Article 13(1), state: “Following the formation of the Arbitral Tribunal, all communications shall take place directly between the Arbitral Tribunal and the parties (to be copied to the Registrar), unless the Arbitral Tribunal decides that communications should continue to be made through the Registrar.”¹⁷ The same Article, in paragraph 4, provides that “during the arbitration from the Arbitral Tribunal’s formation onwards, no party shall deliberately initiate or attempt to initiate any unilateral contact relating to the arbitration or the parties’ dispute with any member of the Arbitral Tribunal or any member of the LCIA Court exercising any function in regard to the arbitration (but not including the Registrar), which has not been disclosed in writing prior to or shortly after the time of such contact to all other parties, all members of the Arbitral Tribunal (if comprised of more than one arbitrator) and the Registrar”.¹⁸

3. Soft Law and Ex Parte Communication in International Arbitration

In addition to the rules of international arbitral institutions that apply in arbitral proceedings conducted before them, there are many rules, codes and guidelines of arbitral institutions and bar associations that in the form of soft law inter alia address the issue of ex parte communication in international arbitration.¹⁹ Although not binding on arbitrators and parties in arbitral proceedings, these soft law instruments set forth generally accepted standards of ethical conduct for the guidance of participants in arbitral proceedings with the aim of ensuring the fairness and integrity of international arbitral proceedings. Among these soft law instruments probably the most prominent are: IBA Guidelines on Party Representation in International Arbitration; IBA Rules of Ethics for International Arbitrators; American Bar Association and American Arbitration Association Code of Ethics for Arbitrators.²⁰

rowser/PDF/arbitration/2013_hkiac_rules.pdf (20 June 2019).

¹⁴ See Singapore International Arbitration Centre, Arbitration Rules of the Singapore International Arbitration Centre, 1 August 2016, available at <http://www.siac.org.sg/our-rules/rules/siac-rules-2016> (20 June 2019).

¹⁵ See *World Intellectual Property Organization*, WIPO Arbitration Rules, 1 June 2014, available at <http://www.wipo.int/amc/en/arbitration/rules/index.html> (20 June 2019).

¹⁶ See International Centre for Settlement of Investment Disputes, ICSID Convention, Regulations and Rules, April 2006, available at https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf (20 June 2019).

¹⁷ See London Court of International Arbitration, LCIA Arbitration Rules, 1 October 2014, available at [http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article 13](http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article%2013) (20 June 2019).

¹⁸ Ibid.

¹⁹ On soft law and international arbitration see G. Kaufmann-Kohler, *Soft Law in International Arbitration: Codification and Normativity*, Journal of International Dispute Settlement, Vol. 1, 2010, pp. 1-17.

²⁰ See also E. Sussman, *Ethics in International Arbitration: Soft Law Guidance for Arbitrators and Party Representatives*, in L. W. Newman & M. J. Radine (Eds.), *Soft Law in International Arbitration*, JurisNet, LLC, Huntington 2014, p. 239.

The IBA Guidelines on Party Representation in International Arbitration, which have become widely accepted by the arbitration community as an expression of arbitration best practises, provide in Guideline 7 that “unless agreed otherwise by the parties, and subject to the exceptions below (Guideline 8), a party representative should not engage in any ex parte communications with an arbitrator concerning the arbitration”.²¹ Accordingly, a party representative may have ex parte communications only in defined circumstances set out in Guideline 8. These circumstances relate to providing a general description of the dispute and obtaining information regarding the suitability of the potential arbitrator (party-nominated or presiding arbitrator).²² However, during these communications a party representative should not seek the views of the prospective party-nominated arbitrator or presiding arbitrator on the substance of the dispute.²³

The IBA Rules of Ethics for International Arbitrators, which reflect internationally acceptable guidelines developed by practising lawyers from all continents, in Rule 5.3, state: “Throughout the arbitral proceedings, an arbitrator should avoid any unilateral communications regarding the case with any party, or its representatives. If such communication should occur, the arbitrator should inform the other party or parties and arbitrators of its substance.”²⁴ The only circumstance in which ex parte communication is permitted relates to the participation of a party-nominated arbitrator in the selection of a third or presiding arbitrator (Rule 5.2.).

Unlike international standards, a more liberal approach toward ex parte communication in arbitration has been long favoured in the United States. Party-nominated arbitrators in the United States were traditionally considered partisan and thus allowed to have ex parte communications with the parties that appointed them.²⁵ However, thanks to the 2004 version of the Code of Ethics for Arbitrators in Commercial Disputes of the American Bar Association (ABA) and the American Arbitration Association (AAA), which has become tremendously influential in the arbitration community,²⁶ arbitration standards in the United States have come closer to international standards regarding ex parte communications in arbitration. The 2004 Code established a presumption of neutrality for all arbitrators, including party appointed arbitrators, which applies unless the parties’ agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise.²⁷ Therefore, Canon III of the Code explicitly prohibits ex parte communication except in certain limited circumstances. But Canon X expands the possibility of ex parte communication for the so-called ‘Canon X arbitrators’, i.e. for arbitrators appointed by one party who are not subject to rules of neutrality. Still, Canon X arbitrators may not at any time during the arbitration disclose any deliberations by the arbitrators on any matter or issue submitted to them for decision; communicate with the parties that appointed them concerning any matter or issue taken under consideration by the panel after the record is closed or such matter or issue has been submitted for decision; or disclose any final decision or interim decision in advance of the time that it is disclosed to all parties.

There is no doubt that the look into the soft law instruments has also confirmed the inadmissibility of ex parte communication in international arbitration. As well as binding rules of arbitral institutions, soft law instruments allow ex parte communication only in certain limited circumstances. But even then, ex parte communication is not allowed during, and about the deliberations and the likely outcome of the arbitration.

²¹ IBA Guidelines on Party Representation in International Arbitration (2013), p. 6.

²² Ibid, p. 7.

²³ Ibid.

²⁴ IBA Rules of Ethics for International Arbitrators, International Bar Association, 1987, available at https://www.trans-lex.org/701100/_iba-rules-of-ethics-for-international-arbitrators-1987/ (20 June 2019).

²⁵ See W. W. Park, *Arbitrators and Accuracy*, Journal of International Dispute Settlement, Vol. 1, 2010, pp. 36-37.

²⁶ See Sussman 2014, p. 242.

²⁷ The Code of Ethics for Arbitrators in Commercial Disputes, American Bar Association/American Arbitration Association, 2004, available at https://www.americanbar.org/content/dam/aba/migrated/dispute/commercial_1_disputes.authcheckdam.pdf (20 June 2019).

4. The Ex Parte Communications in the Arbitration Between Croatia and Slovenia

On 4 November 2009, the Prime Ministers of Croatia and Slovenia signed the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia (hereinafter “the Arbitration Agreement”) by which Croatia and Slovenia (hereinafter “the Parties”) submitted their maritime and land boundary dispute to arbitration.²⁸

Pursuant to Article 1 of the Arbitration Agreement, the Parties established an Arbitral Tribunal in early 2012. The Parties agreed to appoint Judge Gilbert Guillaume (France), former President of the International Court of Justice, as the President of the Tribunal, and to appoint Professor Vaughan Lowe (United Kingdom) and Judge Bruno Simma (Germany) as arbitrators. In addition, Croatia appointed Professor Budislav Vukas (Croatia) as arbitrator and Slovenia appointed Dr. Jernej Sekolec (Slovenia) as arbitrator. The Permanent Court of Arbitration acted as Registry in the arbitration.

Article 3(1) of the Arbitration Agreement tasked the Arbitral Tribunal to determine: “(a) the course of the maritime and land boundary between the Republic of Slovenia and the Republic of Croatia; (b) Slovenia’s junction to the High Sea; and (c) the regime for the use of the relevant maritime areas.”

Following the first procedural meeting on 13 April 2012, the Parties exchanged three rounds of written pleadings. According to the Tribunal, the Parties included with these pleadings nearly 1500 documentary exhibits and legal authorities, as well as over 250 figures and maps.²⁹ Oral hearing was held from 2 to 13 June 2014, and following the hearing, the Tribunal commenced its deliberations.

Meanwhile, as reaction to two public statements concerning the possible outcome of the arbitration made by the Slovenian minister of Foreign Affairs on 7 January 2015,³⁰ and 22 April 2015,³¹ Croatia sent to the Tribunal a letter on 30 April 2015, in which Croatia expressed deep concerns over both statements, which could be construed as implying that one of the Parties to the proceedings may have an informal channel of communication with the Tribunal that may compromise the arbitration procedure and its outcome.³² Moreover, Croatia requested confirmation that the Parties continue to be bound to “refrain from any actions or statements which might intensify the dispute or jeopardize the work of the Arbitral Tribunal”, as required by Article 10(1) of the Arbitration Agreement.

In response to the Croatian letter, Slovenia informed on 1 May 2015 “that Slovenia has no information concerning the outcome of the arbitration, nor any ‘informal channel of communication with the Tribunal’, and has not sought ‘to bring pressure on the Tribunal in any way.’”³³

On 5 May 2015, the Arbitral Tribunal sent a letter to both Parties in which the Tribunal expressed serious concerns to the suggestion that one Party would have been privy to confidential information related to Tribunal’s deliberations.³⁴ The Tribunal also recalled the duty, incumbent on the

²⁸ See 2009 Arbitration Agreement.

²⁹ See Permanent Court of Arbitration, Press Release, Arbitration Between the Republic of Croatia and the Republic of Slovenia, The Hague, 10 July 2015, available at <https://pcacases.com/web/sendAttach/1308> (20 June 2019).

³⁰ The minister was reported to have stated that he “had talks in The Hague last year... And I made it very clear to the Arbitral Tribunal that if they do not fulfil this task—we in Slovenia shall consider that the Arbitral Tribunal has not executed its mandate. Because the contact with the high seas has not been determined...” See http://www.mvep.hr/files/file/dokumenti/arbitraza/hr/150820-letter-from-fm-pusic-to-mr-pulkowski-pca3004201_5.pdf (20 June 2019).

