Arbitration — Arbitration tribunal — Members of tribunal — Requirement of impartiality and independence — Whether *ex parte* communications between arbitrator and party agent violating arbitration agreement

Arbitration — Jurisdiction — Competence of arbitration tribunal to rule on objections to jurisdiction — Whether breach of arbitration agreement ground to terminate agreement — Definition of material breach — Vienna Convention on the Law of Treaties, 1969 — Whether attempt to terminate the treaty for material breach depriving arbitration tribunal of jurisdiction — Article 65 — Whether conduct in breach of arbitration agreement repudiating or frustrating object or purpose of arbitration agreement — Whether measures taken by arbitration tribunal ensuring procedural fairness

General principles of international law — *Compétence de la compétence* — Challenges to jurisdiction of arbitration tribunal — Whether tribunal having power to decide on challenges to its own jurisdiction — Jurisdiction of arbitration tribunal to rule on validity of termination of arbitration agreement

Sea — Law of the sea — Geneva Convention on the Territorial Sea and the Contiguous Zone, 1958 — Status of bay as internal waters — Definition of "closing line" of a juridical bay — Article 7 — No requirement to publish chart indicating closing line or to give publicity to baselines

Sea — Law of the sea — United Nations Convention on the Law of the Sea, 1982 — Delimitation of territorial sea — Article 15 — Equidistance line subject to special circumstances — Whether difference in lengths of coastal fronts or whether coastal configuration exacerbating "boxed-in condition" special circumstance requiring adjustment of equidistance line

Sea — Maritime boundaries — Delimitation — Dispute settlement — Arbitration agreement — Use of word "junction" — Ordinary meaning of word — Regime to ensure unimpeded access between Slovenia's territorial sea and the high seas or exclusive economic zones of other States in accordance with international

law, equity and principle of good neighbourly relations — Freedom of movement within "junction area" not subject to requirements applicable to innocent passage or transit passage — No right of Slovenia to exploit living or non-living marine resources within junction area — Requirement that parties exercise rights and obligations within junction area in good faith and in accordance with duty of cooperation

State responsibility — *Ex parte* communication between arbitrator and party agent — Breach of arbitration agreement — Whether conduct of party agent attributable to State

State succession — Law of the sea — Whether internal waters of a single State retaining that status upon dissolution of that State

Territory — Determination of land boundary — *Uti possidetis* — Whether internal boundaries prior to independence constituting present-day land boundary between the parties — Presumption that aligned cadastral limits from pre-independence period constituting present-day land boundary — Whether other formal evidence of title establishing boundary if cadastral limits disputed or not aligned — Whether *effectivités* sufficient to override evidence of aligned cadastral limits or other formal evidence of title — Reliance on *effectivités* only in absence of other pre-independence evidence — Whether preferences of local population relevant to determination of land boundary

Territory — Internal waters — Delimitation of juridical bay — Application of *uti possidetis* principle — No formal division of bay prior to independence of the parties — Delimitation of bay subject to evidence of *effectivités* — Whether special regime for usage of bay required

Treaties — Vienna Convention on the Law of Treaties, 1969 — Notice of termination of a treaty — Articles 60 and 65 — Requirement of material breach — Whether breach constituting repudiation of a treaty or frustrating its object and purpose

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

(Republic of Croatia/Republic of Slovenia)[1]

Arbitration Tribunal[2]

Partial Award. 30 *June* 2016

Final Award. 29 *June* 2017

(Guillaume, *President*; Fife, Lowe, Michel and Simma, *Members*)

Summary:[3] *The facts*:—The Republic of Croatia ("Croatia") and the Republic of Slovenia ("Slovenia") (together "the Parties") were successor States to the Socialist Federal Republic of Yugoslavia ("the SFRY"). From 1992 until 2001, the Parties engaged in unsuccessful negotiations to resolve the dispute over their shared land and maritime boundaries.

In 2004, Slovenia acceded to the European Union. Negotiations regarding Croatia's accession to the European Union commenced in 2005. Slovenia raised certain reservations to the accession process on the basis that it might prejudice the course of the border. Following intervention by the European Commission, on 4 November 2009 the Parties signed an arbitration agreement ("the Arbitration Agreement"). In accordance with Article 3 of the Arbitration Agreement, the Arbitration Tribunal ("the Tribunal") was to determine: (a) the course of the maritime and land boundary between the Parties; (b) Slovenia's "junction to the High Sea"; and (c) the regime for the use of the relevant maritime areas. Article 4 provided that the Tribunal was to apply the rules and principles of international law to determine the course of the maritime and land boundary. The other issues were to be decided on the basis of international law, equity, and the principle of good neighbourly relations in order to achieve a "fair and just result". The Arbitration Agreement entered into force in 2010, after which Slovenia lifted its reservations to Croatia's accession to the European Union. Croatia acceded to the European Union in 2013.

