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The Concept of 'Junction Area' – *Sui Generis* Solution to Reconciling the Integrity of Territorial Sea and 'Freedoms of Communication'?

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The rendering of the Final Award in the arbitration proceeding between Croatia and Slovenia in June 2017 immediately triggered the rise of a new and still ongoing dispute. Croatia does not accept the application of the Award and refuses to implement it, claiming that the arbitration process was irreversibly compromised; Slovenia, on the other hand, insists on the Award's implementation. The focus of this Article is not on the deeper elaboration of the Final Award, but rather on the examination of the 'Junction area' concept, which has been introduced by the Award. It represents a unique and challenging regime of a 'freedoms of communication' that is to be implemented in part of the Croatian territorial sea with the purpose of reconciling both the Slovenian request for access to the High Seas and the Croatian sovereignty in its territorial sea.

Keywords: Junction area, Croatia, Slovenia, arbitration, maritime dispute, law of the sea

1. Introduction

Croatia and Slovenia are neighbouring countries that share a common history, EU membership, land and maritime boundaries, good relations between their citizens, but also a long-standing border disagreement.[1] After proclaiming their independence, both Croatia and Slovenia, as successor states of the former Yugoslavia, arranged their land borders by using the principle of *uti possidetis juris*.[2] This means that in a situation of succession, the boundaries of the predecessor state become

[1] About the events during almost two decades of misunderstandings, see more in: T. Bickl, *Reconstructing the Intractable: The Croatia-Slovenia Border Dispute; and Its Implications for EU Enlargement,* Croatian Political Science Review, Vol. 54, No. 4, 2017, pp. 11-17; V. Đ. Degan, *Consolidation of Legal Principles on Maritime Delimitation: Implications for the Dispute between Slovenia and Croatia in the North Adriatic*, Chinese Journal of International Law, Vol. 6, No. 3, 2007, pp. 619-634; V. Đ. Degan, *Spor o granicama između Hrvatske i Slovenije [The boundary dispute between Croatia and Slovenia]*, Poredbeno pomorsko pravo [Comparative Maritime Law], Vol. 58, No. 173, 2019, pp. 18-30; P. Pipan, *Border Dispute Between Croatia and Slovenia Along the Lower Reaches of the Dragonja River*, Acta Geografica Slovenica, Vol. 48, No. 2, 2008, pp. 332-356; V. Sancin, *Slovenia-Croatia Border Dispute: From „Drnovšek-Račan" to „Pahor-Kosor" Agreement*, European Perspectives – Journal of European Perspectives of the Western Balkans, Vol 2, No. 2, 2010, pp. 93-111; D. Vidas, *The UN Convention on the Law of the Sea, the European Union and the Rule of Law - What is going on in the Adriatic Sea?*, The International Journal of Marine and Coastal Law, Vol. 24, No. 1, 2009, pp. 9-40; T. Vuk, *Arbitraža kao sredstvo mirnog rješavanja sporova s posebnim osvrtom na hrvatsko-slovenski granični spor [Arbitration as a Means of the Peaceful Settlement of Disputes with a Special Focus on the Boundary Dispute between Croatia and Slovenia]*, Poredbeno pomorsko pravo [Comparative Maritime Law], Vol. 58, No. 173, 2019, pp. 79-80.

[2] The principle of *uti possidetis juris* is considered as a general principle "logically connected with the phenomenon of the obtaining of independence, wherever it occurs." Its application "freezes the territorial title" and "stops the clock" at the moment of independence in order to produce the "photograph of the territory at the critical date" and to "secure the territorial boundaries at the moment when independence is achieved." For more see: Case Concerning the Frontier Dis-

boundaries of the newly existing successor state, unless the states concerned agree otherwise. Since both the Croatian and Slovenian land had already been framed by their borders, the application of *uti possidetis* was applicable to their land delimitation, transforming their internal land borders within the predecessor state into external ones. However, since the former Yugoslavia had never introduced maritime borders in the Adriatic between its republics, including Croatia and Slovenia, the same principle was not applicable for their maritime delimitation.[3] It was, therefore, left to the successor states to arrange these boundaries among themselves, which resulted in a long-standing border dispute that unfortunately still has not been resolved.

