

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

**- between -**

**THE REPUBLIC OF CROATIA**

**- and -**

**THE REPUBLIC OF SLOVENIA**

**(together, the “Parties”)**

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**PARTIAL AWARD**

**30 JUNE 2016**

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**ARBITRAL TRIBUNAL**

Judge Gilbert Guillaume (President)  
H.E. Mr. Rolf Einar Fife  
Professor Vaughan Lowe  
Professor Nicolas Michel  
Judge Bruno Simma

**REGISTRY**

Dr. Dirk Pulkowski  
The Permanent Court of Arbitration

## I. INTRODUCTION

### A. THE PARTIES TO THE ARBITRATION

1. The Parties to this arbitration are the Republic of Croatia (“**Croatia**”) and the Republic of Slovenia (“**Slovenia**”).
2. Croatia was represented in these proceedings by Professor Maja Seršić, Head of the Department of International Law, University of Zagreb, Faculty of Laws as Agent; H.E. Ms. Andreja Metelko-Zgombić, Ambassador, Director-General, Directorate for European Law, International Law and Consular Affairs, Ministry of Foreign and European Affairs of the Republic of Croatia as Co-Agent; and Professor Zachary Douglas, Matrix Chambers, Gray’s Inn, London, United Kingdom; Mr. Paul Reichler, Foley Hoag LLP, Washington DC, U.S.A.; Professor Philippe Sands, Matrix Chambers, Gray’s Inn, London, United Kingdom; Ms. Anjolie Singh, Matrix Chambers, Gray’s Inn, London, United Kingdom; and Professor Davor Vidas, Fridtjof Nansen Institute, Lysaker, Norway as Counsel.
3. By letter dated 31 July 2015, Croatia notified the Tribunal that it had relieved its Agent, Co-Agent, Counsel and assistants of their respective duties and engagement in the case and requested that further communications, if needed, be addressed to the Ministry of Foreign and European Affairs of the Republic of Croatia. Since that date, any correspondence from the Tribunal has been addressed to H.E. Ms. Andreja Metelko-Zgombić as Croatia’s contact person.
4. Slovenia is represented in these proceedings by Professor Mirjam Škrk, Head of the Chair of International Law, Faculty of Law, University of Ljubljana as Agent; H.E. Ms. Nataša Šebenik, Minister Plenipotentiary, Ministry of Foreign Affairs, as Co-Agent; and Mr. Rodman R. Bundy, Eversheds LLP, Singapore; Mr. Daniel Müller, Freshfields Bruckhaus Deringer, Paris, France; Professor Alain Pellet, Université Paris Ouest, Nanterre-La Défense, France; and Sir Michael Wood, 20 Essex Street, London, United Kingdom as Counsel.

### B. BACKGROUND OF THE DISPUTE

5. The present arbitration concerns a territorial and maritime dispute between the Republic of Croatia and the Republic of Slovenia. Both Croatia and Slovenia are successor States to the Socialist Federal Republic of Yugoslavia. The dispute was submitted to arbitration in accordance with an Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009 in Stockholm

(the “**Arbitration Agreement**”).<sup>1</sup> Pursuant to the Arbitration Agreement, “[t]he Arbitral Tribunal shall determine (a) the course of the maritime and land boundary between the Republic of Croatia and the Republic of Slovenia; (b) Slovenia’s junction to the High Sea; (c) the regime for the use of the relevant maritime areas”.<sup>2</sup>

6. On 22 July 2015, Serbian and Croatian newspapers reported that telephone conversations between Dr. Jernej Sekolec, the arbitrator originally appointed by Slovenia in the present proceedings, and H.E. Ms. Simona Drenik, then one of two Agents designated by Slovenia, had been intercepted. In the course of these conversations, Dr. Sekolec reportedly disclosed confidential information about the Tribunal’s deliberations to Ms. Drenik. Following the press reports, both Dr. Sekolec and Ms. Drenik resigned from their functions, as arbitrator and as Agent, in the present proceedings.
7. The incident has given rise to significant disagreement between the Parties as to how to proceed with the arbitration. Croatia requests the Tribunal to discontinue the arbitral proceedings, whereas Slovenia asks the Tribunal to complete its mandate as envisaged by the Arbitration Agreement.
8. The present Partial Award sets out the Tribunal’s decision in this respect.

## **II. HISTORY OF THE PROCEEDINGS**

### **A. EVENTS LEADING TO THE CONCLUSION OF THE ARBITRATION AGREEMENT**

9. In the period between 1992 and 2001, following Croatia’s and Slovenia’s declarations of independence, bilateral negotiations concerning the land and maritime boundaries between the two States took place. In particular, the Parties established expert groups, which met between December 1992 and June 1993, and set up a Diplomatic Commission for the Identification and Demarcation of the State Border between the Republic of Croatia and the Republic of Slovenia on 30 July 1993, which met until July 1998. These attempts to resolve the boundary dispute were unsuccessful.
10. Between 1998 and 1999, bilateral negotiations continued at the Foreign Minister level but were ultimately fruitless. A mediation process, conducted by Dr. William Perry, former U.S. Secretary of Defence, was discontinued in 1999.

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<sup>1</sup> Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, done in Stockholm on 4 November 2009 (Annex HRLA-75/Annex SI-395).

<sup>2</sup> *Ibid.*, Article 3(1).

11. On 20 July 2001, negotiations at the Prime Minister level resulted in the Drnovšek-Račan Agreement on the Common State Border (“**Drnovšek-Račan Agreement**”). The Committee on International Relations of the National Assembly of Slovenia approved the Drnovšek-Račan Agreement on 25 July 2001; however, the text was rejected by the Foreign Affairs Committee of the Parliament of Croatia before it was submitted to the Croatian Parliament for approval. Further bilateral efforts in the following years to resolve the boundary dispute proved unsuccessful.
12. On 1 May 2004, Slovenia acceded to the European Union.
13. Negotiations regarding Croatia’s accession to the European Union commenced in 2005. In December 2008, Slovenia raised reservations to seven of the negotiating chapters at the Intergovernmental Accession Conference of the European Union with Croatia, on the basis that these might prejudice the course of the border between Croatia and Slovenia.
14. In January 2009, the European Commissioner for Enlargement, Mr. Olli Rehn, launched an initiative to facilitate the resolution of the border dispute. In the following months, Commissioner Rehn presented to the Parties several draft agreements regarding dispute settlement. The drafts ultimately resulted in the Arbitration Agreement, which was signed by Croatia and Slovenia at Prime Minister level and witnessed by the Presidency of the Council of the European Union, represented by the Prime Minister of Sweden, in a ceremony in Stockholm on 4 November 2009.
15. After ratification of the Arbitration Agreement in accordance with the respective constitutional requirements in Croatia and Slovenia, the Arbitration Agreement entered into force on 29 November 2010. Following its entry into force, and in conformity with the Agreement, Slovenia lifted its reservations to Croatia’s accession to the European Union. The Treaty of Accession between the Member States of the European Union and Croatia was subsequently signed on 9 December 2011. It entered into force on 1 July 2013, making Croatia the 28<sup>th</sup> Member State of the European Union.

## **B. COMMENCEMENT OF THE ARBITRATION AND FIRST PROCEDURAL MEETING**

16. The Arbitration Agreement provides for the establishment of an Arbitral Tribunal. Article 2 of the Arbitration Agreement stipulates:

### Article 2: Composition of the Arbitral Tribunal

- (1) Both Parties shall appoint by common agreement the President of the Arbitral Tribunal and two members recognized for their competence in international law within fifteen days drawn from a list of candidates established by the President of the European Commission and the Member responsible for the enlargement of the European Commission. In case that they cannot agree within this delay, the President

and the two members of the Arbitral Tribunal shall be appointed by the President of the International Court of Justice from the list.

- (2) Each Party shall appoint a further member of the Arbitral Tribunal within fifteen days after the appointments referred to in paragraph 1 have been finalised. In case that no appointment has been made within this delay, the respective member shall be appointed by the President of the Arbitral Tribunal.
  - (3) If, whether before or after the proceedings have begun, a vacancy should occur on account of the death, incapacity or resignation of a member, it shall be filled in accordance with the procedure prescribed for the original appointment.
17. Pursuant to Article 2, paragraph 1 of the Arbitration Agreement, on 17 January 2012, the Parties agreed to appoint Judge Gilbert Guillaume, former President of the International Court of Justice, as the President of the Tribunal, and to appoint Professor Vaughan Lowe and Judge Bruno Simma as arbitrators.
  18. Pursuant to Article 2, paragraph 2 of the Arbitration Agreement, on 26 January 2012, Slovenia appointed Dr. Jernej Sekolec as arbitrator; on 31 January 2012, Croatia appointed Professor Budislav Vukas as arbitrator.
  19. Following the constitution of the Tribunal, Terms of Appointment were signed on 4 April 2012 by Croatia and on 12 April 2012 by Slovenia as well as by the President on behalf of the Tribunal. By agreement of the Parties, the Permanent Court of Arbitration (“PCA”) acts as Registry in this arbitration, as confirmed in Section 7 of the Terms of Appointment.
  20. On 13 April 2012, a first procedural meeting (“**First Procedural Meeting**”) between the Parties and the members of the Tribunal took place at the Peace Palace, The Hague, the Netherlands, during which the Tribunal and the Parties discussed and agreed on the procedural framework for the arbitration.
  21. On 1 May 2012, the Tribunal issued Procedural Order No. 1, which reflected the results of the First Procedural Meeting. On 7 February 2013, Procedural Order No. 1 was amended by Procedural Order No. 2, further to a joint proposal of the Parties with regard to the form of written submissions and communications.

### **C. WRITTEN AND ORAL PROCEEDINGS**

22. Pursuant to Procedural Order No. 1, Croatia and Slovenia filed their Memorials and accompanying documents on 11 February 2013.
23. On 11 November 2013, the Parties submitted their Counter-Memorials and accompanying documents.

24. On 23 December 2013, the Tribunal issued Procedural Order No. 3, which allowed for the submission of a Reply Memorial limited to responding to new documents annexed to the opposing Party's Counter-Memorial and set a schedule for the hearing. On 21 January 2014, the schedule for the hearing set out in Procedural Order No. 3 was modified by Procedural Order No. 4.
25. Pursuant to Procedural Order No. 3, Croatia and Slovenia filed their Reply Memorials on 26 March 2014 with accompanying documents.
26. The hearing was held from 2 June to 13 June 2014 at the Peace Palace, The Hague, the Netherlands. It consisted of two rounds of presentations during which the Agents and Counsel for both Parties presented the Parties' views in respect of the maritime and land boundaries, as well as "Slovenia's junction to the High Sea" and "the regime for the use of the relevant maritime areas". Parts of the hearing were attended by the Minister of Foreign and European Affairs of Croatia and the Minister of Foreign Affairs of Slovenia.
27. Following the hearing, the Tribunal commenced its deliberations.

#### **D. THE 2015 INTERVIEWS OF THE SLOVENIAN FOREIGN MINISTER**

28. On 30 April 2015, Croatia forwarded to the Tribunal a letter addressed to Slovenia, in which Croatia asked Slovenia to explain two statements concerning the arbitration made by the Slovenian Minister of Foreign Affairs during interviews with Slovenian television on 7 January 2015 and 22 April 2015.
29. On 1 May 2015, Slovenia answered that letter.
30. On 5 May 2015, in a letter to the Parties, the Tribunal expressed concerns over the suggestion that one Party might have access to confidential information related to the Tribunal's deliberations. It took note of both Parties' acknowledgment of their obligations under Article 10, paragraph 1 of the Arbitration Agreement and affirmed that the arbitrators and the Parties' representatives were to refrain from *ex parte* communications.
31. On 19 June 2015, the Tribunal informed the Parties that deliberations had progressed sufficiently to allow the Tribunal to render an award in the fourth quarter of 2015, and instructed the Registrar to consult with the Parties with regard to the issuance of the award. On 29 June 2015, the Parties agreed on a telephone conference with the Registrar.

32. Also on 19 June 2015, Slovenia requested that the Tribunal permit it to publish the Tribunal's letter of 5 May 2015. With the agreement of Croatia, the Tribunal disclosed the letter in question on the website of the PCA on 20 June 2015.
33. By letter dated 28 June 2015, Croatia drew the Tribunal's attention to further interviews of the Slovenian Foreign Minister on Slovenian television on 17 June 2015 and with a Slovenian newspaper on 26 June 2015, respectively. Croatia expressed its concern that Slovenia might have "an additional channel of communications" with the Tribunal, that Slovenia had access to the Tribunal's deliberations, and that the Tribunal's award "might be unfavourable to Croatia".
34. On 1 July 2015, Slovenia suggested that the Minister's statements were taken out of context and attached an alternative translation of the relevant excerpts of the interviews.
35. In a separate communication of the same date, Slovenia accepted the Tribunal's suggested dates for the issuance of an award. On 6 July 2015, Croatia also agreed to the suggested dates.
36. By letter dated 9 July 2015, the Tribunal determined that the award would be rendered on 17 December 2015. In relation to the public statements made on 17 and 26 June 2015 by the Slovenian Foreign Minister in respect of the forthcoming award, the Tribunal called on the Parties to refrain from any further public statements in this regard.

**E. EVENTS FOLLOWING THE 22 JULY 2015 REPORTS ABOUT *EX PARTE* COMMUNICATIONS**

37. On 22 July 2015, Serbian and Croatian newspapers published transcripts and audio files of two telephone conversations reportedly involving the arbitrator appointed by Slovenia, Dr. Jernej Sekolec, and Ms. Simona Drenik, then one of two Agents designated by Slovenia. The conversations were reported to have taken place over six months earlier, on 15 November 2014 and 11 January 2015.
38. On 23 July 2015, the Tribunal notified the Parties that Dr. Sekolec had resigned from the Tribunal, inviting Slovenia to appoint an arbitrator to replace him.
39. On 24 July 2015, Croatia transmitted translated extracts of the reported telephone conversations to the Tribunal and asked that the Tribunal suspend the proceedings. The pertinent text of Croatia's letter is reproduced in paragraph 80 below.
40. On 25 July 2015, the Tribunal invited Slovenia to submit by 28 July 2015 any observation that it might have in relation to Croatia's letter.

41. On 26 July 2015, Slovenia expressed its deep regret about the facts reported in the Croatian press and informed the Tribunal of Ms. Drenik's resignation from her position as Agent of Slovenia.
42. By letter to the Tribunal dated 27 July 2015, Slovenia opposed Croatia's request to suspend the arbitral proceedings. On 28 July 2015, Slovenia appointed H.E. Mr. Ronny Abraham, President of the International Court of Justice, to the Tribunal.
43. On 30 July 2015, the Tribunal notified the Parties that Professor Budislav Vukas had resigned from the Tribunal. The Tribunal accordingly invited Croatia to appoint an arbitrator to replace him as member of the Tribunal.
44. By *note verbale* dated 30 July 2015, Croatia notified Slovenia that it "considers that the Republic of Slovenia has engaged in one or more material breaches of the Arbitration Agreement", entitling Croatia to terminate the Arbitration Agreement "in accordance with Article 60, paragraph 1 of the Vienna Convention on the Law of Treaties". Croatia added that "from the date of this note the Republic of Croatia ceases to apply the Arbitration Agreement". The text of Croatia's *note verbale* is reproduced in full in paragraph 84 below.
45. On 31 July 2015, Croatia informed the Tribunal of the content of this *note verbale*. The pertinent text of Croatia's letter is reproduced in paragraph 85 below.
46. On the same day, the Tribunal informed the Parties that Judge Ronny Abraham had resigned from the Tribunal. The Tribunal accordingly invited Slovenia to appoint an arbitrator to replace Judge Abraham as member of the Tribunal.
47. On 13 August 2015, Slovenia informed the Tribunal that it had objected to Croatia's notification of the termination of the Arbitration Agreement and stated that the Tribunal had the power and the duty to continue the proceedings.
48. On the same day, Slovenia communicated to the Tribunal its decision to refrain from appointing a member of the Tribunal to replace Judge Abraham. It requested that the President of the Tribunal, in exercise of his powers under Article 2, paragraph 2 of the Arbitration Agreement, appoint an arbitrator to replace Judge Abraham.
49. On 25 September 2015, the Tribunal informed the Parties that the President, in accordance with the procedure for the replacement of party-appointed arbitrators in Article 2, paragraphs 2 and 3 of the Arbitration Agreement, had appointed H.E. Mr. Rolf Einar Fife, Ambassador, a national of Norway, to succeed Judge Abraham, and Professor Nicolas Michel, a national of Switzerland, to succeed Professor Vukas. The Parties were provided with a curriculum vitae as well as a signed



Declaration of Acceptance and Statement of Impartiality and Independence from each of Ambassador Fife and Professor Michel.

**F. PROCEEDINGS FOLLOWING THE RECOMPOSITION OF THE TRIBUNAL**

50. On 13 October 2015, the Tribunal requested Croatia to provide complete transcripts of the two telephone conversations between Dr. Sekolec and Ms. Drenik that were referred to in Croatia's letter of 24 July 2015, and asked Croatia to indicate any measures that it had taken to verify the accuracy of the reported information. Furthermore, the Tribunal invited each of Croatia and Slovenia to inform the Tribunal of "any other incidents in which information emanating from the Tribunal or the PCA was passed on to either Party".
51. No response to the Tribunal's request and invitation of 13 October 2015 was received from Croatia. On 27 November 2015, Slovenia responded to the Tribunal's request and invitation, stating that, "[o]n the Slovenian side, only the former Agent, Ms. Simona Drenik, would know of 'any other incidents in which information emanating from the Tribunal or the PCA was passed on to either Party'". Slovenia further stated that, according to Ms. Drenik, the information passed to her by Dr. Sekolec consisted of "(a) his views on the attitude and positions of his co-arbitrators during the Tribunal's deliberations; and (b) draft summaries of the Parties' arguments prepared by the PCA". Slovenia went on to stress that the Slovenian authorities had neither instructed nor authorised any contact between Dr. Sekolec and Ms. Drenik.
52. By letter dated 1 December 2015, the Tribunal fixed a procedural calendar for further written and oral submissions "concerning the legal implications of the matters set out in Croatia's letters of 24 July 2015 and 31 July 2015". The Tribunal directed the Parties to file their written submissions by 15 January 2016 (Croatia) and 26 February 2016 (Slovenia). In addition, the Tribunal informed the Parties that it intended to hold a hearing on these matters on 17 March 2016, requesting the Parties to confirm by 9 December 2015 their availability on that date.
53. By the same letter, the Tribunal released to the Parties two internal documents that Dr. Sekolec had submitted in the course of the proceedings: a note entitled "personal and confidential notes regarding the border on or around Dragonja" provided to the Tribunal in January 2015, and a document entitled "Mura River Sector: Various effectivités by Slovenia" provided to the Registry in November 2014. The Tribunal also informed the Parties that these were the only documents provided by Dr. Sekolec to the Tribunal or the Registry.
54. On 7 December 2015, in response to the Tribunal's letter dated 1 December, Slovenia confirmed its availability for the hearing on 17 March 2016. Croatia did not respond to the Tribunal's letter.