[1] The names of the representatives of the Parties appear at paras. 2-4 of the Partial Award and at para. 171 of the Final Award.

[2] The Tribunal was constituted pursuant to 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 Permanent Court of Arbitration served as Registry.

[3] Prepared by Mr M. Becker.

In January 2012, the Tribunal was constituted pursuant to the Arbitration Agreement. It commenced its deliberations following the close of the hearing in The Hague on 13 June 2014.

On 30 April 2015, Croatia forwarded to the Tribunal a letter addressed to Slovenia in which Croatia asked Slovenia to explain two statements made by the Slovenian Minister of Foreign Affairs during interviews with Slovenian television. In one statement, the Minister referred to "unofficial information" that the Tribunal would determine that Slovenia "had contact with the high seas". In the other statement, he indicated that he had "made it very clear" to the Tribunal that Slovenia would consider the absence of such a determination a failure to execute its mandate. Croatia called on Slovenia to "remove suspicion" that it had attempted to influence the work of the Tribunal. Slovenia responded that it did not possess information about the outcome of the arbitration and had not sought to influence the work of the Tribunal.

On 5 May 2015, the Tribunal expressed concern to the Parties with respect to the suggestion that a Party might have access to confidential information relating to its deliberations, and affirmed that representatives and arbitrators were to refrain from *ex parte* communications.

In a letter dated 28 June 2015, Croatia drew the Tribunal's attention to further media interviews by the Slovenian Minister and expressed concern that Slovenia had access to information on the Tribunal's deliberations, including that the award would be unfavourable to Croatia. On 1 July 2015, Slovenia suggested that the Minister's statements had been mistranslated and taken out of context.

In a letter dated 9 July 2015, the Tribunal announced, following consultations with the Parties, that it would render an award on 17 December 2015. It also called on the Parties to refrain from making public statements concerning the arbitration.

On 22 July 2015, newspapers in Serbia and Croatia published transcripts and audio files of two telephone conversations dating from 15 November 2014 and 11 January 2015, reportedly involving the arbitrator appointed by Slovenia, Dr Sekolec, and one of Slovenia's agents, Ms Drenik. The conversations concerned the internal deliberations of the Tribunal and covered a range of issues, including its tentative conclusions, possible opportunities to influence Tribunal members, and the provision of documents from Ms Drenik to Dr Sekolec.[4]

On 23 July 2015, the Tribunal notified the Parties that Dr Sekolec had resigned from the Tribunal. Croatia requested that the Tribunal suspend proceedings on the ground that Ms Drenik and Dr Sekolec had colluded to influence other members of the Tribunal by introducing new "facts" and "arguments", with the aim of obtaining a more favourable outcome for

[4] Excerpts from the transcripts of the recorded telephone conversations appear at paras. 76-8 of the Partial Award.

Slovenia.[5] Croatia described the arbitration as "tainted" by this conduct. Slovenia opposed this request and on 28 July 2015 appointed Mr Abraham, President of the International Court of Justice, to replace Dr Sekolec.

On 30 July 2015, the Tribunal notified the Parties that Professor Vukas, the arbitrator appointed by Croatia, had resigned. On the same day, Croatia notified Slovenia that it considered Slovenia in material breach of the Arbitration Agreement, that Croatia was entitled to terminate the Arbitration Agreement in accordance with Article 60(1) of the Vienna Convention on the Law of Treaties, 1969 ("the Vienna Convention"), and that it was ceasing to apply the Arbitration Agreement.[6] On 31 July 2015, Croatia informed the Tribunal that it considered the arbitration process to have been "totally and irreversibly compromised" and had notified Slovenia of its intention to terminate the agreement. Judge Abraham resigned from the Tribunal on the same day.

On 13 August 2015, Slovenia informed the Tribunal that it rejected Croatia's notification of its intent to terminate the Arbitration Agreement, and stated that the Tribunal had a duty to continue the proceedings. Slovenia further requested a replacement for Judge Abraham. On 25 September 2015, the Tribunal informed the Parties that the President had appointed Mr Fife, a national of Norway, to succeed Judge Abraham, and Professor Michel, a national of Switzerland, to succeed Professor Vukas.