³¹ The minister stated: “According to the information that I have, which is very much unofficial, as well as on the basis of a feeling that our legal team has, being composed of the world’s best renowned scholars of the law of the sea, we are somehow optimistic in a way that the Arbitral Tribunal will determine that contact with the high seas.” Ibid.

³² Ibid.

³³ See *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Partial Award of 30 June 2016, at 12, para. 69.

³⁴ For the text of the Tribunal’s letter see Tribunal Letter to Parties, Permanent Court of Arbitration, 5 May 2015, available at <http://www.pcacases.com/web/sendAttach/1307> (20 June 2019).

arbitrators and the Parties, in Section 9.1 of the Terms of Appointment, that “the Parties shall not engage in any oral or written communications with any member of the Arbitral Tribunal *ex parte* in connection with the subject matter of the arbitration or any procedural issues that are related to the proceedings”. Finally, the Tribunal concluded that it was confident that no information about the likely outcome of any aspect of the arbitration had been disclosed.

However, on 22 July 2015, first Serbian newspapers Kurir and Newseek Srbija, and then Croatian newspaper Večernji list, published transcripts and audio files of two telephone conversations between Dr. Jernej Sekolec, the arbitrator appointed by Slovenia and Ms. Simona Drenik, Agent of Slovenia.³⁵ The conversations had occurred on 15 November 2014 and 11 January 2015, after the conclusion of the hearing, during the deliberations of the Tribunal. The recordings revealed Dr. Sekolec’s disclosure of confidential information about the deliberations of the Tribunal and likely outcome of the arbitration to Slovenia’s Agent.³⁶ Further, the recordings also revealed discussion of how to influence the other arbitrators to rule in Slovenia’s favour.³⁷ Finally, the recordings indicate that Dr. Sekolec had received documents from Ms. Drenik so he could use them in his discussion with other arbitrators as his own notes.³⁸

There is no doubt that communication described above between the arbitrator appointed by Slovenia and Agent of Slovenia without the presence of the Croatian representative represent *ex parte* communication. Moreover, it is not difficult to conclude that these *ex parte* communications are prohibited.³⁹ Article 6(5) of the Arbitration Agreement is more than clear – “the proceedings are confidential”.⁴⁰ In addition, Article 10(1) of the Arbitration Agreement requires “both Parties to refrain from any action or statement which might intensify the dispute or jeopardize the work of the Arbitral Tribunal”.⁴¹ The PCA Optional Rules, pursuant to which the arbitration was conducted, provide in Article 15(3) that *ex parte* communication is not allowed.⁴² Finally, Section 9.1 of the Terms of Appointment, signed by Croatia, Slovenia and the Arbitral Tribunal, provides that “the Parties shall not engage in any oral or written communications with any member of Arbitral Tribunal *ex parte* in connection with the subject matter of the arbitration or any procedural issues that

³⁵ For transcripts of parts of their conversations, translated from Slovenian into English, see Ministry of Foreign and European Affairs of the Republic of Croatia, Excerpts from Recordings of Conversation Between Dr. Jernej Sekolec, Member of the Arbitral Tribunal, and Ms. Simona Drenik, Agent of the Republic of Slovenia, 2015, available at <http://www.mvep.hr/files/file/dokumenti/arbitraza/hr/150820-excerpts-from-recordings-between-dr-sekolec-and-mr-drenik-14082015.pdf> (20 June 2019).

³⁶ Excerpt from Recording 1:

“Jernej Sekolec: About the division of the Bay, a bigger part, a smaller part, we do not yet have a solution there. At one point, it was mentioned 1/4 to 3/4, but then the President (Judge Gilbert Guillaume, President of the Arbitral Tribunal) on more occasions mentioned 2/3, 1/3.

Simona Drenik: Yes.

Jernej Sekolec: Then, the line which would delimit the territorial sea would run from that point on the base line...

Simona Drenik: Yes.

Jernej Sekolec: ...of the Bay, where that line... In the worst example, it should not go below 1/3.” Ibid, p. 1.

³⁷ Excerpt from Recording 2:

“Simona Drenik: How about, I am thinking, what if one day you got together with Bruno (Judge Bruno Simma, Member of the Arbitral Tribunal)? With Simma.

Jernej Sekolec: Listen, I agreed to meet with Bruno for dinner at his home, in any case.

Simona Drenik: Aha, great! And, you know, you give him one or two (murmur), say, OK, you know ‘I looked at this, so you know, I think...’ Not that you would give him 500 arguments. But you say ‘I think, look at this...’ He is not just anybody. Maybe he will then present it, but if you present it, he will look at it, Guillaume (Judge Gilbert Guillaume, President of the Arbitral Tribunal) I mean. But if Simma says ‘Oh, it seems to me, we could look at this again’.” Ibid, p. 12.

³⁸ Excerpt from Recording 1:

“Simona Drenik: You know, I could prepare that for you. But, one thing is that it would be good for all those documents that they are sent so that you brought along your computer.

Jernej Sekolec: Yes. I have a file. Simona Drenik: And then we. And then on your computer we save a file, and just transfer the documents, you know, the text. That is just so that afterwards you are recorded as the author of the file.

Jernej Sekolec: I understand, I understand, yes, yes.

Simona Drenik: If not, then it is nobody, or afterwards, someone there could find out that I am the author of the file. If I just opened the file with the key like on my computer, and transfer it to you into a new file, for each effectivité, we open a new one on your computer and save it, that is the best way, it would be good to do it that way.

Jernej Sekolec: Yes, alright. (...)” Ibid, pp. 7-8.

³⁹ See also L. W. Newman, D. Zaslowsky, *When Arbitrators Stray: Ex Parte Communications*, New York Law Journal, 25 September 2015, available at <http://nysbar.com/blogs/ResolutionRoundtable/When%20Arbitrator%20Stray.pdf> (20 June 2019).

⁴⁰ Art. 6(5) of the 2009 Arbitration Agreement.

⁴¹ Ibid.

⁴² Art. 15(3) of the PCA Optional Rules.

are related to the proceedings”.⁴³ It is important to note that Ms. Drenik’s actions, which was at the time acting in her official capacity as Agent for her country, are attributable to Slovenia under international law.⁴⁴ In other words, Slovenia has violated provisions of the Arbitration Agreement, the PCA Optional Rules and the Terms of Appointment.

5. Consequences of the Ex Parte Communications

5.1. Events Following the Public Disclosure of the Ex Parte Communications

On 23 July 2015, the day after the publication of the recordings, Dr. Sekolec and Ms. Drenik resigned from their posts. On the same day, the Tribunal invited Slovenia to appoint an arbitrator to replace Dr. Sekolec, and noted that “once reconstituted, the Tribunal intends to resume its deliberations in the present arbitration without delay”.⁴⁵ However, by letter to the Tribunal, dated 24 July 2015, Croatia stated that “the most fundamental principles of procedural fairness, due process, impartiality and integrity of the arbitral process have been systematically and gravely violated, to the prejudice of Croatia” and that “the entire arbitral process has been tainted”.⁴⁶ Accordingly, in the same letter Croatia asked the Tribunal to suspend the proceedings with immediate effect.⁴⁷ In response to the Croatian letter, in its letter to the Tribunal, dated 27 July 2015, Slovenia did not agree that “the Tribunal should suspend the arbitration proceedings” or “that the entire Arbitral process has been tainted”.⁴⁸ The next day, on 28 July 2015, Slovenia appointed Judge Ronny Abraham, President of the International Court of Justice, as a new arbitrator.

It soon became apparent that the Parties had completely opposing views regarding the continuation of the arbitration process. Moreover, at its Extraordinary Session of July 29th 2015, the Croatian Parliament unanimously passed the Ruling on the obligation of the Government of the Republic of Croatia to begin the procedure of termination of the Arbitration Agreement.⁴⁹ Accordingly, on 30 July 2015, by *note verbale* the Ministry of Foreign and European Affairs of the Republic of Croatia informed Slovenia of Croatian intention to terminate the Arbitration Agreement because Slovenia has engaged in one or more material breaches of the Arbitration Agreement.⁵⁰ Slovenia was also informed that “as of the date of the notification Croatia ceased to apply the Arbitration Agreement”.⁵¹ On the same day, Professor Vukas, member of the Arbitral Tribunal appointed by Croatia, resigned, stating that the reason for his resignation were “the numerous acts of Mr Sekolec, arbitrator appointed by Slovenia, and Ms Simona Drenik, the Agent of Slovenia, which have violated the basic principles of a fair arbitration proceeding”.⁵² Professor Vukas added that “the resignation of Mr Sekolec and Ms Drenik cannot rectify the detriment they have caused to the arbitration proceeding”.⁵³ On 31 July 2015, Croatia informed the Tribunal that it “cannot further continue the process in good faith”, and about its intention to terminate the Arbitration Agreement due to fact that the arbitration

⁴³ See *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Partial Award of 30 June 2016, at 44, para. 175.

⁴⁴ See I. Brownlie, *Principles of Public International Law*, 7th edn., Oxford University Press, Oxford 2008, pp. 446-454; M. N. Shaw, *International Law*, 7th edn., Cambridge University Press, Cambridge 2014, p. 572; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, 1999 ICJ Rep. 62, at 87, para. 62; Report of the International Law Commission on the work of its fifty-third session, 23 April – 1 June, 2 July – 10 August 2001, General Assembly Official Records, Fifty-sixth session, Supplement No. 10 (A/56/10), pp. 40-43.

⁴⁵ See Permanent Court of Arbitration, Press Release, Arbitration Between the Republic of Croatia and the Republic of Slovenia, The Hague, 23 July 2015, available at <http://www.pcacases.com/web/sendAttach/1310> (20 June 2019).

⁴⁶ See <http://www.mvep.hr/files/file/dokumenti/arbitraza/en/150820-letter-from-fm-pusic-to-mr-pulkowski-pca-24072015.pdf> (20 June 2019).

⁴⁷ Ibid.