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

55. Also on 26 December 2015, the Tribunal provided to the Parties a verbatim translation of the audio recordings of telephone conversations to which Croatia had referred in its earlier correspondence. The translation had been prepared on the instruction of the Tribunal by a certified interpreter and translator. The Tribunal requested the Parties to provide any comments as to the accuracy of the translation at their earliest convenience.
56. By letter dated 18 January 2016, Slovenia submitted its comments on the accuracy of the translation. The Tribunal received no comments on the accuracy of the translation from Croatia.
57. Croatia did not make any submission by the 15 January 2016 deadline stipulated in the Tribunal's letter to the Parties dated 1 December 2015. The Written Submission of the Republic of Slovenia ("**Written Submission**"), with accompanying documents, was filed on 26 February 2016.
58. A hearing concerning the legal implications of the matters set out in Croatia's letters of 24 July 2015 and 31 July 2015 was held on 17 March 2016 at the Peace Palace, The Hague, the Netherlands. Present at the hearing were:

**The Tribunal**

Judge Gilbert Guillaume  
H.E. Mr. Rolf Einar Fife  
Professor Vaughan Lowe  
Professor Nicolas Michel  
Judge Bruno Simma

**For the Republic of Slovenia**

H.E. Mr. Karel Erjavec  
*As Head of the Delegation*

H.E. Ms. Nataša Šebenik  
*As Co-Agent*

Mr. Rodman R. Bundy  
Dr. Maja Menard  
Dr. Alina Miron  
Dr. Daniel Müller  
Professor Alain Pellet  
Mr. Eran Sthoeger  
Sir Michael Wood, K.C.M.G.  
*As Counsel and Advocates*

Ms. Tessa Barsac  
*As Assistant to Counsel*

H.E. Mr. Roman Kirn  
H.E. Ms. Vlasta Vivod  
Mr. Edvin Skrt  
Ms. Sonja Slovša Končan  
Mr. Marko Štucin  
Ms. Simona Vučak  
Mr. Vlado Ekmečić  
Ms. Héloïse Bajer-Pellet  
*As Experts and Advisers*

Mr. Boštjan Zupančič  
*As Interpreter*

Ms. Diana Podgornik  
*As Support Staff*

Mr. Boštjan Grm  
*As Security*

**For the PCA**

Dr. Dirk Pulkowski  
Ms. Fedelma Claire Smith

59. The Republic of Croatia did not appear at the hearing. The Tribunal was apprised of a press release of the Croatian Ministry of Foreign and European Affairs dated 14 March 2016 and of a *note verbale* from the Permanent Mission of the Republic of Croatia to the United Nations to the Permanent Missions and Permanent Observer Missions accredited to the United Nations dated 16 March 2016, in which Croatia confirmed that it did not intend to participate in the hearing. This press release and *note verbale* were communicated to the Tribunal by Slovenia.
60. On 17 March 2016, shortly after the closure of the hearing, Croatia and Slovenia were each provided with a copy of the verbatim transcript of the hearing.
61. The Ministry of Foreign and European Affairs of Croatia also established a website in the English language entitled “Termination of the Arbitration Process between Croatia and Slovenia: Causes and Consequences”, in which it presented a timeline of events from 30 April 2015, with hyperlinks to selected documents, and set out its analysis of these events.<sup>3</sup>
62. On 25 March 2016, Slovenia brought to the attention of the Tribunal a statement by Mr. Zoran Milanović, the Prime Minister of Croatia until January 2016, published in a Croatian newspaper. Mr. Milanović is quoted as follows:

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<sup>3</sup> Ministry of Foreign and European Affairs of the Republic of Croatia, “Termination of the Arbitration Process between Croatia and Slovenia: Causes and Consequences,” *available at* <[www.mvep.hr/en/other/termination-of-the-arbitration-process](http://www.mvep.hr/en/other/termination-of-the-arbitration-process)>.

For me, withdrawal from the arbitration is one of my favorite decisions of the Government under my leadership. The arbitration procedure was the result of direct blackmail of Croatia on the part of Slovenia with the European Commission's sponsorship, which the Government at the time could not counter, and this I understand to a point. I managed to get Croatia out of it. We did the right thing at the right moment . . .<sup>4</sup>

### III. THE PARTIES' REQUESTS

#### A. CROATIA'S REQUEST

63. Croatia made no formal submissions to the Tribunal. However, in the above-mentioned *note verbale* dated 16 March 2016, Croatia stated:

As for the arbitration process itself, Croatia submits that – to assure the sound administration of justice, and for legal and ethical reasons – the Arbitral Tribunal should terminate its work with immediate effect.<sup>5</sup>

#### B. SLOVENIA'S REQUEST

64. In its Written Submission dated 26 February 2016, Slovenia asked the Tribunal to decide as follows:

Based on the foregoing, the Republic of Slovenia respectfully requests the Arbitral Tribunal to adjudge and declare that:

1. The Arbitration Agreement of 4 November 2009 remains in force between the Parties; and
2. The proceedings pursuant to the Arbitration Agreement shall continue until the Tribunal issues a final Award.<sup>6</sup>

65. At the hearing on 17 March 2016, Slovenia reiterated the same submission.<sup>7</sup>

### IV. STATEMENT OF FACTS

66. While the Tribunal has summarised the history of the proceedings as a whole in general terms (see Section II), the Parties' arguments in respect of the continuation of the present arbitration

<sup>4</sup> *Note verbale* from the Ministry of Foreign Affairs of the Republic of Slovenia to the Ministry of Foreign and European Affairs of the Republic of Croatia, No. 570-10/2015/12 (25 March 2016), referring to "Milanović: Uspio sam izvući Hrvatsku i arbitraže," *Novi list*, p. 5 (19 March 2016).

<sup>5</sup> *Note verbale* from the Permanent Mission of the Republic of Croatia to the United Nations to the Permanent Missions and Permanent Observer Missions, No. 55/2016, p. 3 (16 March 2016) (Annex SI-1058).

<sup>6</sup> Written Submission, p. 56.

<sup>7</sup> Transcript of the Oral Hearing of 17 March 2016, pp. 83:26, 84:1-6 (Statement by Professor Alain Pellet).

focus on events that were brought to the Tribunal's attention between April and July 2015. It is to these events that the Tribunal now returns in greater detail.

67. The Tribunal was first made aware, on 30 April 2015, that breaches of the confidentiality of its deliberations might have occurred, when Croatia addressed a letter to Slovenia asking Slovenia to explain two statements concerning the arbitration proceedings made by the Slovenian Minister of Foreign Affairs during interviews with Slovenian television on 7 January 2015 and on 22 April 2015. According to Croatia, the Slovenian Foreign Minister had said in the 22 April 2015 interview that "he had 'unofficial information' that the arbitral tribunal would determine that the Republic of Slovenia had contact with the high seas". In the same letter, Croatia asserted that the Minister had, in the 7 January 2015 interview, said that "he had a meeting last year in The Hague"<sup>8</sup> and quoted him as follows:

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 to the high seas has not been determined.<sup>9</sup>

68. Croatia noted in its letter that the statements might amount to a "serious violation of . . . Article 10(1) of the Arbitration Agreement" and might "compromis[e] the work and reputation of the Arbitral Tribunal", calling on Slovenia to "remove suspicion that it was an attempt by the Republic of Slovenia to influence the work of the Arbitral Tribunal".
69. On 1 May 2015, Slovenia indicated that it did not possess information concerning the outcome of the arbitration, did not have any "informal channel of communication with the Tribunal", and had not sought "to bring pressure on the Tribunal" in any way.
70. In response to the communications received by the Parties, by letter of 5 May 2015, the Tribunal expressed its serious concern over the suggestion that one Party would have been privy to confidential information related to the Tribunal's deliberations. The Tribunal considered that such a meaning could be attributed to the statements by the Slovenian Foreign Minister and welcomed both Parties' unconditional acknowledgement of their obligations pursuant to Article 10, paragraph 1 of the Arbitration Agreement. The Tribunal further recalled the duty in Section 9.1 of the Terms of Appointment, incumbent on the arbitrators and the Parties' representatives alike, to refrain from any *ex parte* communications between a party and an arbitrator.

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<sup>8</sup> The Tribunal notes in this regard that no private meeting between the Tribunal and Minister Erjavec occurred. The only occasions on which the Minister addressed the Tribunal were the hearings in June 2014 and March 2016, held at the Peace Palace in The Hague.

<sup>9</sup> Letter from the Ministry of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal, p. 2 (30 May 2015) (emphasis omitted).

71. On 19 June 2015, Slovenia requested the Tribunal's permission to publish the Tribunal's letter of 5 May 2015 in view of the recent disclosure of information about the content of the letter in Croatian media. In particular, according to Slovenia, a Croatian newspaper reported that it had received information from "diplomatic sources" that the Tribunal had called on the Slovenian Foreign Minister to refrain from commenting on the award and the work of the Tribunal. On 20 June 2015, Croatia indicated to the Tribunal that it did not have any objections to the publication of the letter on the website of the PCA. On 20 June 2015, the Tribunal disclosed the letter in question on the PCA's website, on an exceptional basis, given that both Parties had consented to its publication.
72. In response to Slovenia's letter, on 28 June 2015, Croatia observed in an e-mail to the Registrar of the Tribunal that the Croatian press article referred to in that letter was published in reaction to a further statement of the Slovenian Foreign Minister on Slovenian television, on 17 June 2015, stating that the Tribunal's award might only be made public after the general elections in Croatia. Croatia further noted that the Slovenian Foreign Minister had allegedly made another statement to a similar effect in the Slovenian journal, *Mladina*, on 26 June 2015, saying that "it is likely to happen . . . that the Arbitral Tribunal will wait after the elections". In light of the repeated public statements, Croatia expressed its serious concern "that Slovenia has an additional channel of communications with the Arbitral Tribunal and that it is privy to its internal deliberations" and that "the Award of the Tribunal might be unfavourable to Croatia".
73. By e-mail dated 1 July 2015, also addressed to the Registrar of the Tribunal, Slovenia responded to Croatia's letter dated 28 June 2015, drawing the Tribunal's attention to what it perceived to be a misleading translation of the Slovenian Foreign Minister's statement made on 17 June 2015. Slovenia asserted that the Minister's statements were taken out of context, attaching to its e-mail a full translation of the parts of Minister's interviews that related to the arbitration.
74. On 22 July 2015, a Croatian newspaper, *Večernji list*, and a Serbian newspaper, *Newsweek Srbija*, published transcripts and audio files of two telephone conversations reportedly involving the arbitrator appointed by Slovenia, Dr. Jernej Sekolec, and one of Slovenia's Agents, Ms. Simona Drenik.<sup>10</sup> The conversations had reportedly occurred on 15 November 2014 and 11 January 2015, after the conclusion of the hearing, and concerned the internal deliberations of the Tribunal. No explanation was provided for the time lapse between the reported interception of the

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<sup>10</sup> See Ministry of Foreign and European Affairs of the Republic of Croatia, "Termination of the Arbitration Process between Croatia and Slovenia: Causes and Consequences," *available at* <[www.mvep.hr/en/other/termination-of-the-arbitration-process](http://www.mvep.hr/en/other/termination-of-the-arbitration-process)>.

communications and their publication, who conducted the telephone interceptions, or how the audio recordings came into the possession of the media.

75. The reported conversations between Dr. Sekolec and Ms. Drenik concerned a range of issues, including (i) the disclosure of information about discussions and tentative conclusions of the Tribunal during its deliberations, (ii) possible opportunities to influence Tribunal members during deliberations and privately, and (iii) the provision of documents from Ms. Drenik to Dr. Sekolec.
76. The first of these, Dr. Sekolec's disclosure of arbitrators' preliminary views with regard to contested issues, is reflected in the following excerpts, to which the Tribunal refers by way of example:

Drenik: Maybe Vaughan Lowe. Vaughan Lowe is more interested in these ecological issues, I think. Maybe he could . . .

Sekolec: But he, he was quiet.

[. . .]

Drenik: This is typically French, if you ask me. . . . This is the same, the exact same mentality as Pellet. He said to me "knowing Guillaume, he said to me. We will get the major part of the Gulf of Piran, we'll get the junction, but we will loss on Dragonja. We will lose on Dragonja [the speaker corrects herself]."

Sekolec: Yes, yes. It seems . . . from the way he looks at things . . .<sup>11</sup>

77. The recordings, in addition to suggesting that Dr. Sekolec had disclosed positions taken by individual arbitrators during deliberations, also reveal attempts to identify opportunities through which Dr. Sekolec could exert additional influence on the Tribunal:

Drenik: What if you . . . I'm thinking . . . what if you . . . a day before, I don't know . . . or whenever . . . met with Bruno, for example, with Simma?

Sekolec: I have a dinner appointment with Bruno at his place anyway. Just the two of us.

Drenik: Excellent! You see, and you could just give him . . . "I'm fine with that, I understand," you see, take-it-easy attitude . . . "but look, I've checked this and here, I think that . . ." The point is not to give him 500 arguments, but just to say "I still think it wasn't quite like this here." Maybe he would then bring it up . . .

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<sup>11</sup> Recording dated 5 November 2014, 46'42", certified translation commissioned by the Registry (22 December 2015). Slovenia proposes the following alternative translation, which varies slightly from that commissioned by the Registry:

Drenik: Maybe Vaughan Lowe. Vaughan Lowe is more interested in these ecological issues, I think. Maybe he could have bigger . . .

Sekolec: But he, he was quiet, you understand?

[. . .]

Drenik: This is typically French, if you ask me. . . . This is the same, the exact same mentality as Pellet. He said "knowing Guillaume, he said to me. We will get the major part of the Gulf of Piran, we'll get the junction, but we will loss on Dragonja. We will lose on Dragonja [the speaker corrects herself]."

Sekolec: Yes, yes. It seems . . . from the way he looks at things . . .

Sekolec: Yes, yes.

Drenik: . . . because if it's you who does it [brings it up], Guillaume will wonder, but if Simma says "I think we should nevertheless look into it a bit more . . ."

Sekolec: Yes.

Drenik: You know that I mean? That you find someone else to do this . . .

Sekolec: I understand. I will . . .

Drenik: Simma is certainly the one who knows best and the one who will delve into it.

Sekolec: Yes, I will work on Simma. This has been agreed already. The dinner.<sup>12</sup>

78. Finally, the recordings indicate that Dr. Sekolec received documents from Ms. Drenik, for submission as his own to the other arbitrators, in support of Slovenia's arguments:

Drenik: Well, you see, I could prepare all this for you, but there is something else. It would be a good thing to forward all these documents . . . if you are going to forward them . . . in such a way . . . that you would bring your computer . . .

Sekolec: Yes, so that I have the file.

Drenik: . . . and that we open a file in your computer and just transfer the documents, you know, the text.

Sekolec: Yes.

Drenik: This is very simple to do, you see, so that you are registered as the author of the file.

Sekolec: I understand, I understand yes, yes.

Drenik: Because otherwise, the text doesn't have an author and that would look strange and also, someone may break in and find it . . . if I am the author of the file.

Sekolec: Yes, yes.

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<sup>12</sup> Recording dated 11 January 2015, 9'35", certified translation commissioned by the Registry (22 December 2015). Slovenia proposes the following alternative translation, which varies slightly from that commissioned by the Registry:

Drenik: What if you . . . I'm thinking . . . what if you . . . a day before, I don't know . . . or whenever . . . met with Bruno, for example, with Simma?

Sekolec: I have a dinner appointment with Bruno at his place anyway. Just the two of us.

Drenik: Excellent! You see, and you could just give him a couple of . . . "I'm fine with that, I understand," you see, take-it-easy attitude . . . "but look, I've checked this and here, I think that . . ." The point is not to give him 500 arguments, but just to say "I still think it wasn't quite like this here." Maybe he would then bring it up . . .

Sekolec: Yes, yes.

Drenik: . . . because if it's you who does it [brings it up], Guillaume will wonder, but if Simma says "I think we should nevertheless maybe look into it a bit more . . ."

Sekolec: Yes.

Drenik: You know that I mean? That you find someone else to do this . . .

Sekolec: I understand. I will . . .

Drenik: Simma is certainly the one who knows best and the one who will most delve into it.

Sekolec: Yes, I will work on Simma. This has been agreed already. The dinner.



Drenik: But if I only open it on a [USB] key on my computer and transfer it to a new file . . . . So, for each *effectivité* we open a new file on your computer and save it, this is the most safe, so I think this would be a good thing to do.<sup>13</sup>

79. On 23 July 2015, the Tribunal notified the Parties that Dr. Sekolec had resigned from the Tribunal.
80. By letter dated 24 July 2015, Croatia transmitted translated extracts of the reported telephone conversations to the Tribunal. In the same letter, Croatia stated that:

The conversations between Mr. Sekolec, the arbitrator appointed by Slovenia, and Ms. Simona Drenik, the Agent of Slovenia, reveal 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. As you will be aware, the Terms of Appointment provide in Section 9.1 that “(t)he 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 are related to the proceedings.”