One of the main problems that occurred during the negotiation process on maritime delimitation was the (non)existence of a direct/territorial contact of Slovenia's territorial sea with the High Seas. Due to geographic reasons, Slovenia's territorial sea remains boxed-in between the territorial seas of Croatia and Italy, and no physical connection or contact exists between Slovenia and the High Seas. However, by recalling the importance of its vital interests, Slovenia has always insisted on establishing a direct contact with the High Seas, not merely the right of innocent passage throughout the territorial seas of either Croatia or Italy.

Even though the discussions on the border delimitation have started in the early 1990s and – at one point – it seemed that the two states had come close to a final resolution, the unresolved border dispute still poses a burden on their political relationship, although in a somewhat different manner, starting from the end of June 2017.

After almost two decades of disagreements, in November 2009, the Arbitration Agreement between Croatia and Slovenia was signed.[4] It seemed at that point that this long-standing border dispute would be brought to its end.[5] The parties entrusted the Arbitration Tribunal to resolve their dispute by determining: (a) the course of the maritime and land boundary between Slovenia and Croatia; (b) Slovenia's Junction to the High Seas; and (c) the regime for the use of the relevant maritime areas.[6] In exercising its task, the Tribunal was authorised to apply different rules for different assignments: the rules and principles of international law were to be applied for the determination of the course of the maritime and land boundary. However, in order to achieve a fair and just result by taking into account all relevant circumstances for the determination of Slovenia's Junction to the High Seas and the regime for the use of relevant maritime areas, the Tribunal was entitled to apply – not only the international law – but also the equity and the principle of good neighbourly relations.[7] Since the parties were deeply divided over the meaning of Slovenia's Junction to the High Seas,[8] it was apparent that its determination will be challenging for the Tribunal. It was also evident that the Tribunal will not discuss whether Slovenia has the right to the Junction to the High Seas, but will rather confirm its existence and find the course and the area where the Junction will be placed. That was exactly what the Tribunal had done.

The provided solution represents a challenging, hybrid, and in a way *sui generis* system that has not been previously apparent in international case law. At the same time, its implementation should meet the requirements of a friendly relationship and the demands for a peaceful settlement of the

pute (Burkina Faso/Republic of Mali), Judgment, International Court of Justice, 22 December 1986, paras. 20, 23, 30.

[3] S. Fabijanić Gagro, *Border Dispute in the Adriatic Sea between Croatia and Slovenia*, Acta Universitatis Danubius, Vol. 9, No. 3, 2013, p. 6.

[4] Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia (hereinafter: Arbitration Agreement 2009), 4 November 2009. Text available in both Croatian and English: https://narodne-novine.nn.hr/clanci/medunarodni/full/2009_11_12_140.html (14 November 2019).

[5] More about the genesis of the Arbitration Agreement see in Bickl 2017, pp. 17-23.

[6] Arbitration Agreement 2009, Art. 3.

[7] Ibid. Art. 4.

[8] Degan 2019, p. 35.

disputes. Its main purpose is to reconcile the protection of the integrity of Croatian territorial sea, but also to allow the enjoyment of 'freedoms of communication' of other countries (including Slovenia) in that same area. However, these freedoms are not commonly exercisable in territorial sea of the coastal state. All these issues, as well as the examination on how the Tribunal determined the 'Junction', where it is supposed to be settled and what rights are given both to Croatia and Slovenia, but even to other countries, are going to be elaborated in this paper.

However, despite the fact that the arbitration proceeding had come to its end and the Tribunal rendered its decision in June 2017, the Croatian-Slovenian dispute still stands and the final agreement has not been reached. Croatia refuses to implement the Final Award, while Slovenia insists on its implementation. Even though this paper is not going to delve into a deeper examination of the Arbitral awards, for the sake of trying to make the 'framework' of the Junction proposal more understandable it will provide a short overview of the challenges of the arbitration process.