⁴⁸ See Permanent Court of Arbitration, Press Release, Arbitration Between the Republic of Croatia and the Republic of Slovenia, The Hague, 28 July 2015, available at <https://pcacases.com/web/sendAttach/1313> (20 June 2019).

⁴⁹ Ruling on the obligation of the Government of the Republic of Croatia to begin the procedure of termination of the Arbitration Agreement, Official Gazette of the Republic of Croatia, No. 85/2015.

⁵⁰ Republic of Croatia, Ministry of Foreign and European Affairs, Note No. 3303/2015, Zagreb, 30 July 2015, available at [http://www.mvep.hr/files/file/dokumenti/arbitraza/hr/150820-note-verbale-no-3303-2015-\(to-the-republic-of-slovenia\).pdf](http://www.mvep.hr/files/file/dokumenti/arbitraza/hr/150820-note-verbale-no-3303-2015-(to-the-republic-of-slovenia).pdf) (20 June 2019).

⁵¹ Ibid.

⁵² The text of Vukas resignation is available at <http://www.mvep.hr/files/file/dokumenti/arbitraza/hr/150820-resig-nation-of-judge-vukas-30072015.pdf> (20 June 2019).

⁵³ Ibid.

process as a whole had been compromised to such an extent that Croatia was confident that the arbitration process could not continue in this or any similar form.⁵⁴

It did not take long to wait for a new turn in the arbitration process. Just a week after he was appointed by Slovenia, Judge Abraham, member of the Arbitral Tribunal, resigned. Judge Abraham informed the Tribunal that he had agreed to his appointment in the hope that this “would help restore confidence between the Parties and the Arbitral Tribunal and to allow the process to continue normally, with the consent of both Parties”.⁵⁵ However, having realized that “the current situation cannot meet that expectation”, Judge Abraham considered that it was “no longer appropriate” for him to serve as arbitrator.⁵⁶

On 13 August 2015, Slovenia informed the Tribunal that it had objected to Croatia’s purported unilateral termination of the Arbitration Agreement and stated that the Tribunal had the power and the duty to continue the proceedings as it would otherwise be open to any party wishing to delay or prevent the making of an arbitral award to frustrate an arbitration agreement.⁵⁷ In addition, Slovenia informed the Tribunal that it will refrain from appointing a member of the Tribunal to replace Judge Abraham and requested the President of the Arbitration Tribunal, Judge Guillaume, in exercise of his powers under Article 2(2) of the Arbitration Agreement, to appoint a member of the Arbitration Tribunal.⁵⁸

Finally, on 25 September 2015 the Tribunal was reconstituted. The President of the Arbitration Tribunal, Judge Guillaume, appointed H.E. Mr. Rolf Einar Fife (Norway) to succeed Judge Abraham, and Professor Nicolas Michel (Switzerland) to succeed Professor Vukas.⁵⁹ Following the reconstitution, the Tribunal informed the Parties about its intention to consider the Parties’ positions carefully, including in respect of the effect of Croatia’s stated intention to terminate the Arbitration Agreement and in respect of the possible implications for the present proceedings of the events reportedly underlying Croatia’s decision.⁶⁰

5.2. Croatia’s Unilateral Withdrawal from the Arbitration

Croatia explained the rationale for the unilateral withdrawal from the arbitration in the letters sent to the Tribunal and Slovenia. According to Croatia, the *ex parte* communications between Dr. Sekolec and Ms. Drenik revealed that the most fundamental principles of procedural fairness, due process, impartiality and integrity had been systematically and gravely violated, to the prejudice of Croatia.⁶¹ Furthermore, Croatia emphasized that Dr. Sekolec had had numerous conversations, dinners, and written communication with other members of the Tribunal, and with members of the PCA staff, during more than 13 months after the closing of written proceedings and oral hearings.⁶² In Croatia’s view, it was not possible for the other members of the Tribunal, or the PCA staff, to distinguish between the arguments and “facts” presented by Slovenia through Arbitrator Sekolec,

⁵⁴ Croatia stated: “Croatia has entered into the arbitration process *bona fide* and with full confidence in the work of the Arbitral Tribunal, its Members and technical staff. This confidence was violated to the level that Croatia cannot further continue the process in good faith.” For the text of Croatia’s letter to the Tribunal see <http://www.mvep.hr/files/file/dokumenti/arbitraza/hr/150820-letter-from-fm-pusic-to-mr-pulkowski-pca-310720-15.pdf> (20 June 2019).

⁵⁵ Permanent Court of Arbitration, Press Release, Arbitration Between the Republic of Croatia and the Republic of Slovenia, The Hague, 5 August 2015, available at <https://pcacases.com/web/sendAttach/1389> (20 June 2019).

⁵⁶ *Ibid.*

⁵⁷ Permanent Court of Arbitration, Press Release, Arbitration Between the Republic of Croatia and the Republic of Slovenia, The Hague, 19 August 2015, available at <https://pcacases.com/web/sendAttach/1403> (20 June 2019).

⁵⁸ *Ibid.* Art. 2(2) of the Arbitration Agreement provides: “Each Party shall appoint a further member of the Arbitral Tribunal within fifteen days after the appointments referred to in paragraph 1 have been finalised. In case that no appointment has been made within this delay, the respective member shall be appointed by the President of the Arbitral Tribunal.”

⁵⁹ Permanent Court of Arbitration, Press Release, Arbitration Between the Republic of Croatia and the Republic of Slovenia, The Hague, 25 September 2015, available at <https://pcacases.com/web/sendAttach/1468> (20 June 2019). *Ibid.*

⁶⁰ *Ibid.*

⁶¹ See Note No. 3303/2015 (2015).

⁶² *Ibid.*

and those developed solely by Arbitrator Sekolec on his own.⁶³ Thus, Croatia argued that no reasonable person would conclude that the actions that had occurred may not have influenced other actors in the arbitration process.⁶⁴ As a consequence the entire arbitral process had been tainted and compromised, such that the mechanisms available within the Arbitration Agreement and means at the disposal of the Arbitration Tribunal could not repair the far-reaching and irreversible damage that has been done.⁶⁵ Finally, Croatia concluded that its confidence in the work of the Tribunal was violated to the level that it could not further continue the process in “good faith”.⁶⁶

Legal analysis of the ex parte communication between Dr. Sekolec and Ms. Drenik confirms, without any doubt, the violation of the fundamental principles of the arbitration process, including due process, procedural fairness, impartiality and independence in the arbitration between Croatia and Slovenia. However, in order to understand the gravity of the violation of the fundamental principles of the arbitration process by Dr. Sekolec and Ms. Drenik, it is necessary to know the importance and the role that the said principles have in rendering a fair and just award in the arbitral proceedings.⁶⁷

The concept of due process in international arbitration is derived from the general principles of law and as such constitutes the cornerstone of international arbitral process.⁶⁸ Moreover, due process is considered as a core or foundation of all other procedural rules.⁶⁹ Although there is no generally accepted definition of due process, there is general agreement about its key constituent elements. Thus, the concept of due process encompasses the right to notice, the right to be heard (the right to present case), the right to equality (the equality of arms),⁷⁰ and the right to an independent and impartial tribunal.⁷¹ Therefore, due process in international arbitration can be described as a shield which protects essential procedural rights of the parties in the arbitration process.

Further, procedural fairness, one of the principles that emanates from due process, has become the most important attribute of the arbitration process. According to a survey conducted among attorneys and their clients in international commercial arbitrations an overwhelming majority of survey participants ranked a fair and just result as the single most important attribute of the process.⁷² Moreover, fair and just result was nearly twice as important as the next ranked attribute.⁷³

Finally, one of the most fundamental principles of international arbitration is independence and impartiality of arbitrators, i.e. every arbitrator must be and remain independent and impartial of the parties. Although ‘independence’ and ‘impartiality’ are two distinct concepts, they are strongly interrelated, and therefore they should be viewed as two sides of the same coin.⁷⁴ Independence refers to the relationship between an arbitrator and one of the parties. It is generally considered that independence is more an objective concept because it has nothing to do with an arbitrator’s state of mind.⁷⁵ On the other hand, impartiality refers to bias of an arbitrator. Thus, impartiality is

⁶³ Ibid.

⁶⁴ For the text of Croatia’s letter to the Tribunal see <http://www.mvep.hr/files/file/dokumenti/arbitraza/hr/150820-letter-from-fm-pusic-to-mr-pulkowski-pca-31072015.pdf> (20 June 2019).

⁶⁵ See Note No. 3303/2015 (2015).

⁶⁶ For the text of Croatia’s letter to the Tribunal see <http://www.mvep.hr/files/file/dokumenti/arbitraza/hr/150820-letter-from-fm-pusic-to-mr-pulkowski-pca-31072015.pdf> (20 June 2019).

⁶⁷ See M. Ilic, *Croatia v. Slovenia: The Defiled Proceedings*, *Arbitration Law Review*, Vol. 9, 2017, pp. 360-371.

⁶⁸ See also C. T. Kotuby, *General Principles of Law, International Due Process, and the Modern Role of Private International Law*, *Duke Journal of Comparative & International Law*, Vol. 23, 2013, p. 426; L. Reed, *Ab(use) of due process: sword vs shield*, *Arbitration International*, Vol. 33, 2017, p. 365.

⁶⁹ M. Kurkela & S. Turunen, *Due Process in International Commercial Arbitration*, 2nd edn., Oxford University Press, Oxford 2010, p. 4.

⁷⁰ The principle of equality of arms was first developed by the European Court of Human Rights (ECtHR). According to the ECHR, the principle of equality of arms implies that each party must be given the reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent. See *Dombo Beheer B.V. v. The Netherlands* (App. no. 14448/88) ECtHR (1993), p. 9.

⁷¹ See also F. Fortese & L. Hemmi, *Procedural Fairness and Efficiency in International Arbitration*, *Groningen Journal of International Law*, Vol. 31, 2015, p. 111; Kurkela & Turunen 2010, p. 2; Reed 2017, p. 366; D. J. A. Cairns, *Oral Advocacy and Time Control in International Arbitration*, in (A. J. Berg, van den (Ed.), *Arbitration Advocacy in Changing Times*, Kluwer Law International, Alphen aan den Rijn 2011, p. 187.