In the wake of the unprecedented situation that the publication of these materials has given rise to, we note the resignation of Arbitrator Sekolec, as noted by the Permanent Court of Arbitration. We understand that Ms. Drenik has also resigned as Agent of Slovenia.

The two resignations do not begin to address the gravity of the situation. The communications appear to reveal that Arbitrator Sekolec *inter alia* disclosed critical elements of the Arbitral Tribunal’s deliberations to Slovenia’s Agent; advised her on the issues on which he believed the Tribunal was inclined to rule in Slovenia’s favour, and on which issues it was not so inclined; requested that Ms. Drenik provide him with arguments and “facts” not already in the record so that he could use them in his discussions with other members of the Arbitral Tribunal as his own; conspired with Ms. Drenik to assure that the other members of the Tribunal would not know their true source; communicated these arguments and “facts” to the other members of the Tribunal on the basis that they were his own.

Croatia is deeply alarmed by these events. The apparent collusion between Arbitrator Sekolec and Ms. Drenik is without known precedent, reflecting a fundamental breach of professional ethics and dishonesty that gives rise to a violation of fundamental due process and prejudice to Croatia.

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<sup>13</sup> Recording dated 5 November 2014, 46’42,” certified translation commissioned by the Registry (22 December 2015). Slovenia proposes the following alternative translation, which varies slightly from that commissioned by the Registry:

Drenik: Well, you know, I could prepare this for you, but there is one thing. It would be good to, then, all these documents . . . if you are going to forward them, send them in such a way, you know . . . that you would bring your computer . . . and I would . . .

Sekolec: Yes, so that I have the file.

Drenik: . . . and that we open a file in your computer and just transfer the documents, you know, the text.

Sekolec: Yes.

Drenik: This is very simple to do, you see, so that you are registered as the author of the file.

Sekolec: I understand, I understand yes, yes.

Drenik: Because otherwise, the text doesn’t have an author and that would look strange and also, someone may break in and find it . . . if I am the author of the file.

Sekolec: Yes, yes.

Drenik: But if I only open it on a [USB] key on your computer and transfer it to a new file . . . . So, for each *effectivité* we open a new file on your computer and save it, this is the most safe, so I think this would be a good thing to do.

On the basis of what has been made publicly available, Croatia considers that the entire arbitral process has been tainted by the actions of Arbitrator Sekolec and Ms. Drenik. To our further dismay, arbitrator Sekolec appears to have had numerous conversations, dinners, and written communications with other members of the Tribunal, and with members of the PCA staff, during the more than 13 months that have passed since the end of the oral hearings, when the submission of argument and evidence by the Parties was closed. Croatia has difficulty understanding how it would be possible, at this juncture, for the other members of the Tribunal, or the PCA staff, to distinguish between the arguments and “facts” presented by Slovenia through Arbitrator Sekolec, and those developed solely by Arbitrator Sekolec on his own. The official records appear to have been corrupted by improper argument and “facts” submitted by one of the Parties after the close of the written proceedings and the hearings.<sup>14</sup>

81. Accordingly, Croatia asked “that the Tribunal suspend the proceedings with immediate effect”, inviting “the remaining members of the Tribunal to review the totality of the materials presented, and reflect on the grave damage that has been done to the integrity of the entire proceedings”.
82. On 25 July 2015, the Tribunal invited Slovenia to submit any observation that it might have in relation to Croatia’s letter by 28 July 2015. By letter dated 26 July 2015, Slovenia expressed its deep regret about the events reported in the Croatian press and conveyed its sincere apologies to the President and the members of the Tribunal. It further informed the Tribunal of Ms. Drenik’s resignation from her position as Agent of Slovenia and welcomed the resignation of Dr. Sekolec from the Tribunal.
83. In a further letter dated 27 July 2015, Slovenia opposed Croatia’s request to suspend the arbitral proceedings and submitted that the Tribunal “should continue to fulfil its mandate” in accordance with the Arbitration Agreement. Slovenia did not agree that the “entire arbitral process has been tainted”, and affirmed its full confidence in the Tribunal and the arbitral proceedings.
84. By *note verbale* No. 3303/2015 dated 30 July 2015 from the Ministry of Foreign and European Affairs of the Republic of Croatia to the Ministry of Foreign Affairs of the Republic of Slovenia, Croatia notified Slovenia that it “considers that the Republic of Slovenia has engaged in one or more material breaches of the Arbitration Agreement”, thus entitling Croatia to terminate the Arbitration Agreement “in accordance with Article 60, paragraph 1 of the Vienna Convention on the Law of Treaties”. The *note verbale* was made available on the website of the Croatian Ministry of Foreign and European Affairs and was submitted by Slovenia as an annex to its Written Submission.<sup>15</sup> The text of Croatia’s diplomatic note is reproduced in full below:

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<sup>14</sup> Letter from the Minister of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal (24 July 2015) (Annex SI-1021).

<sup>15</sup> *Note verbale* from the Ministry of Foreign and European Affairs of the Republic of Croatia to the Ministry of Foreign Affairs of the Republic of Slovenia, No. 3303/2015 (30 July 2015) (Annex SI-1034).

The Ministry of Foreign and European Affairs of the Republic of Croatia presents its compliments to the Ministry of Foreign Affairs of the Republic of Slovenia and has the honour to notify the following:

The Republic of Croatia considers that it is entitled to terminate the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia (signed on 4 November 2009 and entered into force on 29 November 2010). In accordance with Article 60, paragraph 1 of the Vienna Convention on the Law of Treaties, the Republic of Croatia considers that the Republic of Slovenia has engaged in one or more material breaches of the Arbitration Agreement. The Republic of Croatia hereby provides the notification pursuant to Article 65, paragraph 1 of the Vienna Convention that it proposes to terminate forthwith the Arbitration Agreement.

This notification is made pursuant to the *Ruling of the Croatian Parliament on the obligation of the Government of the Republic of Croatia to begin the procedure of termination of the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia signed on 4 November 2009*, of 29 July 2015 and in accordance with the *Decision of the Government of the Republic of Croatia to begin the procedure of termination of the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia because of its breach*, of 30 July 2015.

By violating one or more provisions that are “essential to the accomplishment of the object or purpose of the [Arbitration Agreement], the Republic of Slovenia has materially breached the Arbitration Agreement within the meaning of Article 60, paragraph 3 of the Vienna Convention. The acts giving rise to the violations are evidenced in the actions recorded in publicly available conversations between the Agent of Slovenia, for which the Republic of Slovenia is internationally responsible, and the arbitrator appointed by Slovenia. These conversations record blatant, systematic and repeated violations of the most fundamental principles of arbitral procedure, including procedural fairness, due process, equality of arms and independence. As a result of the actions of the Republic of Slovenia, the impartiality and integrity of the arbitral proceedings have been irrevocably damaged, giving rise to a manifest violation of the rights of Croatia.

The actions for which Slovenia is internationally responsible have violated *inter alia* Article 6 of the Arbitration Agreement, by violating the agreed procedure and rules of confidentiality and Article 10 of the Arbitration Agreement, which obliges the parties to “refrain from any action of statement which might . . . jeopardize the work of the Arbitral Tribunal”.

These provisions are essential to the accomplishment of the object and purpose of the Arbitration Agreement. The illegal and unethical activities of the Agent of Slovenia and the arbitrator appointed by Slovenia have corrupted the entire procedure, by seeking to integrate additional “evidence” and “arguments” after the close of the written proceedings and hearings. Publicly available material establishes that documents were given to an arbitrator by the Agent of Slovenia after the closure of the public proceedings, and were presented by that arbitrator to other arbitrators and the secretariat of the PCA as his own, or were inserted into the official record as a result of these actions by the Tribunal’s secretariat. Such actions violate the most fundamental and basic tenets of fairness and integrity in international legal proceedings of this kind. As a result of these acts it is no longer possible to distinguish between evidence and material which is properly part of the official record, and evidence introduced by illicit, unlawful and unethical means.

As a consequence, the entire arbitral process has been tainted and compromised, such that the mechanisms available within the Arbitration Agreement and means at the disposal of the Arbitration Tribunal cannot repair the far-reaching and irreversible damage that has been done. The irreparable harm that has been done to the factual record before the Arbitral Tribunal precludes the Tribunal from accomplishing its main tasks, as provided for in Articles 3 and 4 of the Arbitration Agreement.

Principles of fairness and integrity have been violated, irreparable harm has been done to the legitimacy and prospects of the process. In the absence of any possibility that the arbitral process will now be seen to be fair and proper, and to meet all applicable standards, the object and purpose of the Arbitration Agreement cannot be accomplished.

Taking all this in account, Ministry of Foreign and European Affairs of the Republic of Croatia has the honor to notify its entitlement to propose the termination of the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009 and entered into force on 29 November 2010.

The Ministry of Foreign and European Affairs of the Republic of Croatia also notifies the Republic of Slovenia that from the date of this note the Republic of Croatia ceases to apply the Arbitration Agreement.

The Ministry of Foreign and European Affairs of the Republic of Croatia shall communicate this notification to the Secretary – General of the United Nations in his capacity as the depository of the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009 and entered into force on 29 November 2010.

The Ministry of Foreign and European Affairs of the Republic of Croatia avails itself of this opportunity to renew to the Ministry of Foreign Affairs of the Republic of Slovenia the assurances of its highest considerations.

85. On 31 July 2015, Croatia informed the Tribunal that it “cannot further continue the process [of the present arbitration] in good faith”. It stated:

[U]pon thorough examination of the available evidence, the Government of the Republic of Croatia concluded that the arbitration process has been totally and irreversibly compromised. In the view of Croatia, arbitral proceedings cannot produce an impartial decision, notwithstanding the nomination of a replacement Member of the Tribunal.

[. . .]

The official record of the entire arbitration has been contaminated, for reasons set out in [Croatia’s letter to the Tribunal dated 24 July 2015]. There is no tool available for repairing the damage that has been occasioned to the proceedings and the Arbitral Agreement. The official records appear to have been corrupted by unlawful and unethical submissions by one of the Parties after the close of written proceedings and hearings, and no reasonable person would conclude that the actions that have occurred may not have influenced other actors in the arbitration process.

The arbitration process as a whole has been compromised to such an extent that Croatia is confident that the arbitration process cannot continue in this or any other similar form. 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.

[. . .]

In accordance with the relevant provisions of the Vienna Convention on the Law of Treaties, the Government informed the other Signatory to the Agreement of its intention to terminate this Agreement, notifying at the same time that as of the date of the notification it ceased to apply the Arbitration Agreement. The Secretary-General of the United Nations, in his capacity of the depository of the Agreement, has equally been informed.

Having acted to terminate the Arbitration Agreement, the procedure to be followed next will be governed by Article 65 of the Vienna Convention. In this regard, Croatia is bound to point out that the Arbitration Agreement contains no provision with regard to the settlement of disputes arising in relation to the validity and effect of the Arbitration Agreement and the Tribunal is without competence to express any views as to the requirements for the termination of the Arbitration Agreement. In the event that Slovenia objects to the

termination, Article 65(3) of the Vienna Convention provides that the parties shall “seek a solution through the means indicated in article 33 of the Charter of the United Nations”.<sup>16</sup>

86. On 13 August 2015, Slovenia informed the Tribunal that it had objected to Croatia’s notification regarding the termination of the Arbitration Agreement and that, in Slovenia’s view, 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.

## V. THE PARTIES’ LEGAL ARGUMENTS

87. The Parties disagree as to whether the present arbitration may continue, in view of the events outlined above. In support of their submission, the Parties develop opposing arguments relating to the jurisdiction of the Tribunal, its duty and ability to continue the proceedings and the validity of the termination of the Arbitration Agreement by Croatia.

### A. CROATIA’S LEGAL ARGUMENTS

#### 1. Jurisdiction

88. Croatia considers that “the Tribunal is without competence to express any views as to the requirements for the termination of the Arbitration Agreement”. In support of its conclusion, Croatia notes that the Arbitration Agreement “contains no provision with regard to the settlement of disputes arising in relation to the validity and effect” of the Agreement.<sup>17</sup>
89. In addition, Croatia argues that the Vienna Convention on the Law of Treaties (“**Vienna Convention**”)<sup>18</sup> sets out a procedure pursuant to which the consequences of the termination of the Arbitration Agreement are to be assessed. In Croatia’s view, “[i]n the event that Slovenia objects to the termination, Article 65(3) of the Vienna Convention provides that the parties shall ‘seek a solution through the means indicated in article 33 of the Charter of the United Nations’”.<sup>19</sup> Accordingly, Croatia argues that the Vienna Convention “does not provide a role for the Arbitral

<sup>16</sup> Letter from the Minister of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal (31 July 2015) (Annex SI-1040).

<sup>17</sup> Letter from the Minister of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal, p. 2 (31 July 2015) (Annex SI-1040).

<sup>18</sup> Vienna Convention on the Law of Treaties, done in Vienna on 23 May 1969, 1155 U.N.T.S. 331.

<sup>19</sup> Letter from the Minister of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal, p. 2 (31 July 2015) (Annex SI-1040).

Tribunal in this process”.<sup>20</sup> It asserts that a solution to the border dispute must be found outside the framework of the present arbitration, “in accordance with international law and in the spirit of good neighbourly relations”.<sup>21</sup>

## 2. The Tribunal’s Duty and Ability to Continue the Proceedings

90. Croatia does not recognise a duty, grounded in the Arbitration Agreement, general international law, or elsewhere, on the Tribunal to continue the proceedings in their present form. It makes two assertions in this regard. First, in Croatia’s view, essential procedural rules have been violated and, second, such violations cannot be remedied by the Tribunal.
91. Croatia considers 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”. Croatia adds that “[o]n the basis of what has been made publicly available, Croatia considers that the entire arbitral process has been tainted by the actions of Arbitrator Sekolec and Ms Drenik”. Croatia alleges, in particular, that Ms. Drenik prepared documents and provided new facts not already on the record to Dr. Sekolec, who passed those documents off as his own in deliberations with other members of the Tribunal. Croatia deems this a violation of Article 9.1 of the Terms of Appointment and a “breach of professional ethics and dishonesty that gives rise to a violation of fundamental due process and prejudice to Croatia”.<sup>22</sup>
92. In this regard, Croatia submits that the “mechanisms available within the Arbitration Agreement and means at the disposal of the Arbitration Tribunal cannot repair the far-reaching and irreversible damage that has been done”.<sup>23</sup> It considers that the resignations of one of Slovenia’s Agents, Ms. Drenik, and of the arbitrator originally appointed by Slovenia, Dr. Sekolec, “do not begin to address the gravity of the situation”.<sup>24</sup>

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<sup>20</sup> *Note verbale* from the Permanent Mission of the Republic of Croatia to the United Nations to the Permanent Missions and Permanent Observer Missions, No. 55/2016, p. 3 (16 March 2016) (Annex SI-1058).

<sup>21</sup> Letter from the Croatian Prime Minister to the Slovenian Prime Minister (31 July 2015); *Note verbale* from the Permanent Mission of the Republic of Croatia to the United Nations to the Permanent Missions and Permanent Observer Missions, No. 55/2016, p. 4 (16 March 2016) (Annex SI-1058).

<sup>22</sup> Letter from the Minister of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal, p. 2 (24 July 2015) (Annex SI-1021).

<sup>23</sup> *Note verbale* from the Ministry of Foreign and European Affairs of the Republic of Croatia to the Ministry of Foreign Affairs of the Republic of Slovenia, No. 3303/2015, p. 2 (30 July 2015) (Annex SI-1034).

<sup>24</sup> Letter from the Minister of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal, p. 1 (24 July 2015) (Annex SI-1021).

93. Croatia asserts that the aforementioned infringements cannot be repaired “by tinkering with the procedure, or merely replacing one or two arbitrators”.<sup>25</sup> It regards the “entire arbitral process” as “tainted by the actions of Arbitrator Sekolec and Ms. Drenik”. Considering the scope of these *ex parte* communications, Croatia “has difficulty understanding how it would be possible, at this juncture, for the other members of the Tribunal, or the PCA staff, to distinguish between the arguments and ‘facts’ presented by Slovenia through Arbitrator Sekolec, and those developed solely by Arbitrator Sekolec on his own”.<sup>26</sup> Indeed, in Croatia’s view, “it is no longer possible to distinguish between evidence and material which is properly part of the official record, and evidence introduced by illicit, unlawful and unethical means”.<sup>27</sup>
94. In this light, Croatia considers that “no reasonable person would conclude that the actions that have occurred may not have influenced other actors in the arbitration process”. Accordingly, it concludes that the arbitral process “has been totally and irreversibly compromised”.<sup>28</sup>

### 3. Material Breach as a Ground for Termination

95. Croatia “considers that it is entitled to terminate the Arbitration Agreement”.<sup>29</sup>
96. In this regard, Croatia argues that the conduct described above implies “a rejection of the most fundamental principles that govern the integrity of international proceedings”. Under international law, “these acts, including those of the Agent of Slovenia” are “directly attributable to Slovenia”.<sup>30</sup>
97. In Croatia’s view, the *ex parte* communications between Dr. Sekolec and Ms. Drenik constitute “one or more material breaches of the Arbitration Agreement” in accordance with Article 60, paragraph 1 of the Vienna Convention.<sup>31</sup> Specifically, Croatia alleges a breach of Articles 6 and

<sup>25</sup> *Note verbale* from the Permanent Mission of the Republic of Croatia to the United Nations to the Permanent Missions and Permanent Observer Missions, No. 55/2016, p. 2 (16 March 2016) (Annex SI-1058).

<sup>26</sup> Letter from the Minister of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal, p. 2 (24 July 2015) (Annex SI-1021).

<sup>27</sup> *Note verbale* from the Ministry of Foreign and European Affairs of the Republic of Croatia to the Ministry of Foreign Affairs of the Republic of Slovenia, No. 3303/2015, p. 2 (30 July 2015) (Annex SI-1034).