The Tribunal then invited the Parties to inform it of any other incidents involving disclosure of information by members of the Tribunal to either Party. Croatia did not respond. On 27 November 2015, Slovenia reported that Ms Drenik had disclosed that Dr Sekolec had passed to her his views on the attitude and positions of his co-arbitrators during deliberations, as well as draft summaries of the Parties' arguments prepared by the Permanent Court of Arbitration.

On 1 December 2015, the Tribunal scheduled an oral hearing to address the legal implications of the matters set out in Croatia's letters of 24 July 2015 (concerning the alleged disclosures by Dr Sekolec) and 31 July 2015 (concerning Croatia's notification of intent to terminate the Arbitration Agreement). The Tribunal also released to the Parties two internal documents that Dr Sekolec had prepared during the proceedings, which he had provided to the Registry in November 2014, and a verbatim translation of the recorded telephone conversations to which Croatia had previously referred. Slovenia submitted written observations and asked the Tribunal at the oral hearing on 17 March 2016 to find that the Arbitration Agreement remained in force and that the proceedings would continue until the issuance of a final award. Croatia made no submission and did not appear.

[5] The text of the relevant part of Croatia's request to the Tribunal can be found at para. 80 of the Partial Award.

[6] The text of the relevant part of Croatia's *note verbale* can be found at para. 84 of the Partial Award.

Partial Award

Held (unanimously):—The Tribunal had jurisdiction.

(1) Slovenia had violated provisions of the Arbitration Agreement.

(a) The Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States ("the PCA Optional Rules"), which were selected by the Parties in the Arbitration Agreement, required that arbitrators remain impartial and independent from the Parties. The terms of appointment required the Parties not to engage in any oral or written communications with any member of the Tribunal *ex parte*. The arbitrator appointed by Slovenia, Dr Sekolec, and Slovenia's agent, Ms Drenik, had acted in blatant violation of these provisions (para. 175).

(b) As Ms Drenik had been acting as an agent of Slovenia, the breaches of the Arbitration Agreement evidenced by her conversations with Dr Sekolec were attributable to Slovenia (para. 210).

(2) The Arbitration Agreement remained in force.

(a) Under general international law (*compétence de la compétence*), and in accordance with Article 21(1) of the Arbitration Agreement, the Tribunal was empowered to rule on any objection to its jurisdiction, including with respect to the existence or validity of the Arbitration Agreement (paras. 147-58).

(b) Croatia's notice of termination of the Arbitration Agreement did not deprive the Tribunal of the jurisdiction to rule on whether termination of the agreement was valid, which related to whether the Arbitration Agreement remained in force. Article 65(4) of the Vienna Convention[7] preserved the jurisdiction of the Tribunal over that question, notwithstanding other paragraphs of Article 65 relating to dispute settlement in the event of the termination of a treaty (paras. 159-67).

(c) Article 60(1) of the Vienna Convention, which provided that material breach of a treaty was a ground to terminate or suspend the treaty, applied to the Arbitration Agreement, which contained no provision concerning breach. Pursuant to Article 60(3),[8] material breach required repudiation of the treaty or the violation of a provision essential to accomplishment of its object or purpose (para. 212).

(d) The Arbitration Agreement had not been repudiated by Slovenia, which had neither refused to apply the Arbitration Agreement nor rejected the agreement as a whole. Repudiation of the agreement as a whole was distinct from the purported material breach of a treaty's provisions (paras. 213-14).

[7] For the text of Article 65(1)-(3) of the Vienna Convention, see para. 164 of the Partial Award. Article 65(4) of the Vienna Convention provided that: "Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes."

[8] For the text of Article 60(1) and (3) of the Vienna Convention, see para. 202 of the Partial Award.

(e) Croatia was not entitled to terminate the Arbitration Agreement under Article 60(1) of the Vienna Convention. The violation of a treaty provision essential to the accomplishment of the treaty's object or purpose was not a question of the intensity or gravity of the breach. The object and purpose of the Arbitration Agreement was the peaceful and definitive settlement of the territorial and maritime dispute between the Parties. The remedial action taken by the Tribunal since July 2015, including the appointment of two new arbitrators and its assessment that no new facts or arguments were introduced by Dr Sekolec, meant that Slovenia's breach of the Arbitration Agreement did not render continuation of the proceedings impossible and thus did not defeat the object and purpose of the Arbitration Agreement (paras. 215-25).