⁷² R. W. Naimark & S. E. Keer, *International Private Commercial Arbitration: Expectations and perceptions of Attorneys and Business People*, *International Business Lawyer*, Vol. 30, No. 5, 2002, pp. 203-205.

⁷³ Ibid.

⁷⁴ See also J. Jenkins & S. Stebbings, *International Construction Arbitration Law*, Kluwer Law International, Alphen aan den Rijn 2006, p. 151.

⁷⁵ A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration*, 4th edn., Sweet & Maxwell, London 2004, paras. 4-55.

considered a subjective and more abstract concept than independence because it involves primarily a state of mind.⁷⁶

All the above mentioned principles have been implemented in the rules of the major international arbitral institutions,⁷⁷ as well as in the soft law rules of arbitral institutions and bar associations.⁷⁸ This only confirms the essential importance that the said principles have in international arbitral proceedings and rendering a fair and just award. Moreover, the said principles can be found in the Arbitration Agreement and the PCA Optional Rules, pursuant to which the arbitration was conducted. Thus, Article 4 of the Arbitration Agreement states that the Tribunal applies international law, equity and the principle of good neighbourly relations in order to achieve “a fair and just result”.⁷⁹ In addition, the Arbitration Agreement in Article 6(5) provides that “the proceedings are confidential”.⁸⁰ Confidentiality is closely related to independence and impartiality, and they together form an integral part of procedural fairness, i.e. due process. Further, the PCA Optional Rules also emphasize arbitrator independence and impartiality,⁸¹ as well as requirement for procedural fairness, i.e. equality of the parties in the proceedings and a full opportunity of each party to present its case.⁸² Finally, Section 3.4 of the Terms of Appointment specifies that the “members of the Arbitral Tribunal are and shall remain impartial and independent of the Parties”.⁸³

It is interesting to note that the Tribunal has also recognized the importance and duty to protect the procedural rights of both Parties in the dispute.⁸⁴ According to the Tribunal, procedural fairness includes the right to an impartial and independent judge, which is of paramount importance.⁸⁵

Thus, considering severity of the violation of the fundamental principles in the arbitration process, which caused the ex parte communications between Dr. Sekolec and Ms. Drenik, to the prejudice of Croatia, but also the vital national interests of Croatia, Croatia’s unilateral withdrawal from the arbitration was the only logical decision at that moment. However, despite Croatia’s unilateral withdrawal from the arbitration, the question of a possible legal remedy in the given case remained still open.

International practice provides rare cases that are similar to the present one. Still, there are two cases where a similar situation occurred. In the first case, the *Buraimi Oasis Arbitration (Saudi Arabia v. United Kingdom)* of 1955, sheikh Yousuf Yasin, the arbitrator appointed by Saudi Arabia, was in the continuous communication with the legal representatives of the Saudi Arabia.⁸⁶ After the ex parte communications were disclosed, three of the five arbitrators resigned.⁸⁷ Since it was not possible to reconstitute the tribunal, the arbitration was abandoned.⁸⁸ The second case is the *Victor Pey*

Casado et al. v. Chile case in which Mr. Leoro Franco, the arbitrator appointed by Chile, provided Chile with a partial draft of the decision on jurisdiction prepared by the president.⁸⁹ The arbitrator resigned, and the new one was appointed.⁹⁰ After the tribunal was reconstituted, the proceedings

⁷⁶ Ibid.

⁷⁷ See arts. 6(7) and 17(1) of the UNICTRAL Arbitration Rules (2014); arts. 11(1) and 22(4) of the ICC Rules of Arbitration (2017); arts. 13(1) and 20(1) of the ICDR International Arbitration Rules (2016); arts. 11.1, 13.1 and 13.5 of the Administered Arbitration Rules of the Hong Kong International Arbitration Centre (2013); arts. 13.1 and 19.1 of the Arbitration Rules of the Singapore International Arbitration Centre (2016); arts. 22 and 37(b) of the WIPO Arbitration Rules (2014); Rule 6(2) of the Arbitration Rules of the ICSID (2006); arts. 5.4, 14.4, 14.5 of the LCIA Arbitration Rules (2014).

⁷⁸ Guideline 1 and 27 of the IBA Guidelines on Party Representation in International Arbitration (2013); Rule 3.1 of the IBA Rules of Ethics for International Arbitrators (1987); Canon I-IX of the AAA/ABA Code of Ethics for Arbitrators (2004).

⁷⁹ Art. 4 of the 2009 Arbitration Agreement.

⁸⁰ Ibid, art. 6(5).

⁸¹ Arts. 6(4) and 9-12 of the PCA Optional Rules.

⁸² Art. 15(1) of the PCA Optional Rules clearly states that “the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case”.

⁸³ *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Partial Award of 30 June 2016, at 44, para. 175.

⁸⁴ Ibid, at 56, para. 227.

⁸⁵ Ibid.

⁸⁶ See Goy 1957, pp. 195-197.

⁸⁷ See A. Ross, *Poisoned Waters: Croatia’s Stance on the Sekolec Scandal*, Global Arbitration Review, Vol. 10, 2015, p. 13

⁸⁸ Ibid.

⁸⁹ *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award of 8 May 2008, at 15-17, paras. 34-43.

⁹⁰ Ibid.

continued and an entirely new round of written submissions was made on the jurisdictional issues.⁹¹

Unlike the *Buraimi Oasis* case in which the tribunal was not reconstituted, in the *Victor Pey Casado et al. v. Chile* case the tribunal was successfully reconstituted after the ex parte communications were disclosed. Therefore, Slovenia referred to the *Victor Pey Casado et al. v. Chile* case where the tribunal was reconstituted and the proceedings continued despite previous ex parte communications.⁹² Although the *Victor Pey Casado et al. v. Chile* case and the present case are similar, they are also different. Thus, in the *Victor Pey Casado et al. v. Chile* case the ex parte communications encompass only the exchange of a drafted tribunal decision on jurisdiction between the party-appointed arbitrator and its appointing party. On the other hand, in the arbitration between Croatia and Slovenia, apart from the exchange of documents, the ex parte communications between Dr. Sekolec and Ms. Drenik encompass disclosure of confidential information about the deliberations of the Tribunal and the likely outcome of the arbitration to Slovenia's Agent, as well as discussion of how to influence the other arbitrators to rule in Slovenia's favour. Moreover, in a period of thirteen months after the end of the oral hearings Dr. Sekolec had numerous conversations, dinners, and written communications with other members of the Tribunal.⁹³ Although such contacts between members of the Tribunal are common during deliberations, they enabled Dr. Sekolec to act *de facto* as an Agent of Slovenia, and thus influence the formation of the views of other members of the Tribunal regarding the final settlement of the Parties' dispute to the prejudice of Croatia. Ilic also correctly notes that the remaining members of the Tribunal "would mentally retain any form of ex parte information or strategies conveyed by Sekolec".⁹⁴ In addition, thanks to the "informal channel of communication with the Tribunal", Slovenia gained access to confidential information related to the Tribunal's deliberations, including arbitrators' views on certain facts and arguments, and thus achieved a strategic procedural advantage over Croatia. Therefore, it is hard to imagine that the replacement of the member of the Tribunal who was involved in the ex parte communication, as it was done in the *Victor Pey Casado et al. v. Chile* case, can be a sufficient remedy to repair the grave damage that has been done to the arbitral proceedings in the present case. In other words, all members of the Tribunal who were influenced by the ex parte communications were supposed to be replaced in order to ensure the procedural prerequisites for the continuation of the proceedings. However, even then the question remains of the success of conducting such proceedings whose award, because of legal and political connotations, would hardly be accepted and implemented by both Parties. Moreover, Croatia warned that "no award issued under these legally and ethically completely compromised proceedings could be considered as effective, authoritative or credible" and thus "such an award could never be implemented, or enforced, and consequently, any effort to continue arbitration would be futile and counterproductive".⁹⁵ Therefore, termination of the proceedings by the Tribunal, pursuant to Article 34(2) of the PCA Optional Rules,⁹⁶ was probably the best solution for the present case. Finally, in a similar situation, in the *Buraimi Oasis* case, due to grave procedural violations caused by ex parte communications and a sensitive political context, the arbitral proceedings were abandoned.

5.3. Termination of the Arbitration Agreement

On 30 July 2015, by *note verbale* Croatia notified Slovenia that, in accordance with Article 60(1)

⁹¹ Ibid.

⁹² See *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Partial Award of 30 June 2016, at 29, 31, paras. 119, 123.

⁹³ Ibid, at 17, para. 80.

⁹⁴ See also Ilic 2017, p. 376. Croatia also stated that "no reasonable person would conclude that the actions that have occurred may not have influenced other actors in the arbitration process". For the text of Croatia's letter to the Tribunal see <http://www.mvep.hr/files/file/dokumenti/arbitraza/hr/150820-letter-from-fm-usic-to-mr-pulkowski-pca-31072015.pdf> (20 June 2019).

⁹⁵ See Permanent Mission of the Republic of Croatia to the United Nations, No. 55/2016, New York, 16 March 2016, available at <http://www.mvep.hr/files/file/dokumenti/arbitraza/en/160330-nv-pm-croatia-no-55-2016.pdf> (20 June 2019).