<sup>28</sup> Letter from the Minister of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal, p. 1 (31 July 2015) (Annex SI-1040).

<sup>29</sup> *Note verbale* from the Ministry of Foreign and European Affairs of the Republic of Croatia to the Ministry of Foreign Affairs of the Republic of Slovenia, No. 3303/2015, p. 1 (30 July 2015) (Annex SI-1034).

<sup>30</sup> *Note verbale* from the Permanent Mission of the Republic of Croatia to the United Nations to the Permanent Missions and Permanent Observer Missions, No. 55/2016, p. 3 (16 March 2016) (Annex SI-1058).

<sup>31</sup> *Note verbale* from the Ministry of Foreign and European Affairs of the Republic of Croatia to the Ministry of Foreign Affairs of the Republic of Slovenia, No. 3303/2015, p. 1 (30 July 2015) (Annex SI-1034).

10 of the Arbitration Agreement—provisions that it deems essential for the arbitration procedure—and emphasises that the aforementioned conversations “record blatant, systematic and repeated violations of the most fundamental principles of arbitral procedure, including procedural fairness, due process, equality of arms and independence”.<sup>32</sup> In Croatia’s view, such actions “violate the most fundamental and basic tenets of fairness and integrity in international legal proceedings of this kind”.<sup>33</sup>

98. Croatia considers, moreover, that these violations threaten the object and purpose of the Arbitration Agreement for the purposes of Article 60, paragraph 3 of the Vienna Convention. It argues that, due to “[t]he irreparable harm that has been done to the factual record before the Arbitral Tribunal”, the Tribunal is no longer in a position to accomplish its main tasks as set forth in Articles 3 and 4 of the Arbitration Agreement.<sup>34</sup> In its view, “no award issued under these legally and ethically completely compromised proceedings could be considered as effective, authoritative or credible”. Indeed, Croatia considers that such an award, if rendered, “could never be implemented, or enforced. Consequently, any effort to continue this arbitration would be futile and counterproductive”.<sup>35</sup>
99. Croatia submits that it entered into the arbitral proceedings *bona fide*, but that “[t]his confidence was violated to the level that Croatia cannot further continue the process in good faith”.<sup>36</sup>
100. Finally, Slovenia’s conduct amounts in Croatia’s view to “a repudiation of the Arbitration Agreement”.<sup>37</sup> This point was only made briefly in the *note verbale* issued in New York on the eve of the hearing, held on 17 March 2016. It was not further treated. However, it may be understood as advancing a distinct argument for Croatia’s position that the Arbitration Agreement may be terminated.
101. Accordingly, Croatia considers the termination of the Arbitration Agreement both justified and necessary. Croatia notes that it has already begun the process of termination; in accordance with “the relevant provisions of the Vienna Convention”, it has “informed the other Signatory to the

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<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, p. 2.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Note verbale* from the Permanent Mission of the Republic of Croatia to the United Nations to the Permanent Missions and Permanent Observer Missions, No. 55/2016, p. 3 (16 March 2016) (Annex SI-1058).

<sup>36</sup> Letter from the Minister of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal, p. 1 (31 July 2015) (Annex SI-1040).

<sup>37</sup> *Note verbale* from the Permanent Mission of the Republic of Croatia to the United Nations to the Permanent Missions and Permanent Observer Missions, No. 55/2016, p. 3 (16 March 2016) (Annex SI-1058).



Agreement of its intention” to terminate the agreement. As a consequence, Croatia adds, “as of the date of the notification it ceased to apply the Arbitration Agreement”.<sup>38</sup>

## B. SLOVENIA’S LEGAL ARGUMENTS

### 1. Jurisdiction

102. Slovenia argues that the Tribunal is competent to decide on Croatia’s claim that it is entitled to terminate the Arbitration Agreement. It explains that a tribunal’s inherent power to decide upon challenges to its own jurisdiction is a firmly established general principle of international law, usually known under its French or German appellations *compétence de la compétence* or *Kompetenz-Kompetenz*.<sup>39</sup> In support of this proposition, Slovenia cites several cases emanating from the International Court of Justice (“**ICJ**”) or from arbitral tribunals.<sup>40</sup> According to Slovenia, the principle was also codified by the International Law Commission (“**ILC**”) in the Draft Convention on Arbitral Procedure adopted at the fifth session of the ILC in 1953.<sup>41</sup>
103. Characterizing the *Kompetenz-Kompetenz* principle as “inherent and stemming from the very nature of [any] judicial or arbitral function”,<sup>42</sup> Slovenia concludes that the principle applies unless it is expressly excluded.<sup>43</sup> Slovenia notes in this regard that there is no express limitation to this effect in the Arbitration Agreement. To the contrary, Article 3, paragraph 4 provides that “[t]he Arbitral Tribunal has the power to interpret the present Agreement” and Article 6, paragraph 4 states that “[t]he Arbitral Tribunal shall, after consultation of the Parties, decide expeditiously on all procedural matters by majority of its members.”<sup>44</sup>
104. In addition, Slovenia submits that the *Kompetenz-Kompetenz* principle is expressly provided for in Article 21 of the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes

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<sup>38</sup> Letter from the Minister of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal, p. 2 (31 July 2015) (Annex SI-1040); cf. *note verbale* from the Ministry of Foreign and European Affairs of the Republic of Croatia to the Ministry of Foreign Affairs of the Republic of Slovenia, No. 3303/2015 (30 July 2015) (Annex SI-1034).

<sup>39</sup> Written Submission, paras 3.04, 3.15; Transcript of the Oral Hearing of 17 March 2016, p. 20:19-22 (Statement by Professor Alain Pellet).

<sup>40</sup> Written Submission, paras 3.05-3.07, 3.10.

<sup>41</sup> Written Submission, para. 3.08, referring to “Report of the International Law Commission on the Work of its fifth session, 1 June–14 August 1953,” in *ILC Yearbook*, Vol. II, p. 200, at p. 206, para. 42 (U.N. Doc. No. A/2456) (1953).

<sup>42</sup> Transcript of the Oral Hearing of 17 March 2016, pp. 20:23-21:1 (Statement by Professor Alain Pellet).

<sup>43</sup> Written Submission, paras 3.11-3.12, referring to *Prosecutor v. Duško Tadić a/k/a “Dule,”* ICTY Case No. IT-94-1-AR72, Appeals Chamber, Decision of 2 October 1995, paras 18-19.

<sup>44</sup> Written Submission, para. 3.13.

between Two States (“**PCA Optional Rules**”), which are applicable to the present dispute by virtue of Article 6, paragraph 2 of the Arbitration Agreement.<sup>45</sup> Article 21 of the PCA Optional Rules reads:

1. 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.
2. The arbitral tribunal shall have the power to determine the existence or the validity of the treaty or other agreement of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of the treaty or agreement and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the treaty or agreement. A decision by the arbitral tribunal that the treaty or agreement is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
3. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.
4. In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in its final award.

105. In Slovenia’s view, Croatia’s claim to terminate the Arbitration Agreement is inconsistent with the provisions it itself invokes, namely Articles 60 and 65 of the Vienna Convention.<sup>46</sup> While Article 60 of the Vienna Convention confers a right to invoke a ground for termination under certain circumstances, it does not entitle an aggrieved party to terminate the treaty unilaterally.<sup>47</sup> Rather, the procedure to be followed with respect to the termination of a treaty, in particular if objections are raised by the other party, is stipulated in Article 65 of the Vienna Convention. Accordingly, Slovenia concludes that the Arbitration Agreement is still in force and the Tribunal is able to address Croatia’s claim of termination.<sup>48</sup>
106. Slovenia provides two reasons as to why the Tribunal is the competent body to decide on the alleged termination of the Agreement. First, Slovenia refers to Article 21, paragraph 2 of the PCA Optional Rules which is applicable in the present case pursuant to Article 6, paragraph 2 of the Arbitration Agreement. It recalls that Article 21, paragraph 2 confers upon the Tribunal the power “to determine the existence or the validity of the treaty . . . of which an arbitration agreement forms a part”. Slovenia stresses that the purported termination of the Arbitration Agreement by

<sup>45</sup> Written Submission, para. 3.14; Transcript of the Oral Hearing of 17 March 2016, p. 21:2-5 (Statement by Professor Alain Pellet).

<sup>46</sup> Written Submission, para. 3.16.

<sup>47</sup> Written Submission, para. 3.18.

<sup>48</sup> Written Submission, para. 3.19, referring to Report on Arbitral Procedure by Georges Scelle, Special Rapporteur, in *ILC Yearbook 1950*, Vol. II, p. 114, at p. 129, para. 48 (U.N. Doc. No. A/CN.4/18) (1950).

Croatia falls under that provision, as Croatia either challenges the validity of that Agreement or invites the Tribunal to decide upon the validity of the denunciation of the Agreement.<sup>49</sup>

107. In this respect, Slovenia contends that the title of Article 21 of the PCA Optional Rules (“Pleas as to the Jurisdiction of the Arbitral Tribunal”) confirms that the termination of the Arbitration Agreement is a question of jurisdiction. Similarly, the principle of severability, as embodied in Article 21, paragraph 2, second sentence, would be rendered meaningless if Croatia could submit the dispute as to the termination of the Agreement to another means of settlement.<sup>50</sup>
108. Second, Slovenia considers that Articles 60, 65, paragraph 3, and 66 of the Vienna Convention are not applicable in the present dispute. It argues that those provisions must be read together with Article 60, paragraph 4 and Article 42, paragraph 2 of the Vienna Convention, which contemplate the application of rules contained in a treaty to an attempted termination of that same treaty.<sup>51</sup> Further, Slovenia refers to Article 65, paragraph 4 of the Vienna Convention, which provides that “[n]othing 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.”<sup>52</sup> Accordingly, existing agreements on the settlement of disputes between the parties are not affected.<sup>53</sup> According to Slovenia, this is confirmed by various ICJ decisions<sup>54</sup> and supported by academic commentary.<sup>55</sup>
109. Moreover, Slovenia draws on the principle of *lex specialis* to argue that the Arbitration Agreement establishes “a special jurisdiction” of the Tribunal to resolve the boundary dispute between Croatia and Slovenia, which takes precedence over Article 65, paragraph 3 and Article 66 of the

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<sup>49</sup> Transcript of the Oral Hearing of 17 March 2016, pp. 26:6-11, 81:24-82:2 (Statement by Professor Alain Pellet), 36:19-23, 58:5-9 (Statement by Sir Michael Wood).

<sup>50</sup> Written Submission, para. 3.21; cf. Transcript of the Oral Hearing of 17 March 2016, p. 25:2-14 (Statement by Professor Alain Pellet).

<sup>51</sup> Transcript of the Oral Hearing of 17 March 2016, pp. 38:15-41:11 (Statement by Sir Michael Wood).

<sup>52</sup> Written Submission, para. 3.25.

<sup>53</sup> Written Submission, para. 3.26, referring to H. Krieger, “Article 65,” in *Vienna Convention on the Law of Treaties: A Commentary*, p. 1131, at p. 1149, para. 49 (O. Dörr & K. Schmalenbach eds., 2012).

<sup>54</sup> Written Submission, paras 3.22-3.23, 3.27-3.28, referring to *Appeal Relating to the Jurisdiction of the ICAO Council*, Judgment, I.C.J. Reports 1972, p. 46, at pp. 53-54, para. 16; *ibid.*, Separate Opinion of Judge Jiménez de Aréchaga, p. 140, at p. 148, paras 22-23; *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, p. 3, at p. 21, para. 45; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, p. 49, at p. 66, para. 45; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Provisional Measures, Order of 19 July 2002, I.C.J. Reports 2002, p. 219, at p. 246, para. 75.

<sup>55</sup> Written Submission, para. 3.24, referring to H. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, p. 714 (2013).

Vienna Convention.<sup>56</sup> Slovenia also submits that “a claim of unilateral termination [of the Arbitration Agreement] would amount to a right of unilateral discontinuance of arbitral proceedings”. In its view, “[n]o such right exists in international law.”<sup>57</sup>

110. Finally, Slovenia suggests that Croatia itself had initially assumed that the Tribunal has jurisdiction to decide upon the continuation of the arbitral proceedings. It notes that, before seeking to terminate the Arbitration Agreement, and “far from questioning the competence of the Tribunal to deal with the continuation of the process”, Croatia invited the Tribunal to reflect on the integrity of the proceedings in light of the facts stated above.<sup>58</sup>

## 2. The Tribunal’s Duty and Ability to Continue the Proceedings

111. Slovenia submits that the Tribunal not only has jurisdiction to decide on the continuation of the proceedings, but also has the duty to continue the present proceedings, and the authority and means to fulfil this duty.<sup>59</sup> Slovenia submits that “[i]t is the very essence of arbitration that the continuation of the proceedings cannot depend on the will or goodwill of one of the parties”. By the same token, Slovenia invites the Tribunal to accomplish its “constitutional goal”, derived from the Arbitration Agreement in conjunction with the PCA Optional Rules, to rule on the validity of the Arbitration Agreement and, ultimately, to determine a final settlement of the Parties’ dispute.<sup>60</sup>
112. As regards the Tribunal’s duty and authority, Slovenia recalls that the duty and competence of the Tribunal are established in the Arbitration Agreement and the PCA Optional Rules and notes that these instruments are drafted in mandatory terms.<sup>61</sup>

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<sup>56</sup> Written Submission, paras 3.29-3.30, referring to *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction of 29 January 2004, para. 141; *Mavrommatis Palestine Concessions (Greece v. Great Britain)*, Judgment of 30 August 1924, P.C.I.J. Reports, Series A, No. 2, p. 3, at pp. 31-32.

<sup>57</sup> Transcript of the Oral Hearing of 17 March 2016, p. 42:3-6 (Statement by Sir Michael Wood).

<sup>58</sup> Transcript of the Oral Hearing of 17 March 2016, pp. 27:18-28:21 (Statement by Professor Alain Pellet), referring to Letter from the Minister of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal (24 July 2015) (Annex SI-1021).

<sup>59</sup> Written Submission, paras 4.01, 4.05; Transcript of the Oral Hearing of 17 March 2016, p. 62:8-16 (Statement by Mr. Rodman Bundy).

<sup>60</sup> Transcript of the Oral Hearing of 17 March 2016, p. 32:5-14 (Statement by Professor Alain Pellet).

<sup>61</sup> Written Submission, paras 4.07-4.08; Transcript of the Oral Hearing of 17 March 2016, pp. 77:15-78:3 (Statement by Mr. Rodman Bundy).

113. Slovenia submits that the duty of an arbitral tribunal to settle the dispute submitted to it in its entirety is confirmed by international case law.<sup>62</sup>
114. Slovenia further argues that the definitive settlement of the boundary dispute constitutes an essential element of the Parties' agreement, as evidenced by the preamble and Article 7, paragraphs 2 and 3 of the Arbitration Agreement. According to Slovenia, without an award, the object and purpose of the Agreement would be frustrated. A settlement of the dispute, on the other hand, is in the interests of the two States, of their people, of the European Union and of other States in the region that have boundary disputes.<sup>63</sup>
115. Slovenia argues that Croatia's position frustrates "the essential *quid pro quo* of the Parties' agreement", which seeks to ensure a realisation of the Parties' respective vital interests.<sup>64</sup> In this respect, Slovenia submits that Croatia achieved its vital interest when Slovenia lifted its objections and Croatia became a full member of the European Union on 1 July 2013. It invokes the judgments of the ICJ in the *Fisheries Jurisdiction* and the *Gabčíkovo-Nagymaros* cases to argue that Croatia cannot be released from its commitment to arbitrate, and to cooperate in the settlement of the dispute, after it has already irrevocably benefited from the bargain.<sup>65</sup>
116. Slovenia submits that, while the course of the proceedings was affected by the conduct of Dr. Sekolec and Ms. Drenik, it is only for the Tribunal, and not for the Parties, to ensure the

<sup>62</sup> Written Submission, paras 4.10-4.20, referring to Commissioner Gore, in *International Adjudications: Modern Series*, Vol. VI, p. 193 (J.B. Moore ed., 1931); *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 13, at p. 23, para. 19; *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, I.C.J. Reports 1991, p. 53, at p. 69, para. 47; *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, p. 466, at p. 502, para. 102; *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, I.C.J. Reports 1973, p. 166, at pp. 189-190, paras 50-51; *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, p. 3, at p. 18, para. 34; Report on Arbitral Procedure by Georges Scelle, Special Rapporteur, in *ILC Yearbook 1950*, Vol. II, p. 114, at p. 147 (U.N. Doc. No. A/CN.4/18) (1950); *Islamic Republic of Iran and United States of America*, Decision No. DEC 134-A3/A8/A9/A14/B61-FT of 1 July 2011, para. 59; *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 253, at pp. 259-260, para. 23; *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457, at p. 463, para. 23.

<sup>63</sup> Written Submission, para. 4.15, referring to Letter from the President of the European Commission and the First Vice-President of the European Commission to the Prime Minister of Slovenia and the Prime Minister of Croatia (30 September 2015) (Annex SI-1050); European Parliament, *Resolution on the 2010 Progress Report on Croatia*, para. 38 (Doc. No. P7\_TA(2011)0059) (16 February 2011).

<sup>64</sup> Written Submission, para. 4.16 (emphasis in original). See also Written Submission, paras 2.06, 2.10-2.11.

