

PERMANENT COURT OF ARBITRATION

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**TRIBUNAL ISSUES PARTIAL AWARD:
ARBITRATION BETWEEN CROATIA AND SLOVENIA TO CONTINUE**

THE HAGUE, 30 June 2016

In the arbitration concerning a territorial and maritime dispute between the Republic of Croatia and the Republic of Slovenia, the Tribunal issued a unanimous Partial Award on 30 June 2016. The Partial Award was delivered to the representatives of the Governments by the Permanent Court of Arbitration, which acts as Registry in the proceedings.

In its Partial Award, the Tribunal holds that Slovenia, by engaging in *ex parte* contacts with the arbitrator originally appointed by it, acted in violation of provisions of the Arbitration Agreement. However, these violations were not of such a nature as to entitle Croatia to terminate the Arbitration Agreement, nor do they affect the Tribunal's ability, in its current composition, to render a final award independently and impartially.

History of the Proceedings

The arbitration concerns a territorial and maritime dispute between Croatia and Slovenia. The dispute was submitted to arbitration in accordance with the Arbitration Agreement between Croatia and Slovenia, signed on 4 November 2009. 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; [and] (c) the regime for the use of the relevant maritime areas".

Between 2012 and 2014, Croatia and Slovenia exchanged three rounds of written submissions on these matters, along with over two thousand documentary exhibits and maps. In June 2014, a two-week hearing was held at the Peace Palace, in the course of which both Parties presented their positions.

On 22 July 2015, Serbian and Croatian newspapers reported that telephone conversations between one of the Agents designated by Slovenia and the arbitrator originally appointed by Slovenia, Dr. Jernej Sekolec, had been intercepted. In the course of these conversations, confidential information about the Tribunal's deliberations was disclosed. Following the press reports, both individuals resigned from their functions, as arbitrator and as Agent, in the present proceedings. Shortly afterwards, the arbitrator originally appointed by Croatia, Professor Budislav Vukas, also resigned.

The incident has given rise to significant disagreement between the Parties as to whether and how to proceed with the arbitration. Croatia requested the Tribunal to discontinue the arbitral proceedings, whereas Slovenia asked the Tribunal to complete its mandate as envisaged by the Arbitration Agreement.

On 25 September 2015, the Tribunal was recomposed, in accordance with the procedure for the replacement of party-appointed arbitrators in Article 2 of the Arbitration Agreement, through the appointment of H.E. Mr. Rolf Einar Fife, a national of Norway, and Professor Nicolas Michel, a national of Switzerland. The Tribunal, in its new composition, invited further written submissions from the Parties concerning the legal implications of the contacts of Slovenia's former Agent with Dr. Sekolec. A hearing on these matters was held on 17 March

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2016. Slovenia filed a written submission and participated in the hearing; Croatia did not participate. However, Croatia explained its position in various letters and diplomatic notes. The Tribunal regretted that Croatia did not avail itself of the opportunity to explain its concerns more fully. However, the Tribunal decided that it was able, and indeed required, to continue the proceeding in the absence of Croatia.

The Parties' Positions

Croatia's position is that it is entitled to terminate the Arbitration Agreement. Croatia contends that Slovenia "engaged in one or more material breaches of the Arbitration Agreement" within the meaning of the Vienna Convention on the Law of Treaties, such that "the impartiality and integrity of the arbitral proceedings has been irrevocably damaged, giving rise to a manifest violation of the rights of Croatia". It notes that it has notified Slovenia to that effect and that, as of the date of the notification, it ceased to apply the Arbitration Agreement. Moreover, Croatia considers that "[t]he official record of the entire arbitration has been contaminated" and that "[t]here is no tool available for repairing the damage that has been occasioned on the proceedings and the Arbitration Agreement".

Slovenia argues that proceedings should "continue until the Tribunal issues a final award". In Slovenia's view, there is no impediment preventing the Tribunal from fulfilling its duty, because the Tribunal possesses the tools to remedy the effects of any wrongdoing that may have occurred. In particular, Slovenia suggests that the resignation of those involved in the events, the appointment of new arbitrators, and the critical inspection of the official record of the arbitration by the Tribunal constitute adequate means of redressing the purported breach of the Arbitration Agreement. Finally, Slovenia contends that no "material breach" of the Arbitration Agreement has occurred since the alleged misconduct does not, in its view, call into question the object and purpose of the Arbitration Agreement.

The Tribunal's Partial Award

At the outset, the Tribunal affirms its jurisdiction, under the provisions of the Arbitration Agreement and the applicable rules of procedure, to decide whether Croatia was entitled to terminate the Arbitration Agreement pursuant to Article 60 of the Vienna Convention. The Tribunal also finds that it has inherent jurisdiction to decide whether the "arbitral process has been compromised to such an extent that ... the arbitration process cannot continue".

Referring to decisions of the International Court of Justice, the Tribunal clarifies that termination of a treaty due to a material breach under Article 60, paragraph 1 of the Vienna Convention "is warranted only if the breach defeats the object and purpose of the treaty". The decisive question is therefore whether the violations of the Arbitration Agreement by Slovenia rendered the accomplishment of its object and purpose impossible. The Tribunal accordingly examines whether Slovenia's breaches have tainted the proceedings in such a way that the proceedings cannot go further.

In this regard, the Tribunal observes that Dr. Sekolec, the arbitrator implicated in *ex parte* communications, has since resigned from the Tribunal, and that no doubt has been expressed as to the independence or impartiality of the recomposed Tribunal. The Tribunal has carefully reviewed its records and communicated

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to the Parties the only two documents circulated by Dr. Sekolec during past deliberations. Those documents do not contain any facts or arguments that were not already presented in the Parties' pleadings.

Moreover, the Tribunal notes that, since Dr. Sekolec has resigned as arbitrator, the views expressed by him in prior deliberation meetings are of no relevance for the work of the Tribunal in its current composition. In any event, the Tribunal would be ready, after consultation with the Parties, 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.

Accordingly, 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. There is no obstacle to the continuation of the proceedings under the Arbitration Agreement.

Finally, the Tribunal notes that the arbitration was intended to resolve the Parties' 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". If the Tribunal had any hesitation that the present process can achieve these 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, 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 put on hold with uncertain consequences for the ultimate resolution of the Parties' dispute.

The Tribunal indicates that it will now consider how to proceed, in its present composition, to a *de novo* consideration of all aspects of the case. The Tribunal shall 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.

The text of the Partial Award will be published on the PCA Case Repository (<https://pcacases.com/web/view/3>) on Friday, 1 July 2016, at approximately 11:00 am.

The Arbitral Tribunal is chaired by Judge Gilbert Guillaume (France), former President of the International Court of Justice. The other members of the Arbitral Tribunal are H.E. Mr. Rolf Einar Fife (Norway), Professor Vaughan Lowe (United Kingdom), Professor Nicolas Michel (Switzerland), and Judge Bruno Simma (Germany). The Permanent Court of Arbitration acts as Registry in the arbitration.

The PCA is an independent intergovernmental organization established by the 1899 Hague Convention on the Pacific Settlement of International Disputes. The PCA has 121 Member States, including Croatia and Slovenia. Headquartered at the Peace Palace in The Hague, the Netherlands, the PCA facilitates arbitration, conciliation,

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fact-finding, and other dispute resolution proceedings among various combinations of States, State entities, intergovernmental organizations, and private parties. The PCA currently serves as Registry in eight arbitration or conciliation proceedings between States.

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