⁹⁶ Article 34(2) of the PCA Optional Rules provides: "If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection."

of the Vienna Convention on the Law of Treaties, “it is entitled to terminate the Arbitration Agreement”.⁹⁷ Accordingly, pursuant to Article 65(1) of the Vienna Convention Croatia proposed to terminate forthwith the Arbitration Agreement.⁹⁸ In addition, Croatia explained that reason for the termination of the Arbitration Agreement was a material breach of the Arbitration Agreement by Slovenia. Thus, Croatia stated that Slovenia had violated Article 6 of the Arbitration Agreement, which provided confidentiality of the proceedings, as well as Article 10 of the Arbitration Agreement, which obliged the parties to “refrain from any action or statement which might jeopardize the work of the Arbitral Tribunal”.⁹⁹ In Croatia’s view, these provisions were “essential to the accomplishment of the object and purpose of the Arbitration Agreement” and therefore their violation constituted material breach of the Arbitration Agreement within the meaning of Article 60(3) of the Vienna Convention.¹⁰⁰ Finally, Croatia informed Slovenia that “as of the date of the *note verbale* it ceased to apply the Arbitration Agreement”.¹⁰¹

However, Slovenia objected to Croatia’s purported unilateral termination of the Arbitration Agreement. In Slovenia’s view, “it was not open to one Party to invoke a material breach as a ground for terminating the Arbitration Agreement”.¹⁰² In addition, Slovenia added that there had been no material breach within the meaning of the Vienna Convention since a violation did not make the accomplishment of the object and purpose of the Arbitration Agreement impossible.¹⁰³ It was more than obvious that the Parties took on completely diametrically opposed views regarding the validity of the purported termination of the Arbitration Agreement.

The dispute that arose between the Parties regarding the validity of the purported termination of the Arbitration Agreement by Croatia in fact encompasses two distinct issues: a) the right of Croatia to invoke a material breach as ground for terminating the Arbitration Agreement pursuant to Article 60(1) of the Vienna Convention; b) the existence of a material breach of the Arbitration Agreement by Slovenia within the meaning of Article 60(3) of the Vienna Convention.

In order to answer these questions, it is necessary first to look at the Vienna Convention on the Law of Treaties whose parties are Croatia and Slovenia. Pursuant to Article 60(1) of the Vienna Convention “a material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part”.¹⁰⁴

However, Slovenia argued that paragraph 4 of Article 60 prevents Croatia to invoke paragraph 1 of Article 60. Namely, paragraph 4 of Article 60 provides that paragraph 1 of Article 60 is “without prejudice to any provision in the treaty applicable in the event of a breach”.¹⁰⁵ In Slovenia’s view, the Arbitration Agreement contained such provisions (Article 3(4) and Article 6(2)), and thus Article 60(1) of the Vienna Convention could not be invoked by Croatia.¹⁰⁶

First, despite Slovenia’s claim, Article 3(4) of the Arbitration Agreement refers exclusively to the disputes regarding the interpretation of the Arbitration Agreement and as such does not prevent a Party of the Arbitration Agreement to invoke Article 60(1) of the Vienna Convention. Second, Article 6(2) of the Arbitration Agreement refers to the PCA Optional Rules which in Article 21(1) confers upon the Tribunal the power to settle disputes between the parties regarding “the jurisdiction with respect to the existence or validity of the arbitration agreement”.¹⁰⁷ In other words, the

⁹⁷ See Note No. 3303/2015 (2015). For the text of the Convention see 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

⁹⁸ See Note No. 3303/2015 (2015).

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² See *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Partial Award of 30 June 2016, at 33, para. 129.

¹⁰³ *Ibid.*, at 34, para. 135.

¹⁰⁴ Art. 60(1) of the 1969 Vienna Convention on the Law of Treaties.

¹⁰⁵ *Ibid.*, art. 60(4).

¹⁰⁶ See *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Partial Award of 30 June 2016, at 51, para. 205.

¹⁰⁷ Art. 21(1) of the PCA Optional Rules.

Tribunal has the power to determine the validity of the termination of the Arbitration Agreement by Croatia.

Nevertheless, textual analysis of the relevant provisions of the Arbitration Agreement, as well as of the PCA Optional Rules, in particular Article 21, reveals that there is no prescribed procedure in the event of a material breach. Consequently, in the absence of clear normative guidance, it can be concluded that Article 60(4) of the Vienna Convention does not refer to provisions which could prevent the application of Article 60(1) in the event of a material breach.

It still remains to answer the question whether there was a material breach of the Arbitration Agreement by Slovenia under Article 60(3) of the Vienna Convention. Pursuant to Article 60(3) there are two types of a material breach. Accordingly, Article 60(3) defines a material breach as: (a) a repudiation of the treaty, or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.¹⁰⁸

The Vienna Convention does not define the term ‘repudiation’, but it is considered that repudiation “encompass all means by which a party intends to relieve itself unlawfully from its obligations under a treaty”.¹⁰⁹ International practice provides rare examples of application of Article 60(3)(a). However, in its Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, the International Court of Justice (ICJ) found that South Africa, by rejecting to fulfill its treaty obligations, had disavowed the Mandate, i.e. it had repudiated it.¹¹⁰ In the present case, Slovenia did not reject to fulfill all its treaty obligations, as it was case with South Africa. While South Africa has consistently refused to apply the provisions of the treaty, in fact it rejected a treaty as a whole, Slovenia has violated some of the provisions of the Arbitration Agreement. Moreover, after disclosure of the ex parte communications, Slovenia has argued that the Arbitration Agreement continues to apply.¹¹¹ In addition, Slovenia has also expressly recognised its continuing obligations under the Arbitration Agreement.¹¹² Although Slovenia did not repudiate the Arbitration Agreement within the meaning of Article 60(3)(a) of the Vienna Convention, violations of the Arbitration Agreement by Slovenia may still constitute a material breach under Article 60(3) (b) of the Vienna Convention.

A textual analysis of Article 60(3)(b) reveals that ‘any’ violation of a provision essential to the accomplishment of the object or purpose of the treaty constitutes a material breach.¹¹³ Consequently, the intensity or gravity of the breach does not have any impact on the existence of a material breach.¹¹⁴ On the contrary, the decisive criterion for determining the existence of material breach is the nature of the provision that has been violated. Pursuant to Article 60(3)(b) that provision must be ‘essential’. However, Article 60 does not provide explanation of an ‘essential provision’. As in the case of paragraph 3(a), examples of application of paragraph 3(b) are rare in international practice. In the *Namibia* case, the ICJ explicitly recognized “the right of a party to treaty to terminate a relationship in case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship”.¹¹⁵ Accordingly, the ICJ found that South Africa had violated precisely those provisions and thus caused a material breach under Article 60(3)(b) of the Vienna Convention.¹¹⁶ Fifteen years later, in 1986, in the *Military and Paramilitary Activities*

¹⁰⁸ Art. 60(3) of the 1969 Vienna Convention on the Law of Treaties.

¹⁰⁹ See P. Reuter, *Introduction To The Law Of Treatise*, Pinter Publishers, London 1989, 161. See also M. M. Gomaa, *Suspension or Termination of Treaties on Grounds of Breach*, Martinus Nijhoff, Leiden 1996, p. 26; B. Simma & C. J. Tams, *Reacting against treaty breaches*, in D. B. Hollis (Ed.), *The Oxford Guide to Treaties*, Oxford University Press, Oxford 2012, p. 583.

¹¹⁰ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ Rep. 16, at 47, para. 95.

¹¹¹ See *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Partial Award of 30 June 2016, at 53, para. 214.

¹¹² *Ibid.*

¹¹³ See also Simma & Tams 2012, pp. 583-584.

¹¹⁴ *Ibid.*

¹¹⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ Rep. 16, at 47, para. 95.

¹¹⁶ *Ibid.*

in and against Nicaragua case, the ICJ also found that certain United States activities constituted a material breach of the 1956 Treaty of Friendship, Commerce and Navigation between United States and Nicaragua. The ICJ first identified object and purpose of the 1956 Treaty – effective implementation of friendship in the specific fields provided for in the Treaty.¹¹⁷ Then, the ICJ found that the direct attacks on ports, oil installations, as well as the mining of Nicaraguan ports undermined the whole spirit of the 1956 Treaty and deprived it of its object and purpose.¹¹⁸ On the other hand, the ICJ took the view that the acts of economic pressure did not constitute an act calculated to defeat the object and purpose of the 1956 Treaty.¹¹⁹

Turning, then, to the present case, it is necessary first to consider the object and purpose of the Arbitration Agreement. A useful guideline in determining the object and purpose of the Arbitration Agreement represents a view of the ICJ in the *Case Concerning the Arbitral Award of 31 July 1989*. The ICJ then stated that an arbitration agreement has “very specific object and purpose: to entrust an arbitration tribunal with the task of settling a dispute in accordance with the terms agreed by the parties, who define in the agreement the jurisdiction of the tribunal and determine its limits”.¹²⁰ Accordingly, the object and purpose of the Arbitration Agreement, pursuant to its Articles 3(1) and 4, was the settlement of the maritime and land boundary dispute between the Parties in accordance with the rules and principles of international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result.¹²¹ In addition, pursuant to Article 9 of the Arbitration Agreement, the object and purpose of the Arbitration Agreement was the continuation of the negotiations regarding Croatia’s access to the European Union.¹²²

Given that one of the objects and purposes of the Arbitration Agreement was achieved – the continuation of negotiations regarding Croatia’s access to the European Union, the question remains whether violations of the Arbitration Agreement by Slovenia have defeated the remaining object and purpose of the Arbitration Agreement.

There is no doubt that the *ex parte* communication between Dr. Sekolec, the arbitrator appointed by Slovenia and Ms. Simona Drenik, the Agent of Slovenia, in the arbitration between Croatia and Slovenia violated the fundamental principles of the arbitration process, including due process, procedural fairness, impartiality and independence. Moreover, the *ex parte* communications are completely incompatible with “the principle of good neighbourly relations”. Therefore, using the words of the ICJ in the *Nicaragua* case, activities of Slovenia “undermined the whole spirit” of the Arbitration Agreement directed to the settlement of the maritime and land boundary dispute between the Parties in accordance with the rules and principles of international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result. It is difficult to understand that such grave violations of the fundamental principles of the arbitration process do not constitute an act calculated to defeat the object and purpose of the Arbitration Agreement since those principles are essential to the integrity of the arbitral process and the achievement of fair and just result. Accordingly, Slovenia’s actions, i.e. the *ex parte* communications constitute a material breach of the Arbitration Agreement under Article 60(3)(b) of the Vienna Convention since they defeated the object and purpose of the Arbitration Agreement.¹²³ Otherwise, the neglect of grave violations of the fundamental principles of the arbitration process and diminishing their key role in rendering fair and just award would bring into question the meaning of arbitration as a means of settling disputes.