<sup>65</sup> Written Submission, para. 4.17, referring to *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, p. 3, at p. 18, para. 34. Cf. Transcript of the Oral Hearing of 17 March 2016, pp. 7:21-8:2 (Statement by H.E. Mr. Karl Erjavec), 41:13-24 (Statement by Sir Michael Wood), 76:8-77:6 (Statement by Mr. Rodman Bundy) (also referring to *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 1, at p. 68, para. 114).

safeguard of the Tribunal's judicial function.<sup>66</sup> According to Slovenia, Croatia accepted this position when it initially requested the Tribunal to review the totality of the materials presented and reflect on the damage that has been done to the integrity of the proceedings and the public perception of the legitimacy of the process.<sup>67</sup>

117. Hence, Slovenia assumes that the Tribunal must “determine whether it can proceed to fulfil its task and reach an award on the merits that is not tainted by what has happened.”<sup>68</sup> Against this background, Slovenia emphasises that “the Tribunal does have the necessary tools to overcome and repair the consequences of the unauthorised communications between one of the former arbitrators and Slovenia's former Agent. This arbitration can and should continue to its conclusion, and can do so”.<sup>69</sup>
118. Slovenia asks the Tribunal to address, as far as possible, the concerns that Croatia has expressed about the continuation of the proceedings. In particular, Slovenia identifies three such concerns: (i) the asserted impossibility to redress the breach of confidentiality of the proceedings; (ii) the claimed violation of the principle of impartiality; and (iii) the alleged irremediable corruption of the record of the proceedings. Slovenia submits that each of these concerns can be adequately addressed by the Tribunal.<sup>70</sup>
119. As regards the confidentiality of the proceedings, Slovenia concedes that there was a regrettable breach of confidentiality as a result of the contacts between Dr. Sekolec and Ms. Drenik and of the publicity given to the wiretappings. However, Slovenia rejects Croatia's allegation that this breach constitutes a ground for the termination of the Arbitration Agreement.<sup>71</sup> To this effect, it recalls that the ICJ in the *Nuclear Tests* case and the ICSID tribunal in *Victor Pey Casado et al. v. Chile*, each facing similar circumstances, decided to continue the proceedings.<sup>72</sup>

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<sup>66</sup> Written Submission, paras 4.21-4.22, referring to *Hrvatska Elektroprivreda, d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Ruling of 6 May 2008, para. 15; *Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 1963, p. 15, at p. 29.

<sup>67</sup> Written Submission, paras 4.23-4.24, referring to Letter from the Minister of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal (24 July 2015) (Annex SI-1021).

<sup>68</sup> Transcript of the Oral Hearing of 17 March 2016, p. 42:15-21 (Statement by Sir Michael Wood).

<sup>69</sup> Transcript of the Oral Hearing of 17 March 2016, pp. 64:24-65:4 (Statement by Mr. Rodman Bundy).

<sup>70</sup> Written Submission, paras 4.26-4.27.

<sup>71</sup> Written Submission, paras 4.28-4.29; Transcript of the Oral Hearing of 17 March 2016, p. 67:18-21 (Statement by Mr. Rodman Bundy).

<sup>72</sup> Written Submission, paras 4.30-4.31 referring to *Nuclear Tests (Australia v. France)*, *supra* note 62, Resolution of 21 March 1974, in *I.C.J. Yearbook*, Vol. 1973-1974, p. 127 (1974); *Victor Pey Casado and Foundation “Presidente Allende” v. Republic of Chile*, ICSID Case No. ARB/98/2, Award of 8 May 2008,

120. Slovenia contends that the Tribunal has the possibility to redress the breach of confidentiality. While, in the first place, this is accomplished through the replacement of the arbitrator concerned and the possibility of “[undertaking] fresh deliberations based on the record in the case and with full confidentiality”,<sup>73</sup> Slovenia also recalls Article 37 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (“**ILC Articles**”),<sup>74</sup> which provides that satisfaction is the appropriate remedy for non-material damages. It further invokes the ILC Commentary on Article 37, which notes that “a declaration of wrongfulness of the act by a competent court or tribunal” is the most common modality of satisfaction in such circumstances. In the same vein, Slovenia recalls that it sincerely apologised immediately after information about the *ex parte* communications had been made public and removed Ms. Drenik from her tasks, while Croatia presented no explanation or excuses or regrets in respect of the unlawful wiretappings.<sup>75</sup> Furthermore, Slovenia highlights the illegality of the wiretappings, which presumably have taken place on Slovenian soil and violate the Slovenian Constitution as well as international law.<sup>76</sup>
121. In respect of Croatia’s concerns as to the impartiality of the Tribunal, Slovenia asserts that the allegations of partiality concerned only Dr. Sekolec, and that his resignation disposed of any such concerns.<sup>77</sup> In addition, Slovenia considers that the appointments on 25 September 2015 of H.E. Mr. Rolf Einar Fife and Professor Nicolas Michel resolved any possible concern of impartiality.<sup>78</sup> It also notes that the European Commission reacted positively to their appointment.<sup>79</sup> Slovenia additionally points out that, after the resignation of Judge Abraham, it

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paras 34-43; Transcript of the Oral Hearing of 17 March 2016, pp. 68:18-71:6 (Statement by Mr. Rodman Bundy).

<sup>73</sup> Transcript of the Oral Hearing of 17 March 2016, pp. 67:23-68:1 (Statement by Mr. Rodman Bundy).

<sup>74</sup> Report of the International Law Commission on the Work of its Fifty-third Session, in *Official Records of the General Assembly*, Fifty-sixth Session, Supplement No. 10, chapter IV.E.1 (U.N. Doc. No. A/56/10) (2001). *See also ILC Yearbook*, Vol. II, Part 2, p. 26 (U.N. Doc. No. A/CN.4/SER.A/2001/Add.1 (Part 2)) (2001).

<sup>75</sup> Written Submission, paras 4.33-4.34.

<sup>76</sup> Written Submission, paras 11-12 (Introduction).

<sup>77</sup> Written Submission, paras 4.35-4.36, referring to Letter from the Registrar of the Tribunal to the Republic of Croatia and the Republic of Slovenia (25 September 2015) (Annex SI-1049).

<sup>78</sup> Written Submission, para. 4.37; Transcript of the Oral Hearing of 17 March 2016, p. 65:9-21 (Statement by Mr. Rodman Bundy).

<sup>79</sup> Written Submission, para. 4.37, referring to Letter from the President of the European Commission and the First Vice-President of the European Commission to the Prime Minister of Slovenia and the Prime Minister of Croatia (30 September 2015) (Annex SI-1050); Transcript of the Oral Hearing of 17 March 2016, pp. 66:17-67:2 (Statement by Mr. Rodman Bundy).

refrained from nominating a successor; this task was left to the President of the Tribunal “precisely in order to ensure the impartiality and the perception of impartiality of the Tribunal.”<sup>80</sup>

122. As regards the impartiality of the other arbitrators, Slovenia considers that meetings between arbitrators outside official deliberations do not create bias or partiality; indeed, in Slovenia’s view, such meetings are both common and appropriate as part of a tribunal’s deliberations.<sup>81</sup>
123. In any event, in Slovenia’s view, the Tribunal has already taken appropriate measures to investigate the possible contamination of the record of the proceedings by any *ex parte* communication.<sup>82</sup> As Croatia itself had suggested, Slovenia argues, the Tribunal identified the only two documents submitted by Dr. Sekolec to the Tribunal and the Registry and transmitted them to the Parties. Slovenia refers to *Victor Pey Casado et al. v. Chile* where the tribunal took the same approach.<sup>83</sup>
124. Slovenia considers it inappropriate to comment on the documents submitted by Dr. Sekolec. However, the Tribunal “is at liberty to deal with these documents as it deems appropriate, including by expunging them entirely from its consideration of the case.”<sup>84</sup>
125. In this regard, Slovenia argues that no “new facts were introduced into the deliberations that the parties had not already adduced in their pleadings before the closure of the oral hearings.”<sup>85</sup> It further recalls that it made inquiries with its former Agent and transmitted the results to the Tribunal.<sup>86</sup>
126. Citing Article 14 of the PCA Optional Rules, Slovenia notes that the provision grants discretion to the Tribunal whether or not to repeat the hearings as a result of the replacement of the arbitrators. In this respect, Slovenia considers that a new hearing may not be necessary because the newly appointed arbitrators have the possibility to become fully acquainted with the case based on the transcripts. Moreover, it cautions that, in light of Croatia’s apparent decision not to

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<sup>80</sup> Transcript of the Oral Hearing of 17 March 2016, p. 66:11-16 (Statement by Mr. Rodman Bundy).

<sup>81</sup> Written Submission, paras 4.38-4.39.

<sup>82</sup> Written Submission, para. 4.40.

<sup>83</sup> Written Submission, paras 4.41-4.43, referring to *Victor Pey Casado and Foundation “Presidente Allende” v. Republic of Chile*, ICSID Case No. ARB/98/2, Award of 8 May 2008, para. 43.

<sup>84</sup> Transcript of the Oral Hearing of 17 March 2016, p. 72:2-11 (Statement by Mr. Rodman Bundy), referring to *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Ruling of 6 May 2008, para. 15.

<sup>85</sup> Transcript of the Oral Hearing of 17 March 2016, p. 71:15-18 (Statement by Mr. Rodman Bundy).

<sup>86</sup> Written Submission, para. 4.45, referring to Letter from the Republic of Slovenia to the Registrar of the Tribunal (27 November 2015) (Annex SI-1053).



participate in any further proceedings, a new hearing may fail to ensure the equality of the Parties.<sup>87</sup>

127. Finally, Slovenia argues that Croatia's non-appearance in these proceedings is not an obstacle to their continuation. Croatia's non-appearance only concerns the present "incidental proceedings" and not the "main proceedings", during which Croatia presented its arguments on the merits in full.<sup>88</sup> In addition, Slovenia invokes Article 28 of the PCA Optional Rules, which stipulates that the tribunal has discretion to proceed with the arbitration if a duly notified party fails to appear or participate in the proceedings without sufficient cause.<sup>89</sup> Slovenia characterises this rule as a general principle of law confirmed by a *jurisprudence constante* in various international judicial proceedings.<sup>90</sup> Furthermore, Slovenia submits that Croatia made its position known to the Tribunal, to Slovenia, to the European Union, and to the general public, and argues that Croatia had (and still has) ample opportunity to set out the legal basis of its claims.<sup>91</sup>
128. Slovenia sums up its view by stating that "whatever procedures are adopted, the Tribunal is able to conduct a fresh round of deliberations in a dispassionate, impartial and confidential manner, relying solely on the evidence and legal arguments that the parties adduced during the written and oral proceedings, and nothing else."<sup>92</sup>

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<sup>87</sup> Written Submission, paras 4.46-4.47; Transcript of the Oral Hearing of 17 March 2016, p. 68:1-10 (Statement by Mr. Rodman Bundy).

<sup>88</sup> Written Submission, para. 4.48.

<sup>89</sup> Written Submission, para. 4.49.

<sup>90</sup> Written Submission, para. 4.50, referring to *Nuclear Tests (Australia v. France)*, *supra* note 62, at p. 257, para. 15; *Nuclear Tests (New Zealand v. France)*, *supra* note 62, at p. 461, para. 15; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14, at p. 24, para. 28; *The "Arctic Sunrise" case (Kingdom of the Netherlands v. Russian Federation)*, Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013, p. 230, at pp. 242-243, paras 51-57; *Republic of the Philippines v. People's Republic of China*, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility of 29 October 2015, paras 113-123. *Cf.* Transcript of the Oral Hearing of 17 March 2016, p. 64:15-20 (Statement by Mr. Rodman Bundy), referring to Statute of the International Court of Justice, Article 53, 33 U.N.T.S. 933; Statute of the International Tribunal for the Law of the Sea, Article 28, 1833 U.N.T.S. 3; Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Article 45, done in Washington, D.C. on 18 March 1965, 575 U.N.T.S. 159.

<sup>91</sup> Written Submission, para. 4.51, referring to Letter from the Minister of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal (24 July 2015) (Annex SI-1021); *Note verbale* from the Ministry of Foreign and European Affairs of the Republic of Croatia to the Ministry of Foreign Affairs of the Republic of Slovenia, No. 3303/2015 (30 July 2015) (Annex SI-1034); Letter from the Prime Minister of the Republic of Croatia to the President of the European Commission (1 October 2015) (Annex SI-1051).

<sup>92</sup> Transcript of the Oral Hearing of 17 March 2016, p. 68:13-17 (Statement by Mr. Rodman Bundy).

### 3. Material Breach as a Ground for Termination

129. Even if the Tribunal were to consider Croatia's argument concerning an alleged material breach of the Arbitration Agreement, Slovenia submits that the argument is without merit.<sup>93</sup> Slovenia's argument proceeds in two steps: First, Slovenia argues that it is not open to one Party to invoke a material breach as a ground for terminating the Arbitration Agreement. In the alternative, Slovenia submits that there has been no material breach within the meaning of the Vienna Convention.<sup>94</sup>
130. Slovenia does not contest that the Vienna Convention applies to the Arbitration Agreement. It draws the Tribunal's attention to Article 60, paragraph 4 of the Vienna Convention, which it characterises as a "key provision" for the present purposes.<sup>95</sup> That Article provides: "The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach".
131. In this respect, Slovenia argues that the Arbitration Agreement contains provisions applicable in the event of a breach, which endow the Tribunal with the competence to determine the effects of a breach of the Agreement, if any, and allow it to address any procedural issue raised by the Parties.<sup>96</sup> In particular, Slovenia points to Article 3, paragraph 4 of the Arbitration Agreement, which provides that "[t]he Arbitral Tribunal has the power to interpret the present Agreement". It also refers to Article 21 of the PCA Optional Rules, which Slovenia views as a codification of the general international law principle of *Kompetenz-Kompetenz*.
132. In the alternative, Slovenia asserts that the breach invoked by Croatia does not constitute a material breach within the meaning of the Vienna Convention.<sup>97</sup> It notes that the term is defined in Article 60, paragraph 3 of the Vienna Convention and that Croatia refers to subparagraph (b) when it alleges that Slovenia has violated "a provision essential to the accomplishment of the object and purpose of the [Arbitration Agreement]".<sup>98</sup> In Slovenia's view, to qualify under Article 60, paragraph 3, subparagraph (b), a violation must make the accomplishment of the object and purpose of the treaty impossible. It cites the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* advisory opinion and the *Military and Paramilitary*

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<sup>93</sup> Written Submission, paras 5.01-5.02.

<sup>94</sup> Written Submission, para. 5.03.

<sup>95</sup> Written Submission, paras 5.05-5.06.

<sup>96</sup> Written Submission, para. 5.06.

<sup>97</sup> Written Submission, para. 5.09.

<sup>98</sup> Written Submission, paras 5.10-5.11, referring to *Note verbale* from the Ministry of Foreign and European Affairs of the Republic of Croatia to the Ministry of Foreign Affairs of the Republic of Slovenia, No. 3303/2015 (30 July 2015) (Annex SI-1034).

*Activities in and against Nicaragua* case of the ICJ in support of its position.<sup>99</sup> According to Slovenia, that yardstick is presently not met.

133. In this regard, Slovenia submits that procedural violations of the Arbitration Agreement and of the PCA Optional Rules can be remedied.<sup>100</sup> Indeed, it considers Croatia's argument that *every* breach of the Arbitration Agreement constitutes a material one "unconvincing".<sup>101</sup> Rather, in Slovenia's view, case law as well as the majority of scholars are united around the proposition that only "a gross infringement of an essential provision" can trigger Article 60, paragraph 3, subparagraph (b); otherwise, the termination of a treaty would be a disproportionate remedy.<sup>102</sup>
134. Moreover, Slovenia emphasises that neither the actions of Dr. Sekolec nor the publication by private media outlets of the transcripts of private conversations are attributable to Slovenia.<sup>103</sup> It argues that its former Agent was exceeding her authority when she engaged in *ex parte* communications with Dr. Sekolec and recalls that she resigned immediately after the reports became known.<sup>104</sup>
135. Slovenia responds to Croatia's argument that the conduct of its former Agent amounted to a material breach of two provisions of the Arbitration Agreement, Articles 6 and 10. Article 6 of the Arbitration Agreement deals with the procedure to be applied by the Tribunal.<sup>105</sup> According to Slovenia, the relevant part of the Article reads as follows:

(2) Unless envisaged otherwise, the Arbitral Tribunal shall conduct the proceedings according to the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States.

[. . .]

(5) The proceedings are confidential and shall be conducted in English.

<sup>99</sup> Written Submission, paras 5.12-5.18, referring to *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16, at p. 47, paras 94-95; *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 90, at p. 135, para. 270, p. 138, paras 275-276.

<sup>100</sup> Transcript of the Oral Hearing of 17 March 2016, pp. 44:15-45:16, 60:2-61:4 (Statement by Sir Michael Wood).

<sup>101</sup> Written Submission, paras 5.19-5.20, referring to B. Simma & C. Tams, "Article 60," in *The Vienna Convention on the Law of Treaties: A Commentary*, Vol. II, p. 1351, at p. 1359, para. 19 (O. Corten & P. Klein eds., 2011).

<sup>102</sup> Transcript of the Oral Hearing of 17 March 2016, pp. 45:17-48:15 (Statement by Sir Michael Wood), referring to B. Simma, "Reflections on Article 60 of the Vienna Convention on the Law of Treaties and Its Background in General International Law," *Österreichische Zeitschrift für öffentliches Recht*, Vol. 20, p. 5, at p. 31 (1970).

<sup>103</sup> Written Submission, para. 5.22.

<sup>104</sup> Written Submission, para. 5.21.

<sup>105</sup> Written Submission, paras 5.23-5.25.