(f) The Tribunal was not in a position to consider whether the recorded telephone conversations had been obtained illegally or whether such conduct was attributable to Croatia and relevant to whether Croatia had breached the Arbitration Agreement (para. 211).

(3) The arbitral proceedings were to continue.

(a) The unilateral decision by Croatia to withdraw from the proceedings could not in itself bring the arbitration to a halt. Article 28 of the PCA Optional Rules reflected this well-established principle of international procedural law (para. 142).

(b) The Tribunal had inherent jurisdiction to decide whether the arbitration process was compromised to such an extent that the arbitration could not continue (para. 168).

(c) The Tribunal had the power and the duty to settle the land and maritime dispute submitted to it following difficult negotiations between the Parties, but had to ensure and preserve the integrity of the arbitral process. No member of the recomposed Tribunal faced any challenge to his impartiality or independence, and Dr Sekolec had not communicated to the Tribunal new arguments or facts not already in the record. His interventions during deliberations focused on the weight to be given to various submissions, principles and interests, all of which were well known to the members of the Tribunal. Moreover, his views were no longer relevant to the work of the Tribunal following his resignation (paras. 183-95).

(d) Since the procedural balance between the Parties remained secure, there was no obstacle to the continuation of the proceedings under the Arbitration Agreement (para. 196).

(4) Further procedural steps were to be decided after consultation with the Parties. Procedural fairness included the right to an impartial and independent judge and the right to a timely decision. It required the process to continue so long as an impartial and independent process could be guaranteed. All aspects of the case were to be considered *de novo* (paras. 226-8).

(5) The sums necessary to cover costs arising from the prolongation of the proceedings were to be advanced by Slovenia, subject to a final decision on the allocation of costs. The breach of the Arbitration Agreement by Slovenia resulted in the prolongation of the proceedings and additional costs. It was

appropriate for Slovenia to cover those costs pending a final decision on the allocation of costs in the Final Award (paras. 229-30).

Final Award

When Croatia and Slovenia had declared independence in 1991, both had accepted that the legal principle of *uti possidetis* applied to the determination of their shared border, but they had disagreed on how the border was defined at the moment of independence. They had agreed that the land border started in the east at the tripoint with Hungary and reached its terminal point along the coast of the bay called the Bay of Piran by Slovenia and the Bay of Savudrija/Piran by Croatia ("the Bay"). The disputed maritime area was in the northernmost part of the Adriatic Sea, an area including the Gulf of Trieste. The Bay, whose mouth measured approximately 5 km, was an indentation of the Gulf of Trieste. While Slovenia submitted that the Bay retained the status of internal waters as a juridical bay following the dissolution of Yugoslavia, Croatia argued that it had always been within the territorial waters of Yugoslavia and therefore had to be delimited in accordance with Article 15 of the United Nations Convention on the Law of the Sea, 1982 ("UNCLOS").

The Arbitration Agreement provided that the course of the maritime and land boundary between the Parties, Slovenia's "junction to the High Sea" and the regime for the use of the relevant maritime areas would be settled by arbitration.

Held (unanimously):—(1) Except as otherwise agreed by the Parties during the arbitral proceedings, the land boundary between Croatia and Slovenia followed the limits specified by the cadastral records of both Parties where those limits were aligned, or, where cadastral limits were not aligned, followed the limits established by other evidence of title.

(a) The principle of *uti possidetis* applied to the determination of the land boundary between the Parties, such that the pre-independence boundary between the Parties when they were constituent republics of the SFRY constituted the present land boundary between the Parties. Evidence of title as of 25 June 1991, the date of independence, included all formal acts adopted prior to independence (paras. 256-63).

(b) Where the outer limits of the Parties' cadastres were aligned, it was presumed that that these limits represented the boundaries between the Parties when they were constituent republics of the SFRY. That presumption was overridden if there was convincing evidence of title to the contrary, but not by mere *effectivités* (para. 560).

(c) The land boundary was determined based on international law, not by the wishes of the inhabitants of the areas in question. Legal title as prescribed by the law of the SFRY as at 25 June 1991 took precedence over *effectivités*, but *effectivités* played a role where legal title could not be established, or could not be established with sufficient precision (paras. 337-43).

(d) Over 90 per cent of the land boundary between the Parties, namely where the cadastral limits of neighbouring Croatian and Slovenian districts coincided, was not disputed. The agreement of the Parties that the boundary was not disputed where the cadastral limits aligned was sufficient to establish that such limits constituted the boundary (paras. 344-50).