2. Challenges of the arbitration process

The arbitration began in April 2012. The written pleadings were closed in spring 2014, while the hearings were concluded in June 2014. All the efforts that had been made[9] became doubtful in July 2015 when a conversation between the arbitrator appointed by Slovenia and the Slovenian agent was intercepted and leaked to the public.[10] That led to a significant reversal of the process, redirecting the path that was expected in 2009 and undoubtedly changed further positions of the parties. Although both the arbitrator and the agent later resigned, that conversation, according to Croatia, "reveal[ed] that the most fundamental principles of procedural fairness, the due process, impartiality, and integrity of the arbitral process have been systematically and gravely violated."[11] At the end of July 2015, Croatia notified its intention to terminate the Arbitration Agreement and informed the Tribunal that it "cannot further continue the process in good faith."[12] Slovenia, on the other hand, expressed the regret and apology for the "inappropriate and intolerable" conduct which affected "the course of the arbitral proceeding."[13] However, it maintained that "this does not free the Arbitral Tribunal from its basic function – to settle the dispute submitted to it," and requested the Tribunal to declare that the proceedings "shall continue until the Tribunal issues a final Award."[14]

Since the parties were in disagreement as to whether the Tribunal had jurisdiction to resolve the dispute concerning the validity of Croatia's termination of the Arbitration Agreement[15], the Tribunal – in applying the principle of *compétence de la compétence* – confirmed its own jurisdiction.[16] In determining as to whether the "arbitration process as a whole has been compromised to such an extent that… the arbitration process cannot continue"[17], the Tribunal's decision was unanimous:

[9] During the process, the parties included into their pleadings nearly 1,500 documentary exhibits and legal authorities, as well as over 250 figures and maps. See https://pcacases.com/web/sendAttach/1308 (17 January 2020).
[10] See more M. Ilić, *Croatia v. Slovenia: The Defiled Proceedings,* Arbitration Law Review, Vol. 9, Article 11, 2017; Vuk 2019, pp. 81-86.
[11] 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, Case No. 2012-04, Partial Award (hereinafter: Partial Award 2016), 30 June 2016, https://pcacases.com/web/sendAttach/1787 (17 November 2019), para. 169. More about the Croatia's reactions see Ilić 2017.
[12] PCA Press Release, 5 August 2015, https://pcacases.com/web/sendAttach/1389 (17 November 2019).
[13] Partial Award 2016, paras. 170, 171.
[14] Ibid. para. 171. More about the Slovenia's reactions see in: Ilić 2017.
[15] Partial Award 2016, para. 159.
[16] Ibid. para. 162.
[17] Ibid. para. 168.

although Slovenia had violated the provisions of the Arbitration Agreement, it remains in force and the arbitral proceeding continues.[18] Many further elaborations have been mainly focused on Croatia's rejection to implement the Tribunal's Final Award. However, this particular moment in the proceedings requires a special emphasis.

One could argue that this was rather a controversial decision. Procedural fairness and the arbitrator's impartiality are immanent elements of arbitration.[19] They require not only the judges' fairness and unbiasedness, but also require the judges to create in the parties and the community a sense of confidence in their justness.[20] The parties' expectations rely in the presumption of the arbitrators' impartiality and independence. It is at the heart of the arbitral process.[21] When a party engages in *ex parte* communication with a party-appointed arbitrator, one could easily claim that the arbitral process is jeopardized.[22] Even more so, in this particular case, the Arbitration Agreement requires the parties to refrain "from any action or statement which might intensify the dispute or jeopardize the work of the Arbitral Tribunal."[23] Some authors also emphasize that such *ex parte* communication is "completely incompatible with the principle of good neighbourly relations."[24] It also represents a material breach of the 2009 Arbitration Agreement, since its object and purpose were defeated.[25] One could agree with the conclusion that the arbitrator's impartiality and procedural fairness were not given enough weight in this case.[26] The fear was also expressed that this episode "will cause tremendous harm to the system of international arbitration."[27] On the other hand, some authors emphasize that Croatia – with respect to the existence of the Arbitration Agreement – disregarded the *compétence de la compétence* principle and the rule of *pacta sunt servanda*.[28]

The Tribunal had the 'power' to decide on these matters. However, by respecting the principle of *nemo judex in causa sua*, it "should not be the one, or at least not the only one, deciding on the consequences of its own procedural irregularities."[29] The Arbitration Tribunal had a justification to terminate the procedure[30] and ultimately did not take the right position[31] when deciding to continue with the proceedings. The process has been "totally and irreversibly compromised."[32]

However, since the Court was recomposed later, the Tribunal came to the conclusions that "no doubt has been expressed on the independence and impartiality"[33] of such a recomposed Tribunal.