136. While acknowledging that the reported events constitute a violation of the agreed procedures for the arbitration, Slovenia contends that the Tribunal can still complete its task under the Arbitration Agreement, considering the resignation of those involved, the appointment of new arbitrators, and the inspection of the documents submitted by Dr. Sekolec to the Tribunal and the Registrar.<sup>106</sup> In addition, Slovenia submits that the Tribunal has the practical means and the obligation to set aside any improper information by distinguishing between legitimate and illegitimate sources of information and has already demonstrated its ability to do so.<sup>107</sup>
137. Slovenia rejects Croatia's argument that Ms. Drenik's conduct jeopardised the work of the Tribunal, in breach of Article 10 of the Arbitration Agreement.<sup>108</sup> Article 10 provides:
- (1) Both Parties refrain from any action or statement which might intensify the dispute or jeopardize the work of the Arbitral Tribunal.
  - (2) The Arbitral Tribunal has the power to order, if it considers that circumstances so require, any provisional measures it deems necessary to preserve the stand-still.
138. Slovenia explains that the purpose of Article 10, as inferred from its title ("Stand-still"), is to preclude any aggravation of the dispute through action on the ground or statements by either Party that would put the proceedings at serious risk.<sup>109</sup> Against this background, Slovenia submits that Article 10 is not aimed at actions which concern the actual conduct of the proceedings, and that the actions of its former Agent do not "jeopardise" the work of the Tribunal in this sense.<sup>110</sup>
139. A breach of Article 10 by Slovenia's former Agent would not amount to a material breach because the Tribunal has the means to accomplish the object and purpose of the Arbitration Agreement, as already explained (see paragraph 136).<sup>111</sup>
140. Finally, Slovenia suggests that its analysis would not change even if Croatia's *note verbale* of 16 March 2016 were interpreted as a submission to the Tribunal that Slovenia's conduct amounted to a repudiation of the Arbitration Agreement.<sup>112</sup> Slovenia stresses that it is still possible for the

<sup>106</sup> Written Submission, para. 5.26. Cf. Transcript of the Oral Hearing of 17 March 2016, p. 49:6-19 (Statement by Sir Michael Wood).

<sup>107</sup> Written Submission, para. 5.28, referring to Letter from the Registrar of the Tribunal to the Republic of Croatia and the Republic of Slovenia (1 December 2015) (Annex SI-1054).

<sup>108</sup> Written Submission, paras 5.29-5.30, referring to *note verbale* from the Ministry of Foreign and European Affairs of the Republic of Croatia to the Ministry of Foreign Affairs of the Republic of Slovenia, No. 3303/2015 (30 July 2015) (Annex SI-1034); Letter from the Minister of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal (31 July 2015) (Annex SI-1040).

<sup>109</sup> Written Submission, para. 5.31.

<sup>110</sup> Written Submission, para. 5.32.

<sup>111</sup> Transcript of the Oral Hearing of 17 March 2016, pp. 50:14-51:12 (Statement by Sir Michael Wood).

<sup>112</sup> See paragraph 100 above.

Tribunal to achieve the object and purpose of the Agreement; the conduct complained of would therefore not be so fundamental as to amount to a repudiation of the Agreement by Slovenia.<sup>113</sup>

## VI. THE TRIBUNAL'S ANALYSIS

141. At the outset, the Tribunal must take note of the fact that Croatia did not make any formal submissions to it in respect of the questions addressed in the present Partial Award, nor did it appear at the hearing held on 17 March 2016. Croatia was fully informed of all procedural developments occurring in this arbitration since its decision of 31 July 2015 not to participate in the proceedings, through its designated contact person, H.E. Ms. Metelko-Zgombić at the Ministry of Foreign and European Affairs. It was invited to file a written submission to substantiate the matters set out in its letters dated 24 July 2015 and 31 July 2015. It was served with hard copies and electronic copies of Slovenia's submission on these matters. It was consulted in respect of a suitable hearing date and invited to participate in the hearing. After the hearing, it was also provided with the verbatim transcript of the oral proceedings.
142. The Tribunal regrets that Croatia did not avail itself of the opportunity to present formal pleadings so as to explain its concerns more fully and respond to questions from the Tribunal. However, it is a well-established principle of international procedural law that a unilateral decision to withdraw from dispute settlement proceedings cannot bring such proceedings to a halt. In the present arbitration, this principle is set out in Article 28 of the PCA Optional Rules. A tribunal is thus able, and may indeed be required, to continue the proceedings in the absence of the non-participating party.
143. The Tribunal also recalls that, while no formal submissions were received from Croatia, Croatia did communicate its views to the Tribunal and to the general public in no unclear terms. The Tribunal has notably had the benefit of two letters from the Minister of Foreign and European Affairs of Croatia, dated 24 July 2015 and 31 July 2015; two *notes verbales*, dated 30 July 2015 and 16 March 2016; as well as other documentary annexes specifically made available by Croatia on a website dedicated to the present arbitration. The Tribunal has reviewed these materials carefully.
144. The Tribunal shall now consider each aspect on which it was presented with legal argument in turn: the question of jurisdiction, the question of the Tribunal's duty and capacity to continue the proceedings in the present circumstances, and the validity of the purported termination of the

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<sup>113</sup> Transcript of the Oral Hearing of 17 March 2016, p. 56:10-21 (Statement by Sir Michael Wood).

Arbitration Agreement by Croatia. The Tribunal shall begin its examination with the question of the Tribunal's jurisdiction.

#### A. JURISDICTION

145. Croatia considers that the Tribunal “should terminate its work with immediate effect”.<sup>114</sup> To this end, it first submits that, as a result of Dr. Sekolec's and Ms. Drenik's behaviour, “the arbitral process as a whole has been compromised to such an extent that Croatia is confident that the arbitration process cannot continue”.<sup>115</sup> It then recalls that it notified Slovenia of its intention to terminate the Arbitration Agreement and ceased to apply it. According to Croatia, the Tribunal is “without competence to express any views as to the requirements for the termination of the Arbitration Agreement”<sup>116</sup> and must immediately give effect to that termination.
146. In contrast, Slovenia submits that there is no obstacle to the Tribunal fulfilling its duty.<sup>117</sup> It requests the Tribunal to exercise its jurisdiction and to decide that the Arbitration Agreement has not been validly terminated by Croatia.<sup>118</sup> Accordingly, Slovenia submits the proceedings must continue.<sup>119</sup>
147. The first question the Tribunal must answer is whether it has competence to assess the issues thus raised.
148. As recognised by the ICJ in the *Nottebohm* case, under general international law, “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”.<sup>120</sup> In the words of the International Criminal Tribunal for the former Yugoslavia in the *Tadić* case:

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

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<sup>114</sup> *Note verbale* from the Permanent Mission of the Republic of Croatia to the United Nations to the Permanent Missions and Permanent Observer Missions, No. 55/2016, p. 3 (16 March 2016) (Annex SI-1058).

<sup>115</sup> Letter from the First Deputy Prime Minister and Minister of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal, p. 1 (31 July 2015) (Annex SI-1040).

<sup>116</sup> *Ibid.*, p. 2.

<sup>117</sup> Written Submission, paras 4.25-4.52.

<sup>118</sup> Written Submission, paras 5.01-5.35.

<sup>119</sup> Written Submission, p. 56 (Conclusion and Submission).

<sup>120</sup> *Nottebohm Case (Preliminary Objections) (Liechtenstein v. Guatemala)*, Judgment of 18 November 1953, I.C.J. Reports 1953, p. 111, at p. 119. *See also Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol)*, Advisory Opinion of 28 August 1928, P.C.I.J. Reports, Series B, No. 16, p. 20; *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, I.C.J. Reports 1991, p. 53, at pp. 68-69, para. 46.

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.<sup>121</sup>

149. The Tribunal adds that, in the absence of such a principle, any party to an arbitration, in objecting to the jurisdiction of a tribunal, would be able to stop the proceedings and thus could escape its obligation to arbitrate. As stated by the tribunal in the *Abyei* arbitration, “[w]ithout a principle of Kompetenz-Kompetenz, any form of third party decision in international law could be paralyzed by a party which challenged jurisdiction.”<sup>122</sup>
150. This principle has been frequently applied and at times expressly stated in a number of arbitral awards. As early as 1900, the tribunal in the *Guano* case between Chile and France stated that “*la doctrine et la jurisprudence sont unanimes pour admettre que les Tribunaux internationaux apprécient eux-mêmes leur compétence sur la base du Compromis lié entre les Parties*”.<sup>123</sup>
151. Similarly, in the *Walfish Bay Boundary* case in 1911, the tribunal considered 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”.<sup>124</sup>
152. In 1928, in the *Rio Grande Irrigation and Land Company Ltd* case, the tribunal stated that arbitral tribunals have an inherent “power, and indeed a duty, to entertain, and, 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”.<sup>125</sup>
153. In the *Lehigh Valley Railroad Company* case, it was recognised in 1933 that the mixed claims commission constituted by the United States and Germany in 1922 was “competent to determine

<sup>121</sup> *Prosecutor v. Duško Tadić a/k/a “Dule,”* ICTY Case No. IT-94-1-AR72, Appeals Chamber, Decision of 2 October 1995, para. 18.

<sup>122</sup> *Abyei Arbitration (The Government of Sudan/The Sudan People’s Liberation Army/Movement)*, Permanent Court of Arbitration, Final Award of 22 July 2009, para. 499, available at 48 I.L.M. 1258.

<sup>123</sup> *Affaire du Guano (Chili/France)*, Awards of 20 January 1896, 10 November 1896, 20 October 1900, 8 January 1901, and 5 July 1901, R.I.A.A. Vol. XV, p. 100 (“doctrine and case law are unanimous in finding that international tribunals judge themselves their competence on the basis of the Arbitration Agreement concluded between the Parties”) (translation of the Tribunal).

<sup>124</sup> *The Walfish Bay Boundary Case (Germany/Great Britain)*, Award of 23 May 1911, R.I.A.A. Vol. XI, p. 263, at p. 307, para. LXVII.

<sup>125</sup> *Rio Grande Irrigation and Land Company, Ltd. (Great Britain) v. United States*, Award of 28 November 1923, R.I.A.A. Vol. VI, p. 131, at pp. 135-136.

its own jurisdiction by interpretation of the instrument creating it. Any other view would lead to the most absurd result”.<sup>126</sup>

154. Finally, in 1940, the arbitral tribunal in the case of the *Société Radio Orient* stated that “*en dehors des cas où les Parties en sont convenues autrement, tout tribunal d’arbitrage international est juge de sa propre compétence*”.<sup>127</sup>
155. The principle thus stated by arbitral tribunals was expressly recognised in Articles 48 and 73 of the Hague Conventions for the Pacific Settlement of International Disputes of 29 July 1899 and 18 October 1907. At the time, the Rapporteur to the 1899 Hague Peace Conference emphasised the necessity of this principle, presented by him as being “of the very essence of the arbitral function and one of the inherent requirements for the exercise of this function”.<sup>128</sup>
156. This principle was incorporated into Article 36, paragraph 4 of the Statute of the Permanent Court of International Justice, and later into Article 36, paragraph 6 of the Statute of the ICJ. It was also incorporated into a number of international conventions such as the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States.<sup>129</sup>
157. The Tribunal arrives at the conclusion that, in the absence of any agreement to the contrary, an arbitral or judicial tribunal has, under general international law, jurisdiction to determine its own jurisdiction. The Tribunal further notes that this principle has been incorporated into a number of treaties.
158. In the present case, the Arbitration Agreement provides in its Article 6, paragraph 2 that, “[u]nless envisaged otherwise, the Arbitral Tribunal shall conduct the proceedings according to the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States”. Section III of those Rules governs the arbitral proceedings. Article 21, paragraph 1 of Section III, in turn, provides that “[t]he arbitral tribunal shall have the power to rule on objections that it has

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<sup>126</sup> *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, R.I.A.A. Vol. VIII, p. 160, at p. 186.

<sup>127</sup> *Affaire de la Société Radio-Orient (États du Levant sous mandat français contre Égypte)*, Award of 2 April 1940, R.I.A.A. Vol. III, p. 1871, at p. 1878 (“except in cases where the Parties have agreed otherwise, every arbitral tribunal is the judge of its own competence.”) (translation of the Tribunal).

<sup>128</sup> Report of Baron Descamps, Rapporteur to the Hague Peace Conference of 18 May to 29 July 1899, cited in *Nottebohm Case (Preliminary Objections) (Liechtenstein v. Guatemala)*, Judgment of 18 November 1953, I.C.J. Reports 1953, p. 111, at p. 119.

<sup>129</sup> See Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Article 41(1), done in Washington, D.C. on 18 March 1965, 575 U.N.T.S. 159.



no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement”.

159. The Parties are in disagreement as to whether the Tribunal has jurisdiction to settle the dispute between them concerning the validity of the termination of the Arbitration Agreement by Croatia.
160. In this regard, the Tribunal notes that Article 21, paragraph 1, as quoted above, confers on it the power to rule on any objection to the Tribunal’s jurisdiction “with respect to the existence or validity of the Arbitration Agreement”. In order to determine whether the Arbitration Agreement remains in force, the Tribunal will necessarily have to decide whether the agreement has been validly terminated. It therefore has jurisdiction to evaluate the validity of Croatia’s purported termination of the Arbitration Agreement.
161. The fact that Croatia decided to terminate the Arbitration Agreement does not deprive the Tribunal of that jurisdiction. As stated by the ICJ in the *ICAO Council* case,

a merely unilateral suspension *per se* [cannot] render jurisdictional clauses inoperative, since one of their purposes might be, precisely, to enable the validity of the suspension to be tested. If a mere allegation, as yet unestablished, that a treaty was no longer operative could be used to defeat its jurisdictional clauses, all such clauses would become potentially a dead letter, even in cases like the present, where one of the very questions at issue on the merits, and as yet undecided, is whether or not the treaty is operative—i.e., whether it has been validly terminated or suspended. The result would be that means of defeating jurisdictional clauses would never be wanting.<sup>130</sup>

162. Accordingly, in applying the principle of *compétence de la compétence*, as incorporated into Article 21, paragraph 1 of the PCA Optional Rules, the Tribunal has jurisdiction under the Arbitration Agreement to decide whether Croatia has validly terminated the Arbitration Agreement.
163. However, Croatia submits that the dispute which has arisen between the Parties on that point must be settled not by the Tribunal, but by one of the means prescribed by Article 65 of the Vienna Convention on the Law of Treaties. In support of this contention, Croatia stresses that the proposal it has made to Slovenia to terminate the Arbitration Agreement was made under Article 60 of the Vienna Convention. It adds that Slovenia has objected to this course of action. Croatia considers that a new dispute has thus arisen between the two countries, which has to be settled as provided for in Article 65.
164. Article 65 of the Vienna Convention provides, in its paragraphs 1 to 3:

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<sup>130</sup> *Appeal Relating to the Jurisdiction of the ICAO Council*, Judgment, I.C.J. Reports 1972, p. 46, at pp. 53-54, para. 16.

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.
  2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.
  3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in article 33 of the Charter of the United Nations.
165. However, in paragraph 4, Article 65 adds that “[n]othing 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”. The article therefore explicitly recognises and preserves a tribunal’s ability, pursuant to its own mandate, to resolve disputes falling within its jurisdiction.
166. The Tribunal has already stated that it has jurisdiction under the Arbitration Agreement to settle the dispute between the Parties concerning the validity of the termination of the Agreement by Croatia (see paragraph 162 above). That jurisdiction is not affected by Article 65 of the Vienna Convention, which on the contrary preserves it in paragraph 4.
167. The Tribunal therefore has jurisdiction under the provisions of the Arbitration Agreement and Article 21, paragraph 1 of the PCA Optional Rules, and in conformity with Article 65 of the Vienna Convention, to decide whether Croatia, acting under Article 60 of the Convention, has validly proposed to Slovenia to terminate the Arbitration Agreement and has validly ceased to apply it.
168. There is no doubt that the Tribunal also has inherent jurisdiction to decide whether the “arbitration process as a whole has been compromised to such an extent that . . . the arbitration process cannot continue”.<sup>131</sup>

## **B. CONTINUATION OF THE PROCEEDINGS**

169. On 22 July 2015, the Serbian and Croatian press published extracts from conversations between Dr. Sekolec, the arbitrator appointed by Slovenia, and Ms. Drenik, the Agent of Slovenia, which related to the deliberations of the Tribunal. According to Croatia, the conversations “reveal[ed] that the most fundamental principles of procedural fairness, due process, impartiality and integrity

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<sup>131</sup> Letter from the First Deputy Prime Minister and Minister of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal, p. 1 (31 July 2015) (Annex SI-1040).

of the arbitral process have been systematically and gravely violated”.<sup>132</sup> Croatia adds that Dr. Sekolec “requested that Ms. Drenik provide him with arguments and ‘facts’ not already in the record so that he could use them in his discussions with other members of the Arbitral Tribunal as his own”.<sup>133</sup> It contends that Dr. Sekolec communicated such arguments and “facts” to the Tribunal. As a consequence, the official records “have been corrupted by unlawful and unethical submissions by one of the Parties after the close of written proceedings and hearings”.<sup>134</sup> According to Croatia, “[t]here is no tool available for repairing the damage that has been occasioned to the proceedings”.<sup>135</sup> In its view, therefore, the “arbitration process cannot continue”.<sup>136</sup>

170. For its part, Slovenia has expressed its “profound regret about the facts reported in the Croatian press”, “considered that this conduct was entirely inappropriate and intolerable” and conveyed its “sincere apologies to the President and the members of the Arbitral Tribunal for this regrettable and sad situation”.<sup>137</sup>
171. Slovenia accepts that “the course of the arbitral proceedings was affected by the conduct of one of the arbitrators and Slovenia’s former Agent”.<sup>138</sup> Slovenia submits, however, that “this does not free the Arbitral Tribunal from its basic function—to settle the dispute submitted to it”.<sup>139</sup> It is, in Slovenia’s view, incumbent on the Tribunal “to use the powers that are inherent to its judicial function in order to restore the trust and credibility in the arbitral process”.<sup>140</sup> In particular, Slovenia argues, the Tribunal has the means to ascertain whether any document submitted by Dr. Sekolec to the Tribunal contained any new information, which apparently is not the case, and to take appropriate measures in this respect if necessary. For those reasons, Slovenia requests the Tribunal to declare that the proceedings “shall continue until the Tribunal issues a final Award”.<sup>141</sup>

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<sup>132</sup> Letter from the First Deputy Prime Minister and Minister of Foreign Affairs of the Republic of Croatia to the Registrar of the Tribunal, p. 1 (24 July 2015) (Annex SI-1021).

<sup>133</sup> *Ibid.*, p. 2.