¹¹⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 1986 ICJ Rep. 14, at 136-137, para. 273.

¹¹⁸ *Ibid.*, para. 275.

¹¹⁹ *Ibid.*, para. 276.

¹²⁰ *Case Concerning Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, 1991 ICJ Rep. 53, at 70, para. 49.

¹²¹ See arts. 3(1) and 4 of the 2009 Arbitration Agreement.

¹²² Art. 9 of the Arbitration Agreement provides: “(1) The Republic of Slovenia shall lift its reservations as regards opening and closing of negotiation chapters where the obstacle is related to the dispute; (2) Both Parties shall refrain from any action or statement which might negatively affect the accession negotiations.”

¹²³ See also Ilic 2017, pp. 373-374.

5.4. Jurisdiction of the Tribunal

The first question which arose after Croatia's unilateral withdrawal from arbitration and announced termination of the Arbitration Agreement was whether the Tribunal had jurisdiction regarding the Croatian request for termination of the Arbitration Agreement.

Croatia expressed the view that the Tribunal was without competence to express any views as to the requirements for the termination of the Arbitration Agreement since the Arbitration Agreement contained no provision with regard to the settlement of disputes arising in relation to the validity and effect of the Arbitration Agreement.¹²⁴

On the other hand, Slovenia argued that the Tribunal was competent to decide on Croatia's claim that it was entitled to terminate the Arbitration Agreement.¹²⁵ In support of its claim, Slovenia submitted that a tribunal's inherent power to decide upon challenges to its own jurisdiction was a firmly established general principle of international law (*la compétence de la compétence*).¹²⁶ In addition, Slovenia explained that the principle applied unless it was expressly excluded and that the principle was expressly provided for in Article 21 of the PCA Optional Rules, which were applicable in the arbitration between Croatia and Slovenia by virtue of Article 6, paragraph 2 of the Arbitration Agreement.¹²⁷

It is obvious that the Parties were in disagreement as to whether the Tribunal had jurisdiction regarding the Croatian request for termination of the Arbitration Agreement. To answer this question, it is necessary first to answer whether the Tribunal had jurisdiction to determine its own jurisdiction (*la compétence de la compétence* in French or *Kompetenz-Kompetenz* in German). According to the principle of *la compétence de la compétence* every judicial body has the power to determine its own jurisdiction.¹²⁸ This power is incidental, i.e., it is incidental jurisdiction to decide whether the substantive jurisdiction exists.¹²⁹

A look at the history of international arbitration reveals that the question whether the tribunal has jurisdiction to determine its own jurisdiction arose for the first time in the *Betsey* case in 1796. The two commissioners in the *Betsey* case took the view that the tribunal had the power to decide on its own jurisdiction.¹³⁰ After the *Betsey* case, the principle *la compétence de la compétence* has been applied in a number of arbitrations, and in some arbitrations the principle was expressly acknowledged. In 1884, in the *Le More* case, the tribunal decided on its jurisdiction,¹³¹ while in 1900, in the *Guano* case between Chile and France, the tribunal stated that "la doctrine et la jurisprudence sont unanimes pour admettre que les Tribunaux internationaux apprécient eux-mêmes leur compé-

tence sur la base du Compromis lié entre les Parties".¹³² In 1911, in the *Walfish Bay Boundary* case between Germany and Great Britain, the tribunal similarly stated that "it is a constant doctrine of public international law that the arbitrator has powers to settle questions as to his own competence by interpreting the range of the agreement submitting to his decision the questions in dispute".¹³³ Moreover, in 1928, in the *Rio Grande Irrigation and Land Company Ltd* case, the tribunal took the stance that in every legal tribunal "there is inherent power, and indeed a duty, to entertain, and,

¹²⁴ See Croatia's letter to the Tribunal, available at <http://www.mvep.hr/files/file/dokumenti/arbitraza/hr/150820-letter-from-fm-pusic-to-mr-pulkowski-pca-31072015.pdf> (20 June 2019).

¹²⁵ See *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Partial Award of 30 June 2016, para. 102.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*, para. 104.

¹²⁸ See L. Boisson de Chazournes, *The Principle of Compétence de la Compétence in International Adjudication and its Role in an Era of Multiplication of Courts and Tribunals*, in: M. Arsanjani, J. Cogan & S. Weissner (Eds.), *Looking to the Future: Essays in Honor of W. Michael Reisman*, Martinus Nijhoff, Leiden 2010, pp. 1028-1029; I. F. I. Shihata, *The Power of the International Court to Determine Its Own Jurisdiction*, Martinus Nijhoff, The Hague 1965, pp. 25-26.

¹²⁹ See Amerasinghe 2011, p. 32; Shihata 1965, pp. 7-8.

¹³⁰ Amerasinghe 2011, p. 26.

¹³¹ *Ibid.*, p. 25.

¹³² *Affaire du Guano (Chili v. France)*, Awards of 20 January 1896, 10 November 1896, 20 October 1900, 8 January 1901, and 5 July 1901, 15 RIAA 77, at 100.

¹³³ *The Walfish Bay Boundary Case (Germany v. Great Britain)*, Award of 23 May 1911, 11 RIAA 263, at 307, para. LXVII.

in proper cases, to raise for themselves, preliminary points going to their jurisdiction to entertain the claim. Such a power is inseparable from and indispensable to the proper conduct of business. This principle has been laid down and approved as applicable to international arbitral tribunals”.¹³⁴ In 1933, in the *Sabotage cases*, before the American-German Mixed Claims Commission, Umpire Owen J. Roberts stated that “the Commission is competent to determine its own jurisdiction by the interpretation of the Agreement creating it. Any other view would lead to the most absurd results”.¹³⁵ A few years later, in 1940, in the *Société Radio-Orient* case, the tribunal said that “attendu qu’en en dehors des cas où les Parties en sont convenues autrement, tout tribunal d’arbitrage international est juge de sa propre compétence”.¹³⁶

The *compétence de la compétence* of international tribunals was also expressly recognised by the Permanent Court of International Justice (PCIJ) and the ICJ. In the *Interpretation of the Greco-Turkish Agreement of 1 December 1926*, the PCIJ, in regard to the question of the powers of the Mixed Commission, stated that as a general rule, any body possessing jurisdictional powers had the right in the first place itself to determine the extent of its jurisdiction and that questions affecting the extent of the jurisdiction of the Mixed Commission must be settled by the Commission itself without action by any other body being necessary.¹³⁷ In the *Nottebohm case*, the ICJ recognised a rule consistently accepted by general international law in the matter of international arbitration, i.e. that “in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction”.¹³⁸ In the *Case Concerning the Arbitral Award of 31 July 1989*, the ICJ again recognised the power of international arbitral tribunals to determine its own jurisdiction citing its pronouncement in the *Nottebohm case*.¹³⁹

Finally, the International Criminal Tribunal for the former Yugoslavia in the *Tadić* case clearly stated that “this power, known as the principle of ‘Kompetenz-Kompetenz’ in German or ‘la compétence de la compétence’ in French, is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its ‘jurisdiction to determine its own jurisdiction’. It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals, although this is often done.”¹⁴⁰

The principle *compétence de la compétence* has been incorporated into a number of international treaties. It was incorporated into Article 73 of the Hague Convention for the Pacific Settlement of International Disputes of 1907,¹⁴¹ as well as into Article 36(4) of the Statute of the PCIJ,¹⁴² and later into Article 36(6) of the Statute of the ICJ.¹⁴³ The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) is also one of the treaties in which the principle was incorporated.¹⁴⁴ Thus, Article 41(1) of the ICSID Convention provides that the Arbitral Tribunal shall be the judge of its own competence.

There is no doubt that the principle of *compétence de la compétence* has become generally accepted by international law and practice.¹⁴⁵ Moreover, according to the prevailing view, the power to

¹³⁴ *Rio Grande Irrigation and Land Company, Ltd. (Great Britain) v. United States*, Award of 28 November 1923, 6 RIAA 131, at 135-136.

¹³⁵ *Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry Company, Limited, and Various Underwriters (United States) v. Germany (Sabotage Cases)*, Decision of 15 December 1933, 8 RIAA 160, at 186.

¹³⁶ *Affaire de la Société Radio-Orient (États du Levant sous mandat français contre Égypte)*, Award of 2 April 1940, 3 RIAA 1871, at 1878.

¹³⁷ *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV)*, Advisory Opinion, 1928 PCIJ Reports, Series B, No 16, at 20.

¹³⁸ *Nottebohm Case (Preliminary Objections) (Liechtenstein v. Guatemala)*, Judgment, 1953 ICJ Rep. 111, at 119.

¹³⁹ *Case Concerning Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, 1991 ICJ Rep. 53, at 68-69, para 46.

¹⁴⁰ *Prosecutor v. Duško Tadić*, ICTY Case No. IT-94-1-AR72, Decision of 2 October 1995, para. 18.

¹⁴¹ See 1907 Convention for the Pacific Settlement of International Disputes, available at <https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/1907-Convention-for-the-Pacific-Settlement-of-International-Disputes.pdf> (20 June 2019).

¹⁴² See 1920 Statute of the Permanent Court of International Justice, 6 LNTS 380.

¹⁴³ See 1945 Charter of the United Nations, 1 UNTS XVI.

¹⁴⁴ See 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 UNTS 159.

¹⁴⁵ See *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV)*, Advisory Opinion, 1928 PCIJ Reports, Series B, No 16, at 20; *Nottebohm Case (Preliminary Objections) (Liechtenstein v. Guatemala)*, Judgment, 1953 ICJ Rep. 111, at 119; *Case Concerning Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, 1991 ICJ Rep. 53, at 68-69, para 46.

determine its own jurisdiction is inherent in every international arbitral tribunal, unless excluded by agreement of the parties (*clause contraire*).¹⁴⁶ Therefore, although the Arbitration Agreement between Croatia and Slovenia does not explicitly provide power of the Tribunal to decide on its jurisdiction, the Tribunal has the inherent power to determine its jurisdiction. Furthermore, Article 6(2) of the Arbitration Agreement provides that “unless envisaged otherwise, the Arbitral Tribunal shall conduct the proceedings according to the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States”. Thus, the PCA Optional Rules in Article 21(1) provide that “the arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement”.