(e) In the case of disputed segments of the boundary line, cadastral limits remained the prima facie indication of the boundary between the Parties, subject to the application of other criteria. The reasons for disagreement between the Parties over the course of the boundary were the non-alignment or absence of cadastral limits or the presence of other instruments or criteria deemed relevant (paras. 351-3).

(f) Disputed segments of the land boundary in each of three geographic regions—the Mura River Region, the Central Region and the Istria Region—were settled in accordance with the above criteria (paras. 359-61).

(g) The boundary in the Mura River Region followed the aligned cadastral limits of the relevant peripheral Croatian and Slovenian districts, except where that condition was not met and other evidence of title determined the course of the boundary (paras. 385-446).

(i) In the area of the settlement of Brezovec-del/Murišće, the cadastral limits were not aligned, but the *effectivités*, such as records relating to elections, taxation and conscription, demonstrated that the settlement was part of Slovenia; the boundary was fixed accordingly (paras. 395-413).

(ii) In the area of Ferketinec/Pince, a purported modification of the cadastral limits in 1956/1957 by a mixed commission established pursuant to a 1953 ordinance was without effect because the commission was not properly constituted, such that the pre-1956 cadastral limits, as depicted in the Slovenian cadastre as of 1991, controlled. In the areas of Podturen/Pince and Novakovec/Pince, the delimitations made by mixed commissions established pursuant to the 1953 ordinance were not invalidated by various written markings and the 1956/1957 jointly signed minutes fixed the boundary. The boundary followed the cadastral limits of Podturen/Pince as modified in 1956 up to the point on the southern bank of the River Mura at which the modified cadastral limit joined the pre-1956 cadastral limits of Ferketinec/Pince, up to the point at which the boundary reached the Parties' aligned cadastres east of Križovec (paras. 435-42).

(iii) In the area of Mursko Središće and Peklenica, the boundary followed the course recommended by a 1956 survey, per an agreement between the Parties (paras. 444-6).

(h) The boundary in the Central Region followed the aligned cadastral limits of the relevant peripheral Croatian and Slovenian districts, except where that condition was not met and other evidence of title determined the course of the boundary (paras. 447-642).

(i) In the region of Slovenske gorice, the boundary, in accordance with the principle of *uti possidetis*, followed the cadastral limits established in 1946/1947 in the area of Razkrižje, notwithstanding their lack of implementation (paras. 464-73).
(ii) In the Robadje/Globoka area, the boundary followed the aligned cadastral limits established in 1858 because a subsequent 1955 land survey could not be credited (paras. 474-8).
(iii) At the Santavec and Zelena Rivers, the boundary followed the aligned cadastral limits, not the natural features of the rivers as contended by Slovenia (paras. 479-85).
(iv) At the Drava River, the boundary followed the aligned cadastral limits, not the depiction of the boundary found on eighteenth- and nineteenth-century maps as contended by Slovenia (paras. 487-96).
(v) In the area of Haloze–Macelj, the boundary followed the course depicted on a set of maps dating to 1914, which corresponded to the limits of Slovenia's cadastre (paras. 497-506).
(vi) At the Sotla River, the boundary followed the aligned cadastral limits, notwithstanding the deviation of the aligned limits at various points from the middle of the river (paras. 507-22).
(vii) At the Sava and Bregana Rivers, the boundary followed the middle of the Sava River, as affirmed by a 1909 joint commission, and then the aligned cadastral limits in the area of the junction of the two rivers, consistent with evidence of Croatian *effectivités* (paras. 523-41).
(viii) In the Gorjanci/Žumberak area, the boundary followed the aligned cadastral limits near Brezovica pri Metliki, except where such limits did not coincide, in which case the boundary followed Slovenia's cadastral limits because this resulted in a natural, geographical, economic and social unit. The fact that the cadastral boundary created impractical meanders and enclaves did not supersede the Tribunal's duty to decide the boundary in accordance with international law (paras. 542-65).
(ix) In the area of Sekulići/Sekuliči and the settlement of Drage, the boundary followed the eastern limit of Slovenia's cadastral limit, a result supported by evidence of Slovenia having acted *à titre de souverain* in the area for several decades. Croatia's ownership and management of land in the disputed area was distinct from the question of sovereignty (paras. 566-78).
(x) In the area of Trdinov vrh/Sveta Gera, the boundary followed the aligned cadastral limits of the Parties, a result that left a television tower in Slovenia and an adjacent military facility in Croatia, notwithstanding Slovenia's assertion that the facility had been handed over to Slovenia from Croatia in 1991 (paras. 579-90).