<sup>134</sup> Letter from the First Deputy Prime Minister and Minister of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal, p. 1 (31 July 2015) (Annex SI-1040).

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> Letter from the Republic of Slovenia to the Registrar of the Tribunal (26 July 2015) (Annex SI-1023).

<sup>138</sup> Written Submission, para. 4.21.

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.*

<sup>141</sup> Written Submission, p. 56 (Conclusion and Submission).

172. Dr. Sekolec and Ms. Drenik had at least two conversations relating to the ongoing arbitration on 5 November 2014 and 11 January 2015. The Tribunal has had access to what appears to be the full record of those conversations and has had them translated into English; that translation was communicated to the Parties.<sup>142</sup> Slovenia provided minor, mainly editorial, comments.<sup>143</sup> Croatia did not comment.
173. It is not contested that the translated document provided to the Parties faithfully records these conversations. Nor does Slovenia contest the admissibility of the transcripts of the telephone conversations as evidence before the present Tribunal, although Slovenia does point out that the underlying recordings appear to have been procured in violation both of international law and of Slovenian law. The transcripts reveal that Dr. Sekolec provided Ms. Drenik with information on the Tribunal's deliberations. Dr. Sekolec informed Ms. Drenik of the issues on which he believed that the Tribunal was inclined to rule in favour of or against Slovenia. He examined with her those issues and participated in discussions on the best means to improve the prospects of Slovenia. Finally, Dr. Sekolec requested Ms. Drenik to provide him with documents he could present and use as his own in discussions with other members of the Tribunal.
174. Having considered the transcripts of the telephone conversations, the Tribunal asked Croatia and Slovenia to inform it "of any other incidents in which information emanating from the Tribunal or the PCA was passed on to either Party".<sup>144</sup> It received no answer from Croatia. For its part, Slovenia informed the Tribunal that "draft summaries of the Parties' arguments prepared by the PCA" were communicated by Dr. Sekolec to Ms. Drenik, presumably to "ensure that they accurately reflected Slovenia's position".<sup>145</sup> No comments had been made by Dr. Sekolec on those draft summaries.
175. The present arbitration is, by agreement of the Parties in Article 6, paragraph 1 of the Arbitration Agreement, conducted pursuant to the PCA Optional Rules. These Rules extend the same high standard of "impartiality or independence" to all arbitrators, regardless of their method of appointment (as do the arbitration rules of the United Nations Commission on International Trade Law, which contain a comparable provision). The Tribunal recalls that these Rules provide, in

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<sup>142</sup> Letter from the Registrar of the Tribunal to the Republic of Croatia and the Republic of Slovenia (26 December 2015) (Annex SI-1055).

<sup>143</sup> Letter from the Republic of Slovenia to the Registrar of the Tribunal (18 January 2016) (Annex SI-1056). Slovenia included its edits to the Registry's translation as attachments to its letter.

<sup>144</sup> Letter from the Registrar of the Tribunal to the Republic of Croatia and the Republic of Slovenia, p. 1 (13 October 2015) (Annex SI-1052).

<sup>145</sup> Letter from the Republic of Slovenia to the Registrar of the Tribunal, p. 2 (27 November 2015) (Annex SI-1053).

Articles 9 to 12, a mechanism for challenging arbitrators, so as to ensure the arbitrators' independence and impartiality. All arbitrators in the present case accordingly submitted declarations on the PCA's customary forms confirming their independence and impartiality upon accepting their appointment. Additionally, 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". Section 9.1 adds that "[t]he 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". There is no doubt that Dr. Sekolec and Ms. Drenik acted in blatant violation of these provisions.

176. It remains to be determined whether, as alleged by Croatia, those breaches have tainted the proceedings in such a way that the proceedings cannot go further. In order to answer that question, the Tribunal will recall the existing law before considering the situation in the present case.
177. Domestic courts have had a number of opportunities to appreciate the consequences of wrongful behaviour of members of arbitral tribunals for the validity of arbitral awards. They have frequently considered whether a mandatory rule of arbitral procedure has been violated, and whether that violation had any bearing on the ultimate award.<sup>146</sup> Thus, the *Cour d'appel de Paris* recently had to consider the validity of an arbitral award rendered in a case concerning the selling of shares in a sports equipment company, Adidas, by an investor, Mr. Tapie. It found that the arbitrator appointed by Mr. Tapie maintained longstanding ties with him, as well as business interests which were concealed from the tribunal. The Paris court went on to state that the arbitrator in question "*s'est employé, à seule fin d'orienter la solution de l'arbitrage dans le sens favorable aux intérêts d'une partie, à exercer au sein du tribunal arbitral un rôle prépondérant et à marginaliser ses co-arbitres poussés à l'effacement*".<sup>147</sup> The court noted that the arbitrator in question thus consistently exerted a dominant influence on the panel, for instance in preparing terms of

<sup>146</sup> United States: *HSN Capital LLC v. Productora y Comercializador de Television, S.A. de C.V.*, 2006 WL 1876941 (M.D. Fla. 5 July 2006); *Scandinavian Reinsurance Company Limited v. Saint Paul Fire and Marine Insurance Company*, 668 F.3d 60 (2d Cir. 2012). Canada: *Schreter v. Gasmac Inc.* (1992), 7 O.R. (3d) 608, at paras 47 *et seq.* Germany: OLG Brandenburg, *Yearbook of Commercial Arbitration*, Vol. 29, p. 697, at p. 699, para. 6 (2004); OLG Brandenburg, BeckRS 2005, 2036; OLG Cologne, *Yearbook of Commercial Arbitration*, Vol. 29, p. 715, at p. 718, para. 6 (2004); OLG Cologne, *Yearbook of Commercial Arbitration*, Vol. 30, p. 557, at p. 560, para. 5 (2005).

<sup>147</sup> Cour d'appel de Paris, Pôle 1-Chambre 1, Judgment of 17 February 2015 (No. 77), RG No. 13/13278 ("[the arbitrator in question] resorted, for the sole purpose of influencing the outcome of the arbitration in the favour of one party, to exercising a preponderant role within the arbitral tribunal, and marginalising his co-arbitrators, who were pushed to effacement") (translation of the Tribunal).

reference for the tribunal, drafting questions to be put to the parties by the tribunal and writing most of the award. For those reasons, the court annulled the award.<sup>148</sup>

178. The Tribunal will not have to enter into considerations of that kind, however. The common thread of all these decisions is that proceedings had been terminated, and an award or judgment had already been rendered, at the time when concerns regarding the independence or impartiality of an arbitrator or judge became known. The arbitral tribunals had no opportunity to address such concerns or to take any necessary remedial action. The validity of their awards had to be determined in light of unremedied procedural misconduct.
179. However, no arbitral award has been rendered in the present case with the participation of Dr. Sekolec. He resigned and was replaced; the case could be continued and be deliberated upon without his presence, with whatever additional procedural safeguards the Tribunal might consider necessary. Accordingly, no judgment need be passed on the validity of a final award.
180. International courts and arbitral tribunals have rarely been faced with situations comparable to the present one. Two cases may, however, be mentioned.
181. The first one was the arbitration organised in 1954 between Saudi Arabia and the United Kingdom concerning the *Buraimi Oasis*.<sup>149</sup> After a number of procedural incidents, three of the five members of the tribunal, including the president, resigned. The two remaining arbitrators were those who had been implicated in procedural misconduct. In those circumstances, it appeared impossible to reconstitute the tribunal, and no effort was made to that end. The situation is completely different in the present case, Dr. Sekolec having resigned and the tribunal having been recomposed.
182. The second case is the award rendered under the auspices of ICSID in the *Victor Pey Casado et al. v. Chile* case, whose topical relation to the present dispute is clearer. In that case, one of the arbitrators provided the party that had appointed him with a partial draft of the decision on jurisdiction prepared by the president. That arbitrator resigned, and a second arbitrator was successfully challenged on unrelated grounds. Two new arbitrators were appointed.

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<sup>148</sup> *Ibid.*

<sup>149</sup> Arbitration Agreement between the Government of the United Kingdom (acting on behalf of the Ruler of Abu Dhabi and His Highness the Sultan Said bin Taimur) and the Government of Saudi Arabia, done in Jeddah on 30 July 1954, 201 U.N.T.S. 317; H. Fox, "Buraimi Oasis Dispute," *Max Planck Encyclopedia of Public International Law* (December 2006); R. Goy, "L'Affaire de l'Oasis de Buraimi," *Annuaire Français de Droit International*, Vol. 3, p. 188 (1957).

To maintain equality between the parties, the tribunal communicated the draft to the other party.<sup>150</sup> It then decided to hold a new hearing limited to questions previously communicated to the parties. Having taken those steps, the tribunal finally rendered its decision.

183. The Tribunal has not only the power, but also the duty to settle the land and maritime dispute which was submitted to it after lengthy and difficult negotiations between the two countries under the auspices of the European Union. But it also has the duty to safeguard the integrity of the arbitral process and to stop that process if it cannot ensure that integrity. The Tribunal must therefore examine whether that integrity can be preserved and, if so, how.
184. In this respect, the Tribunal will first recall that Dr. Sekolec resigned, with immediate effect, “as arbitrator in the Croatia-Slovenia border dispute” by letter dated 23 July 2015.<sup>151</sup> The Tribunal was informed on 26 July 2015 that Ms. Drenik had also resigned from her position as Agent of Slovenia.<sup>152</sup> She is no longer employed by the Ministry of Foreign Affairs of Slovenia.<sup>153</sup>
185. Professor Vukas, the arbitrator appointed by Croatia, also resigned by letter dated 30 July 2015.<sup>154</sup> In this letter, and in an interview which he gave the same day on Croatian national television, Professor Vukas justified his resignation with the same reasons as those given by Croatia to terminate the arbitration. In the interview, he added that “the fact that my country which appointed me and which is a party and a citizen of which I am is withdrawing from this procedure clearly dictate[d]” his decision.<sup>155</sup>
186. Under the relevant provisions of the Arbitration Agreement, the president of the Tribunal has appointed as new members of the Tribunal H.E. Mr. Rolf Einar Fife, Ambassador, and Professor Nicolas Michel. They replaced Dr. Sekolec and Professor Vukas. No doubt has been expressed on the impartiality or independence of the three remaining arbitrators or of the two new ones. The Tribunal is thus properly recomposed.

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<sup>150</sup> *Victor Pey Casado and Foundation “Presidente Allende” v. Republic of Chile*, ICSID Case No. ARB/98/2, Award of 8 May 2008, paras 34-43.

<sup>151</sup> E-mail from Dr. Jernej Sekolec to the Tribunal (23 July 2015) (Annex SI-1019).

<sup>152</sup> Letter from the Republic of Slovenia to the Registrar of the Tribunal (26 July 2015) (Annex SI-1023).

<sup>153</sup> Written Submission, para. 1.09.

<sup>154</sup> Letter from Professor Budislav Vukas to the President of the Tribunal (30 July 2015) (Annex SI-1037).

<sup>155</sup> Statement of Professor Budislav Vukas for Croatian National Television (HRT) (30 July 2015) (Annex SI-1038), available at <vijesti.hrt.hr/293634/izvanredna-sjednica-sabora-htv4-u-930-stream>; “Vukas: The Tribunal Had an Intention to Take Away from Croatia a Part of Its Territorial Sea,” *Croatian News Agency (HINA)* (31 July 2015) (Annex SI-1038).

187. Croatia, however, considers that “[t]he two resignations do not begin to address the gravity of the situation”.<sup>156</sup> It stresses that Dr. Sekolec communicated to the other members of the Tribunal arguments and “facts” originating with Ms. Drenik not already in the official record of the arbitration. Accordingly, Croatia suggests that the record “has been contaminated”.<sup>157</sup> It asserts that the “damage that has been occasioned to the proceedings” cannot be repaired.<sup>158</sup> In its view, therefore, the proceedings cannot continue.
188. As initially proposed by Croatia,<sup>159</sup> the Tribunal has carefully reviewed the record in order to assess the situation. Dr. Sekolec submitted two documents to the Tribunal. In the interest of transparency, those documents have been released by the Tribunal to Croatia and Slovenia.<sup>160</sup> The first document is a written note entitled “Personal and confidential notes regarding the border on or around Dragonja”. It was provided by Dr. Sekolec in January 2015 in the course of a deliberation meeting. The note had initially served as the basis for an oral intervention by Dr. Sekolec, who subsequently shared a copy with the other arbitrators.
189. The Tribunal observes that it is common practice for arbitrators to prepare notes during deliberations and to share them with their colleagues. It recalls that, in the present case, Professor Vukas proceeded in the same way and circulated two notes relating to maritime issues. More importantly, the Tribunal observes that Dr. Sekolec’s notes merely summarise his point of view on the basis of the Slovenian arguments and refer exclusively to documents annexed to the written memorials of the Parties and to facts already alleged. Professor Vukas’s notes adopted the same approach.
190. The second document submitted by Dr. Sekolec is entitled “Mura River Sector: various effectivites by Slovenia”. It lists references to documents that were all part of the written submissions. It was provided by Dr. Sekolec to the Registry of the Tribunal on 13 November 2014. At the time, the Registry was preparing, on the Tribunal’s instructions, an index listing both Parties’ evidence of title and effectivités in all sectors of the boundary area. The Registry’s index was over 142 pages long. It was prepared independently of Dr. Sekolec’s document, which was

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<sup>156</sup> Letter from the First Deputy Prime Minister and Minister of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal, p. 1 (24 July 2015) (Annex SI-1021).

<sup>157</sup> Letter from the First Deputy Prime Minister and Minister of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal, p. 1 (31 July 2015) (Annex SI-1040).

<sup>158</sup> *Ibid.*

<sup>159</sup> Letter from the First Deputy Prime Minister and Minister of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal, p. 2 (24 July 2015) (Annex SI-1021).

<sup>160</sup> Letter from the Registrar of the Tribunal to the Republic of Croatia and the Republic of Slovenia (1 December 2015) (Annex SI-1054).



never communicated to the arbitrators. It thus appears that, contrary to Croatia's submissions, Dr. Sekolec did not communicate to the Tribunal new arguments or facts not already contained in the official record of the Tribunal, i.e. in the written and oral pleadings of the Parties.

191. It remains to be seen whether the actions of Dr. Sekolec, in blatant breach of his obligations, resulted in any procedural disadvantage to Croatia. The Tribunal has given careful consideration to what could have been, even hypothetically, the practical effects of those actions. Aside from questions of delay and additional costs, it is satisfied that the only advantage to Slovenia, or detriment to Croatia, that could have arisen is that Slovenia found a way, after the close of the hearing, in which Dr. Sekolec might be led to emphasise certain facts or arguments that were already in the record.
192. In this respect, the Tribunal's method of working is relevant. Specific issues were identified for discussion at each session of the deliberations, and members of the Tribunal studied the relevant materials in advance, aided by detailed indices prepared by the Registry that set out cross-references to the relevant exhibits and submissions. The interventions by Dr. Sekolec during deliberations are most accurately characterised as expressions of his views on the weight to be given to various submissions, principles and interests, of all of which were well-known to the members of the Tribunal. Similarly, the members of the Tribunal were well aware of the range of evidence relevant to each individual decision that was to be taken. It is further noted that Professor Vukas participated in the deliberations, was in a position to present his views, and did so. The weight of Dr. Sekolec's interventions in the deliberations must be assessed in the light of those considerations.
193. Moreover, the Tribunal notes, for the avoidance of doubt, that since Dr. Sekolec and Professor Vukas have resigned as arbitrators, their views expressed in prior deliberation meetings are of no relevance for the work of the Tribunal in its current composition. Accordingly, no account will be had of their various deliberation notes, which they had circulated at earlier stages of these proceedings in their capacity as arbitrators.
194. In any event, and in order to put to rest the question of any procedural disadvantage to Croatia resulting from the actions of Dr. Sekolec, the Tribunal would be ready to consider reopening the oral phase of the case and to give each Party a further opportunity to express its views concerning what it regards as the most important facts and arguments. The Tribunal is satisfied that, on the basis of all remedial action taken and such a further opportunity, the procedural balance between the Parties is secured.

195. Dr. Sekolec, as well as Professor Vukas, have resigned and have been replaced. No doubt has been expressed as to the independence or impartiality of the recomposed Tribunal. The Tribunal has carefully reviewed its records and communicated to the Parties the two documents circulated by Dr. Sekolec during past deliberations. It has arrived at the conclusion that those documents do not contain any arguments or facts not already presented in the Parties' pleadings. It is also satisfied that the procedural balance between the Parties is secured.
196. In conclusion, it appears that, save for the question of the validity of the termination of the arbitration agreement, there is no obstacle to the continuation of the proceedings under the Arbitration Agreement.

### C. VALIDITY OF THE TERMINATION OF THE ARBITRATION AGREEMENT

197. By *note verbale* dated 30 July 2015, Croatia informed Slovenia that "it is entitled to terminate the Arbitration Agreement . . . [i]n accordance with Article 60, paragraph 1 of the Vienna Convention on the Law of Treaties".<sup>161</sup> It accordingly provided Slovenia with "the notification pursuant to Article 65, paragraph 1 of the Vienna Convention that it proposes to terminate forthwith the Arbitration Agreement" and added that, "from the date of this note, the Republic of Croatia ceases to apply the Arbitration Agreement".<sup>162</sup> By letter dated 31 July 2015, Croatia informed the Tribunal of the action thus taken and added that it had relieved its Agent, Co-Agent and Counsel of their engagement in the case.<sup>163</sup>
198. By letter of 31 July 2015, Slovenia informed Croatia that the action thus taken had, in its opinion, "no basis in international law" and that the Arbitration Agreement "is and remains the only valid legal basis for settling the border issue between the two countries".<sup>164</sup>
199. In the exercise of its jurisdiction (see paragraph 167 above), the Tribunal thus has to decide whether Croatia has validly expressed its intention to terminate the Arbitration Agreement and has validly ceased to apply it.