Finally, the Tribunal’s jurisdiction is confirmed in Article 65 of the Vienna Convention on the Law of Treaties, entitled “Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty”.¹⁴⁷ Article 65 of the Vienna Convention, in paragraph 4 clearly states that “nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes”. It is indisputable that Article 65(4) of the Vienna Convention refers precisely to Article 21(1) of the PCA Optional Rules which is, in accordance with Article 6(2) of the Arbitration Agreement, in force between the Parties to the dispute.

Otherwise, if a dispute concerning the request of one of the parties for termination of the arbitration agreement constitutes a new dispute between the parties, which is outside the jurisdiction of the tribunal, there would be the possibility that any party to the arbitration unilaterally prevent the tribunal in rendering the award by raising the request for termination of the arbitration agreement. A similar stance was taken by the tribunal in the *Abyei arbitration* when it correctly noted that “without a principle of Kompetenz-Kompetenz, any form of third party decision in international law could be paralyzed by a party which challenged jurisdiction”.¹⁴⁸

5.5. Partial Award

Although Croatia did not participate in the further proceedings after its unilateral withdrawal from the arbitration, on 30 June 2016, the reconstituted Tribunal rendered a Partial Award regarding the legal consequences of the ex parte communications in the arbitration between Croatia and Slovenia.¹⁴⁹ The Tribunal decided that: (a) the Tribunal had jurisdiction to decide whether Croatia, acting under Article 60(1) of the Convention, had validly proposed to Slovenia to terminate the Arbitration Agreement and had validly ceased to apply it; (b) Slovenia had breached the provisions of the Arbitration Agreement, but the breach did not defeat the object and purpose of the Agreement; (c) Croatia was not entitled to terminate the Agreement under Article 60(1) of the Vienna Convention; (d) the Arbitration Agreement remained in force; (e) the breach would not affect the Tribunal’s ability, in its new composition, to render a final award independently and impartially; (f) the arbitral proceedings pursuant to the Arbitration Agreement would continue.¹⁵⁰

First, the Tribunal acted properly when it confirmed its jurisdiction with regard to the Croatian request for the termination of the Arbitration Agreement.¹⁵¹ The Tribunal based its decision on the

nea-Bissau v. Senegal), Judgment, 1991, ICJ Rep. 53, at 68-69, para 46. See also Amerasinghe 2011, p. 32; Boisson de Chazournes 2010, pp. 1034-1035.

¹⁴⁶ See *Rio Grande Irrigation and Land Company, Ltd. (Great Britain) v. United States*, Award of 28 November 1923, 6 RIAA 131, at 135-136; *Prosecutor v. Duško Tadić*, ICTY Case No. IT-94-1-AR72, Decision of 2 October 1995, para. 18. See also Ralston 1929, pp. 47-48.

¹⁴⁷ Art. 65 of the 1969 Vienna Convention on the Law of Treaties.

¹⁴⁸ *The Government of Sudan/The Sudan People’s Liberation Movement/Army (Abyei Arbitration)*, PCA Case No. 2008-07, Final Award of 22 July 2009, at 175, para. 499.

¹⁴⁹ See *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Partial Award of 30 June 2016.

¹⁵⁰ See Permanent Court of Arbitration, Press Release, Arbitration Between the Republic of Croatia and the Republic of Slovenia, The Hague, 30 June 2016, available at <https://pcacases.com/web/sendAttach/1785> (20 June 2019).

¹⁵¹ See *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Partial Award of 30 June 2016, at 40-41, para. 167.

principle *compétence de la compétence* as well as on Article 21(1) of the PCA Optional Rules in which this principle is incorporated and which, in accordance with Article 6(2) of the Arbitration Agreement, obliges the Parties to the dispute.¹⁵² In addition, the Tribunal correctly noted that its jurisdiction is also confirmed in Article 65(4) of the Vienna Convention on the Law of Treaties which refers precisely to Article 21(1) of the PCA Optional Rules.¹⁵³

However, the Tribunal incorrectly found that Slovenia's actions did not constitute a material breach of the Arbitration Agreement under Article 60(3)(b) of the Vienna Convention, i.e. in the Tribunal's view the *ex parte* communications did not defeat the object and purpose of the Agreement.¹⁵⁴ Namely, the Tribunal was convinced that remedial action it had taken, and, the accordingly secured procedural balance between the Parties rendered the continuation of the proceedings and the accomplishment of object and purpose of the Arbitration Agreement possible.¹⁵⁵ As correctly noted by Ilic, the Tribunal placed too much weight on finality as the main goal of arbitration.¹⁵⁶ On the other hand, the Tribunal completely downplayed the importance and the role that the fundamental principles of the arbitration process have in rendering a fair and just award in the arbitral proceedings. Therefore, the object and purpose of the Arbitration agreement must be considered in its entirety, and not partially as the Tribunal did. Pursuant to Article 3(1) and 4 of the Arbitration Agreement, the object and purpose of the Arbitration Agreement was "the settlement of the maritime and land boundary dispute between the Parties in accordance with the rules and principles of international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result".¹⁵⁷ Consequently, in addition to the settlement of the boundary dispute, the object and purpose of the Arbitration Agreement was also the application of the fundamental principles of the arbitration process in resolving the dispute and achieving a fair and just result. Considering that the fundamental principles of the arbitration process are essential to the integrity of the arbitral process as well as the achievement of fair and just result, it is difficult to understand the reasoning of the Tribunal that Slovenia's violations of those principles did not constitute an act calculated to defeat the object and purpose of the Arbitration Agreement.

Furthermore, the Tribunal misjudged that there was no obstacle to the continuation of the proceedings under the Arbitration Agreement.¹⁵⁸ In the Tribunal's view, the Tribunal was properly recomposed and "no doubt has been expressed as to the independence or impartiality of the recomposed Tribunal".¹⁵⁹ This view of the Tribunal is unacceptable considering that Croatia clearly expressed doubts in the remaining members of the Tribunal.¹⁶⁰ Moreover, as it was explained before, it is difficult to understand that the remaining members of the Tribunal were not influenced by Dr. Sekolec who acted as *de facto* an Agent of Slovenia with the task of influencing the formation of the views of other members of the Tribunal regarding the final settlement of the Parties' dispute to the prejudice of Croatia.¹⁶¹ Accordingly, the Tribunal's view that the views expressed by Dr. Sekolec in prior deliberation meetings were of no relevance for the work of the Tribunal in its new composition can hardly be acceptable.¹⁶² Therefore, contrary to the claims of the Tribunal, the Tribunal was not properly recomposed considering that the remaining original members of the Tribunal (Judge Guillaume, Professor Lowe and Judge Simma), who were directly influenced by Dr. Sekolec and the *ex parte* communications, were not replaced.

¹⁵² Ibid.

¹⁵³ Ibid, paras. 165-166.

¹⁵⁴ Ibid, para. 225.

¹⁵⁵ Ibid.

¹⁵⁶ See Ilic 2017, p. 372.

¹⁵⁷ Arts. 3(1) and 4 of the 2009 Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia. See also *Case Concerning Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, 1991 ICJ Rep. 53, at 70, para. 49.

¹⁵⁸ See *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Partial Award of 30 June 2016, at 49, para. 196.

¹⁵⁹ Ibid.

¹⁶⁰ See Croatia's letter to the Tribunal, available at <http://www.mvep.hr/files/file/dokumenti/arbitraza/hr/150820-letter-from-fm-pusic-to-mr-pulkowski-pca-31072015.pdf> (20 June 2019).

¹⁶¹ See also Ilic 2017, p. 376.

¹⁶² See *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Partial Award of 30 June 2016, at 48, para. 193.

Finally, although the Tribunal correctly determined that the two documents presented by Dr. Sekolec during deliberations did not contain any arguments or facts not already presented in the Parties' pleadings,¹⁶³ it disregarded other aspects of the *ex parte* communication like disclosure of confidential informations about the deliberations of the Tribunal and likely outcome of the arbitration to Slovenia's Agent, as well as discussion of how to influence the other arbitrators to rule in Slovenia's favour. Considering the strategic procedural advantage that Slovenia gained through access to confidential information on the Tribunal's deliberations as well as Slovenian influence on Tribunal members through dr. Sekolec, it can be concluded that remedial action taken by the Tribunal did not establish a procedural balance between the Parties that was necessary for the continuation of the proceedings.

5.6. Events Following the Render of the Final Award

On 19 June 2017, the Arbitral Tribunal announced that it would render its award in the Croatian-Slovenian border dispute on 29 June 2017.¹⁶⁴ A few days later, on 21 June 2017, in its reaction to the Tribunal's announcement, the Croatian Prime Minister Andrej Plenkovic stated that following the decision of the Croatian Parliament, the arbitral decision was unacceptable.¹⁶⁵ At the same time, on the 25 June 2017, the Croatian President Kolinda Grabar Kitarovic said that "international arbitration is irreversibly compromised and that Croatia, in accordance with Article 60 of the Vienna Convention on the Law of Treaties, will not accept any decision of the Arbitral Tribunal because it is no longer part of that process nor will it allow the implementation of its decisions whatever they are".¹⁶⁶ On the other hand, on 22 June 2017, the Slovenian Prime Minister Miro Cerar expressed his satisfaction that the Arbitration Tribunal had completed its work and repeated that Slovenia would respect the Tribunal's decision.¹⁶⁷

Finally, on 29 June 2017, the reconstituted Tribunal rendered its Final Award regarding the territorial and maritime dispute between the Republic of Croatia and the Republic of Slovenia.¹⁶⁸ Pursuant to Article 7(2) of the Arbitration Agreement the Final Award is binding on the Parties and constitutes a definitive settlement of the dispute.¹⁶⁹ In addition, same Article, in paragraph 3, provides that the Parties shall take all necessary steps to implement the award within six months after the adoption of the award.¹⁷⁰ Thus, within the prescribed six-month deadline, the Slovenian Parliament, on 27 November 2017, adopted a package of laws necessary for the implementation of the arbitral award.¹⁷¹ However, Croatia maintained its position that it will not accept the arbitral award and that it will not allow its implementation.