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<sup>161</sup> *Note verbale* from the Ministry of Foreign and European Affairs of the Republic of Croatia to the Ministry of Foreign Affairs of the Republic of Slovenia, No. 3303/2015, p. 1 (30 July 2015) (Annex SI-1034).

<sup>162</sup> *Ibid.*, p. 2.

<sup>163</sup> Letter from the First Deputy Prime Minister and Minister of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal (31 July 2015) (Annex SI-1040).

<sup>164</sup> Letter from the Prime Minister of the Republic of Slovenia to the Prime Minister of the Republic of Croatia, No. 570-3/2015/4 (31 July 2015) (Annex SI-1041).

200. Croatia submits that the termination of the Arbitration Agreement is the result of “the actions recorded in publicly available conversations between the Agent of Slovenia, for which the Republic of Slovenia is internationally responsible, and the arbitrator appointed by Slovenia”.<sup>165</sup> It contends that those actions have violated, *inter alia*, Articles 6 and 10 of the Arbitration Agreement.<sup>166</sup> According to Croatia, such actions constitute material breaches of the Agreement under Article 60 of the Vienna Convention.
201. For its part, Slovenia submits that the conversations on which Croatia bases its arguments were “those of persons acting on their own volition without the authorization of the Government”<sup>167</sup> and that they were illegally recorded. Slovenia adds that it is not open to one party to an arbitration agreement to invoke a material breach under Article 60 as a ground for unilaterally terminating such an agreement.<sup>168</sup> It stresses that, in any event, there has been no material breach in the present case.<sup>169</sup>
202. Croatia and Slovenia are both parties to the Vienna Convention on the Law of Treaties. Article 60 of that Convention provides, *inter alia*:
1. 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.
  - [. . .]
  3. A material breach of a treaty, for the purposes of this article, consists in:
    - (a) A repudiation of the treaty not sanctioned by the present Convention; or
    - (b) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.
  4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.
  - [. . .]
203. Slovenia submits that “it is not open to one party to invoke a material breach as a ground for terminating the Arbitration Agreement”.<sup>170</sup> Slovenia also appears to suggest that such a possibility would be incompatible with the object and purpose of the Agreement.

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<sup>165</sup> *Note verbale* from the Ministry of Foreign and European Affairs of the Republic of Croatia to the Ministry of Foreign Affairs of the Republic of Slovenia, No. 3303/2015, p. 1 (30 July 2015) (Annex SI-1034).

<sup>166</sup> *Ibid.*

<sup>167</sup> Written Submission, para. 10 (Introduction).

<sup>168</sup> Written Submission, paras 5.04-5.08.

<sup>169</sup> Written Submission, paras 5.09-5.35.

<sup>170</sup> Written Submission, p. 48 (heading to Section V.I).

204. The Tribunal observes that Article 60, paragraph 1 of the Vienna Convention is drafted in general terms and applies to any treaty not covered by its paragraphs 4 and 5. The provision therefore applies to arbitration agreements. However, the specific object and purpose of such agreements must be taken into account when applying Article 60, paragraph 1. The Tribunal will revert to this consideration below.
205. Slovenia further submits that, pursuant to Article 60, paragraph 4, when a treaty contains provisions applicable in the event of a breach, Article 60, paragraph 1 is not applicable. Slovenia contends that the Arbitration Agreement contains such provisions, that these provisions are applicable in the present case, and that, in consequence, Article 60, paragraph 1 cannot be invoked by Croatia.<sup>171</sup>
206. The Tribunal notes that the provisions of the Arbitration Agreement referred to by Slovenia concern the settlement of disputes relating to the interpretation and application of the Agreement. As stated in paragraph 167, those provisions empower the Tribunal to settle the dispute between the Parties relating to the validity of the termination of the Agreement by Croatia. They do not, however, determine which action may be taken by one Party in cases where the other Party violates the Arbitration Agreement. In fact, the Arbitration Agreement contains no provision in this regard. Accordingly, and contrary to Slovenia's contention, paragraph 4 of Article 60 does not prevent the application of paragraph 1 of the same article.
207. For present purposes, the Tribunal must therefore consider whether there has been a 'material breach' of the Arbitration Agreement by Slovenia entitling Croatia to terminate the Agreement under Article 60, paragraph 1 of the Vienna Convention.
208. The Tribunal has already concluded that Ms. Drenik acted in blatant violation of various provisions governing the arbitration (see paragraph 175 above). In fact, Slovenia itself "does not seek to argue that the regrettable events reported in the media do not constitute a violation of the agreed procedures".<sup>172</sup>
209. Even so, Slovenia submits that the breaches of the Arbitration Agreement "were those of persons acting on their own volition without the authorization of the Government".<sup>173</sup> "In acting as she

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<sup>171</sup> Written Submission, para. 5.06.

<sup>172</sup> Written Submission, para. 5.26.

<sup>173</sup> Written Submission, para. 10 (Introduction).

did,” it suggests, “the former Agent of Slovenia was exceeding her authority”.<sup>174</sup> Accordingly, Slovenia seems to imply that the conduct of Ms. Drenik is not attributable to it.

210. The Tribunal recalls that Ms. Drenik was Agent of Slovenia in the present proceedings. The conversations she had with Dr. Sekolec cannot, under any reasonable interpretation, be considered ‘private’ conversations from the perspective of attribution. Ms. Drenik was at the time acting in her capacity as Agent for her country; the Tribunal is therefore satisfied that the breaches evidenced by the aforementioned conversations are attributable to Slovenia.
211. Slovenia then observes that “the source of the information reported . . . consists of illegal recordings . . . that presumably took place in Slovenian territory in violation of international and domestic legal provisions”.<sup>175</sup> All the same, Slovenia recognises that the source is unknown. In other words, Slovenia has not contended that the recording is attributable to Croatia or that Croatia has also breached obligations under the Arbitration Agreement. In the absence of any evidence clearly establishing such a breach, the Tribunal is not in a position to take this point into account.
212. A ‘material breach’ within the meaning of Article 60, paragraph 1 of the Vienna Convention could consist either in the repudiation of a treaty (Article 60, paragraph 3, subparagraph (a)), or in the violation of a provision essential to the accomplishment of the object or purpose of the treaty (Article 60, paragraph 3, subparagraph (b)). In its *notes verbales* of 30 July 2015 and 16 March 2016, and in its letter of 31 July 2015 to the Tribunal, Croatia has contended that such a violation occurred in the present case. Slovenia denies it. It is therefore incumbent upon the Tribunal to interpret Article 60, paragraph 3, subparagraphs (a) and (b) of the Vienna Convention and to decide whether any breaches of the Arbitration Agreement attributable to Slovenia could entitle Croatia to terminate the Agreement.
213. Croatia’s argument that Slovenia’s conduct constitutes a repudiation of the Arbitration Agreement was made for the first time in its *note verbale* of 16 March 2016, and it is not further explained. To “repudiate” an agreement amounts to a “refus[al] to fulfil or discharge” it.<sup>176</sup> A repudiation of a treaty, as contemplated under Article 60, paragraph 3, subparagraph (a) of the Vienna Convention, involves the rejection of a treaty as a whole by the defaulting party.<sup>177</sup> In the Tribunal’s view, the right of a party to seek the termination of a treaty on the ground that the other

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<sup>174</sup> Written Submission, para. 5.21.

<sup>175</sup> Written Submission, para. 11 (Introduction).

<sup>176</sup> “To Repudiate,” *Concise Oxford English Dictionary* (11th ed., 2008).

<sup>177</sup> M.E. Villiger, “Article 60,” in *Commentary on the 1969 Vienna Convention on the Law of Treaties*, p. 738, at p. 742, para. 14 (2009).

party has repudiated it is closely related to the principle *inadimplenti non est adimplendum*. To safeguard expectations of reciprocity underlying a treaty relationship, a party should not be required to perform a treaty that the other party has clearly and definitively rejected.<sup>178</sup>

214. Against this yardstick, it cannot be said that Slovenia refused to apply the Arbitration Agreement or rejected that treaty as a whole. Quite to the contrary, Slovenia has argued that the Agreement continues to apply and has invited the Tribunal to assume its jurisdiction pursuant to the Agreement. Slovenia has also expressly recognised its continuing obligations under the Agreement. A repudiation of the Agreement as a whole must be distinguished from a purported breach of any of its provisions, which may constitute a material breach under Article 60, paragraph 3, subparagraph (b) of the Vienna Convention.
215. Turning, then, to Article 60, paragraph 3, subparagraph (b) of the Vienna Convention, the Tribunal first observes that Article 60, paragraph 3, subparagraph (b) does not refer to the intensity or the gravity of the breach, but instead requires that the provision breached be essential for the accomplishment of the treaty's object and purpose.
216. In international jurisprudence, very few decisions have undertaken a thorough analysis of Article 60, paragraph 3. However, two decisions of the ICJ may be mentioned. In its Advisory Opinion of 21 June 1971 relating to the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, the ICJ first identified the obligations of South Africa under the mandate given to it. Then, after having quoted Article 60, paragraph 3 of the Vienna Convention, the Court noted that a party to a treaty has "the right to terminate a relationship in case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relation".<sup>179</sup> It concluded that a violation of that nature had occurred in the case and declared that the continued presence of South Africa in that territory was illegal.
217. Some years later, the ICJ, in the *Military and Paramilitary Activities in and against Nicaragua* case, had to decide which of various actions undertaken by the United States in Nicaragua amounted to material breaches of a treaty of friendship, commerce and navigation concluded in 1956 between the two States. It undertook an analysis of the object and purpose of treaties of 'friendship'. In light of this analysis, the Court determined that the mining of Nicaraguan ports

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<sup>178</sup> Cf. B. Simma, "Reflections on Article 60 of the Vienna Convention on the Law of Treaties and Its Background in General International Law," *Österreichische Zeitschrift für öffentliches Recht*, Vol. 20, p. 5, at p. 20 (1970).

<sup>179</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16, at p. 47, para. 95.

and direct attacks on those ports “undermined the whole spirit of the agreement” and thus defeated its object and purpose. In contrast, it decided that certain acts of economic pressure were “less flagrantly in contradiction with the purpose of the Treaty” and did not “constitute an act calculated to defeat the object and purpose of the Treaty.”<sup>180</sup>

218. It results from the text itself of Article 60, paragraph 3, subparagraph (b) and from the jurisprudence thus recalled that a tribunal having to apply that provision must first determine the object and purpose of the treaty which has been breached. Termination of a treaty due to such a breach under Article 60, paragraph 1 is warranted only if the breach defeats the object and purpose of the treaty.
219. The treaty in question is of a specific kind. It is an arbitration agreement. As stated by the ICJ, “when States sign an arbitration agreement, they are concluding an agreement with a very specific object and purpose: to entrust an arbitration tribunal with the task of settling a dispute in accordance with the terms agreed by the parties, who define in the agreement the jurisdiction of the tribunal and determine its limits”.<sup>181</sup> In the present case, the Arbitration Agreement notes in its preamble that, “through numerous attempts, the Parties have not resolved their territorial and maritime dispute in the course of the past years”. It contemplates the constitution of an arbitral tribunal, fixes its composition and task and determines the applicable law and procedure to be followed. It finally states that “[t]he award shall be binding on the Parties and shall constitute a definitive settlement of the dispute”. The Arbitration Agreement, accordingly, is premised on a desire for the peaceful and definitive settlement of a dispute that had theretofore been incapable of amicable resolution.
220. However, this was not the only object and purpose of the Arbitration Agreement. At the time, negotiations were developing with respect to the accession of Croatia to the European Union. Slovenia had expressed reservations as regards the opening and closing of some of the negotiation chapters. It accepted, in Article 9 of the Arbitration Agreement, to lift those reservations. Indeed, the Agreement is intimately tied to the process of Croatia’s accession to the European Union; Article 11, paragraph 3, for instance, provided that “[a]ll procedural time limits expressed in this Agreement shall start to apply from the date of the signature of Croatia’s European Union Accession Treaty.” The Agreement was negotiated with the full support of the European Union, and the Presidency of the Council of the European Union witnessed the signature of the

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<sup>180</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14, at pp. 135-138, paras 270-276.

<sup>181</sup> *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, I.C.J. Reports 1991, p. 53, at p. 70, para. 49.

Agreement. Thus, a nexus was established between the settlement of the territorial and maritime dispute and the accession of Croatia to the European Union.

221. Croatia entered the European Union and the arbitral process started. It would have to be stopped if the breaches of the Arbitration Agreement by Slovenia entitled Croatia unilaterally to terminate the Agreement in accordance with Article 65 of the Vienna Convention. In such a case, only one of the ‘objects and purposes’ of the Agreement, as it were, would be achieved. However, as will appear later, this result does not arise in the present case.
222. The remaining object and purpose of the Arbitration Agreement is the settlement of the maritime and territorial dispute between the Parties in accordance with the applicable rules. The decisive question is whether the breaches of the Agreement by Slovenia rendered the accomplishment of this object and purpose impossible.
223. It was not possible for Croatia to answer that question in July 2015. In its first letter to the Tribunal of 24 July 2015, Croatia took note of the resignation of Ms. Drenik and Dr. Sekolec and, appropriately, invited “the remaining members of the Tribunal to review the totality of the materials presented, and reflect on the grave damage that has been done to the integrity of the entire proceedings, as well as to public perceptions of the legitimacy of the process”.<sup>182</sup>
224. The Tribunal has so proceeded. It has been recomposed, and no doubt has been expressed on the independence and impartiality of the Tribunal in its new composition. The records of the arbitration have been carefully reviewed, and the two documents submitted by Dr. Sekolec to the Tribunal in collaboration with Ms. Drenik have been communicated to the Parties. These documents contained no facts or arguments not already present in the written or oral pleadings. The Parties were provided an opportunity to identify any other breaches of confidentiality in the proceedings of which they were aware, and neither Party raised any further issues. The Tribunal is satisfied that the procedural balance between the Parties is secured.
225. Accordingly, and in view of the remedial action taken, the Tribunal determines that the breaches of the Arbitration Agreement by Slovenia do not render the continuation of the proceedings impossible and, therefore, do not defeat the object and purpose of the Agreement. Accordingly, Croatia was not entitled to terminate the Agreement under Article 60, paragraph 1 of the Vienna Convention. The Arbitration Agreement remains in force.

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<sup>182</sup> Letter from the First Deputy Prime Minister and Minister of Foreign Affairs of the Republic of Croatia to the Registrar of the Tribunal, p. 2 (24 July 2015) (Annex SI-1021).



**D. FINAL CONSIDERATIONS**

226. The Tribunal owes its existence to an agreement between Croatia and Slovenia—the Arbitration Agreement of 2009, which was concluded after years of negotiations in the context of Croatia’s accession to the European Union. Both Parties intended the Tribunal to resolve their long-standing dispute, peacefully and definitively, and in accordance with “the rules and principles of international law” as well as “equity and the principle of good neighbourly relations”, reflecting their “vital interests”.
227. If the Tribunal had any hesitation that the present process can achieve these noble goals, it would conclude that the proceedings must be terminated. However, the Tribunal has found no reason to consider that any aspect of its future decision on the merits would be affected by past events, for which none of its current members was responsible. In this situation, the Tribunal recalls that it is its duty to protect the procedural rights of both Parties. Procedural fairness includes the right to an impartial and independent judge, which the Tribunal agrees is of paramount importance, but also the right to a timely decision in respect of the matters consigned to the Tribunal under the Arbitration Agreement. As long as an impartial and independent decision-making process can be guaranteed, procedural fairness requires that the process be continued, rather than be put on hold with uncertain consequences for the ultimate resolution of the Parties’ dispute.
228. The Tribunal will now consider how to proceed, in its present composition, to a *de novo* consideration of all aspects of the case. In this regard, the Tribunal recalls that it has suspended any consideration of the merits of the case until a decision on whether or not the proceedings should continue is reached. That decision now having been made, the Tribunal shall now review the Parties’ written and oral pleadings, as well as the various cartographic and documentary annexes submitted by the Parties. Once it has done so, the Tribunal shall consult with the Parties in respect of any further procedural steps before rendering its final award.
229. Finally, the Tribunal observes that the events that have given rise to the present Partial Award have significantly increased the costs of the present proceedings. If these events had not occurred, the advances toward the costs of arbitration that both Parties have made would have sufficed until the rendering of a final award in these proceedings. It is evident that, under the present circumstances, further advances will be required.
230. While the Tribunal reserves its position on the ultimate allocation of costs in these proceedings until its final award, it considers that, for the time being, it is appropriate that Slovenia shall advance the sums necessary to cover costs that arise as a result of the prolongation of the proceedings beyond the originally envisaged timetable.

## **VII. DISPOSITIF**

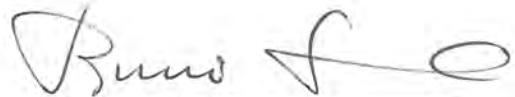
231. For the foregoing reasons, the Tribunal, affirming its jurisdiction, unanimously decides:

- (a) Slovenia has violated provisions of the Arbitration Agreement of 4 November 2009;**
- (b) The Arbitration Agreement remains in force;**
- (c) The arbitral proceedings pursuant to the Arbitration Agreement shall continue;**
- (d) After consultation with the Parties, the Tribunal shall determine the further procedural steps in this arbitration; and**
- (e) The Tribunal reserves any decision in respect of the ultimate allocation of costs until its final award; however, for the time being, Slovenia shall advance the sums necessary to cover costs that arise as a result of the prolongation of the proceedings beyond the originally envisaged timetable.**

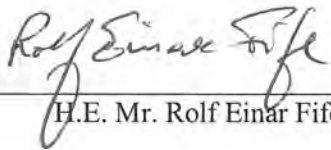
Done in Brussels, Belgium, this thirtieth day of June, two thousand and sixteen, in three copies:



Professor Vaughan Lowe



Judge Bruno Simma



H.E. Mr. Rolf Einar Fife



Professor Nicolas Michel



Judge Gilbert Guillaume  
President



Dr. Dirk Pulkowski  
Registrar