Given that the bilateral talks between the two countries that followed after the Arbitral Tribunal rendered its Final Award, including those between Prime Ministers Plenkovic and Cerar on 12 July 2017 and 19 December 2017, ended in a stalemate on the arbitral award and the final settlement of the border dispute, on 16 March 2018 Slovenia brought the matter before the European Commission under Article 259 of the Treaty on the Functioning of the European Union (TFEU)

¹⁶³ *Ibid.*, para. 224.

¹⁶⁴ Permanent Court of Arbitration, Press Release, Arbitration Between the Republic of Croatia and the Republic of Slovenia, The Hague, 19 June 2017, available at <https://pcacases.com/web/sendAttach/2160> (20 June 2019).

¹⁶⁵ The Croatian Prime Minister Plenkovic stressed: "We will not be bound by it nor under international law not following the decision and notifications that we perform. We remain open to addressing open border issues, but not in the way that is done in the context of a process that was irreversibly contaminated and compromised, not with the guilty of the Croatian side, but the other side." See <https://vlada.gov.hr/vijesti/predsjednik-vlade-zahvaljujem-vatrogascima-i-vojniscima-na-nevjerovatnoj-hrabrosti-u-zauzdavanju-velikih-pozara/21871> (20 June 2019).

¹⁶⁶ The Croatian President Grabar Kitarovic also added: "However, we are ready to start negotiations immediately and therefore I use this opportunity to invite Slovenia to the negotiating table. I believe that we must show the maturity and ability to resolve this issue on a bilateral basis." See <http://predsjednica.hr/objava/2/3/1645> (20 June 2019).

¹⁶⁷ See http://www.vlada.si/en/prime_minister/news/a/pm_cerar_welcomes_support_for_honouring_arbitration_ruling_946/ (20 June 2019).

¹⁶⁸ See *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Final Award of 29 June 2017.

¹⁶⁹ Art. 7(2) of the 2009 Arbitration Agreement.

¹⁷⁰ *Ibid.*, art. 7(3).

¹⁷¹ Slovenian Parliament adopted four laws, including Act on Keeping Records on the National Border with the Republic of Croatia. See Official Gazette of the Republic of Slovenia, No. 80, 2017.

for an alleged violations of European Union law.¹⁷² In Slovenia's view, specific infringements of European Union law have occurred due to the Croatian rejection of the arbitral award and its implementation.¹⁷³ Therefore, bringing the matter under Article 259 of the TFEU before the European Commission was the first Slovenian step toward filing an infringement action against Croatia before the Court of Justice of the European Union (CJEU).¹⁷⁴ Accordingly, each country has used the opportunity provided in Article 259(3) of the TFEU to submit their own case and their observations on the other Party's case both orally and in writing before the European Commission. The European Commission had a three month period starting from the date on which the matter was brought before it to deliver a reasoned opinion, but it did not do so. Although the Commission did not deliver a reasoned opinion within the prescribed period, the absence of such opinion was not an obstacle for Slovenia to bring the matter before the CJEU.¹⁷⁵ Finally, on 13 July 2018, pursuant to Article 259(4) of the TFEU, Slovenia filed a lawsuit against Croatia before the Court for an alleged violation of European Union law.

However, the fact that the European Commission did not deliver a reasoned opinion may be indicative of the outcome of the proceedings between Croatia and Slovenia before the CJEU considering that one of the main tasks of the Commission is to monitor the application of European Union law.¹⁷⁶ Moreover, as "the Guardian of the Treaties", the European Commission has an option of commencing infringement proceedings under Article 258 of the TFEU whenever it considers that a Member State has breached European Union law.¹⁷⁷ Consequently, the Commission has commenced hundreds of infringement proceedings before the CJEU against Member States and most of them ended in the Commission's favor. For example, in 2016 the Court gave 28 judgments under Article 258 of the TFEU, of which 23, i.e. 82% were in the Commission's favour.¹⁷⁸ On the other hand, infringement proceedings between Member States under Article 259 of the TFEU are very rare. So far, there was only five cases in which one Member State launched infringement proceedings under Article 259 of the TFEU against another Member State before the CJEU.¹⁷⁹ Nevertheless, the reason for the Slovenian lawsuit against Croatia before the CJEU is more than clear. Namely, although an arbitral award is final and legally binding upon the parties,¹⁸⁰ in the present case there are no legal mechanisms that can force Croatia to accept and implement the arbitral award of the Tribunal. Unlike arbitration award, decisions of the CJEU can be enforced.¹⁸¹ Therefore, Slovenia is trying, on the basis of a CJEU judgment, to "force" Croatia to implement the arbitral award of the Tribunal.

¹⁷² See Consolidated version of the Treaty on the Functioning of the European Union, OJ 2012 C 326/47 (*hereinafter* TFEU).

¹⁷³ See <http://www.vlada.si/en/projects/arbitration/> (20 June 2019).

¹⁷⁴ Art. 259(2) of the TFEU provides: "Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission."

¹⁷⁵ Art. 259(4) of the TFEU provides: "If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court."

¹⁷⁶ See art. 17 of the Consolidated version of the Treaty on European Union, OJ 2012 C 326/13.

¹⁷⁷ Art. 258 of the TFEU provides:

"If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union."

¹⁷⁸ European Commission, Monitoring the application of European Union law 2016, Annual Report, COM(2017) 370 final, Brussels, 6 July 2017, p. 26.

¹⁷⁹ See *Case 141/78, France v. United Kingdom*, [1979] ECR 02923; *Case 388/95, Belgium v. Spain*, [2000] ECR I-03123; *Case 145/04, Spain v. United Kingdom*, [2006] ECR I-7917; *Case 364/10, Hungary v. Slovakia* [2012] ECLI:EU:C:2012:630 (GC Oct 16, 2012); *Case C-591/17, Austria v. Germany* [2019] ECLI:EU:C:2019:504 (GC Jun 18, 2019).

¹⁸⁰ See Shaw 2014, p. 762.

¹⁸¹ Art. 260(2) of the TFEU provides: "(...) If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it."

6. Conclusion

Ex parte communications in an important arbitration concerning border dispute between Croatia and Slovenia have given rise to a situation without precedent in the history of international arbitration. So far, telephone conversations between Dr. Sekolec, the arbitrator appointed by Slovenia and Ms. Simona Drenik, Agent of Slovenia, have resulted in numerous consequences and with them related legal issues that have precedential value in international adjudication. There is no doubt that Slovenia has systematically and gravely violated provisions of the Arbitration Agreement, the PCA Optional Rules and the Terms of Appointment which were applicable in the arbitration between Croatia and Slovenia. Moreover, it is indisputable that the fundamental principles of the arbitration process, including due process, procedural fairness, impartiality and independence have been violated in the arbitration between Croatia and Slovenia to the prejudice of Croatia.

Given the essential importance that those principles have in the international arbitral proceedings and rendering a fair and just award, the vital national interests of Croatia, and the sensitive political context of the arbitration, Croatia's unilateral withdrawal from the arbitration was only possible decision at that moment.

Although Dr. Sekolec resigned and the Tribunal was recomposed, it was not sufficient remedy to repair the grave damage that has been done to the arbitral proceedings. Namely, remedial action taken by the Tribunal did not establish a procedural balance between the Parties that was necessary for the continuation of the proceedings because the remaining original members of the Tribunal, who were directly influenced by Dr. Sekolec and the ex parte communications, were not replaced. Accordingly, taking into account legal and political connotations of the ex parte communication, for which the acceptance and implementation of the arbitral award by both Parties were unlikely, the proceedings should have been terminated. However, in its Partial Award regarding the legal consequences of the ex parte communications the Tribunal misjudged that there was no obstacle to the continuation of the proceedings.

In addition, although the Tribunal acted properly when it confirmed its jurisdiction with regard to the Croatian request for the termination of the Arbitration Agreement,¹⁸² it incorrectly found that Slovenia's actions did not constitute a material breach of the Arbitration Agreement under Article 60(3)(b) of the Vienna Convention.¹⁸³ According to the Tribunal, the ex parte communications did not defeat the object and purpose of the Arbitration Agreement.¹⁸⁴ From the reasoning of the Tribunal it can be concluded that the Tribunal completely downplayed the importance and the role that the fundamental principles of the arbitration process have in the accomplishment of the object and purpose of the Arbitration Agreement, i.e. it disregarded that those principles are essential to the integrity of the arbitral process as well as the achievement of fair and just result. Therefore, Slovenia's actions, i.e. the ex parte communications constitute a material breach of the Arbitration Agreement because they defeated one of the objects and purposes of the Arbitration Agreement – the settlement of the maritime and land boundary dispute between Croatia and Slovenia in accordance with the rules and principles of international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result. Accordingly, Croatia was entitled to terminate the Arbitration Agreement under Article 60, paragraph 1 of the Vienna Convention.

Despite the above mentioned facts, the Tribunal rendered its binding Final Award regarding the territorial and maritime dispute between Croatia and Slovenia. Soon after that, the situation has become absurd. Croatia, bound by the previous decision of its Parliament, has refused to accept and implement the arbitral award which is unexpectedly favorable for Croatia. On the other hand,

¹⁸² See *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Partial Award of 30 June 2016, at 40-41, paras. 165-168.

¹⁸³ *Ibid.*, at 55, para. 225.

¹⁸⁴ *Ibid.*

Slovenia filed lawsuit against Croatia before the CJEU with the aim to make Croatia accept and implement the arbitral award which is, ironically, unfavorable for Slovenia. At the time of writing this article there was no sign of the final settlement of the border dispute between the two countries, but one thing is for sure – there is still no end in sight to the consequences of the ex parte communications in the arbitration between Croatia and Slovenia.