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[18] Ibid. para. 231.
[19] Ilić, 2017.
[20] P. Perišić, *Maritime Delimitation between the Republic of Croatia and the Republic of Slovenia in the Bay of Piran*, Proceedings of the 2nd Law and Political Science Conference, Prague, 2013, p. 40.
[21] P. Sands, *Developments in Geopolitics – The End(s) of Judicialization?*, 2015, https://www.jus.uio.no/pluricourts/english/blog/guests/2015-10-22-sands-final-lecture-esil.html (18 January 2020).
[22] Ilić 2017.
[23] Arbitration Agreement, 2009, Art. 10(1).
[24] L. Runjić, *Consequences of the Ex Parte Communications in the Arbitration between Croatia and Slovenia*, Pécs Journal of International and European Law, Vol. I-II, 2019, p. 20.
[25] Ibid.
[26] Ilić 2017; Bickl 2017, p. 26.
[27] "I do not see how the arbitration can possibly continue, and what is now needed is a transfer to another procedure." Sands 2015; Ibid.
[28] Degan 2019, p. 59.
[29] P. Tzeng, *The Annulment of Interstate Arbitral Awards*, Kluwer Arbitration Blog, 2017, http://arbitrationblog.kluwerarbitration.com/2017/07/01/the-annulment-of-interstate-arbitral-awards/ (18 November 2019).
[30] See Art. 34(2) of the PCA Optional Rules: If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings.
[31] Perišić 2018, p. 40.
[32] Partial Award 2016, para. 94.
[33] Ibid. para. 224.

Even more so, the Tribunal noted that "neither Party raised any further issues"[34] and expressed its satisfaction because "the procedural balance between the Parties is secured."[35]

It would have been more appropriate for the Arbitration Tribunal to have terminated its work after the conversation between the Slovenian agent and the arbiter appointed by Slovenia had been revealed. The termination of such proceedings would have allowed the parties to start a new process or to come to an agreement on some other method of peaceful dispute resolution. Such proposals were expressed by some authors even before the Partial Award was rendered. As *Sarvarian and Baker* concluded, the self-termination of the process would "avoid more undesirable outcomes."[36] They emphasized that irespective of the outcome of the Award, it "would be open to doubt" and its enforcement "would be highly challenging."[37] Unfortunately, their conclusions have become reality.

The Final Award[38] did not resolve the dispute between Croatia and Slovenia. On the contrary, it has made the disagreement even more obvious and has lifted their positions to the next level. Not only does the border dispute remain unresolved, they are now also involved in a new dispute over the non(implementation) of the Arbitral Award. Because of the aforementioned events, Croatia does not recognize its existence nor accept its application; Slovenia, on the other hand, insists on its implementation. Confronting Croatia's refusal to implement the Award, Slovenia decided to initiate the proceeding before the Court of Justice of the European Union (CJEU) in Luxembourg, claiming that Croatia had violated EU law.[39] In January 2020 the CJEU decided that this case did not fall within its jurisdiction.[40]

3. What is the meaning and the location of Slovenia's Junction to the High Seas?

As already emphasized, one of the tasks of the Arbitral Tribunal was to determine Slovenia's Junction to the High Seas. However, the definition of 'Junction' was not provided by the Arbitration Agreement and its meaning – as will be shown – had become disputable between the parties.[41] Therefore, the task given to the Tribunal, the content of which had resulted in contradictory views of the parties, immediately opened the following questions: what does 'Junction' actually mean and how could it be implemented in this particular case?

In accordance with the standard dictionaries of the English language, the term 'junction' represents a "place at which two things join or are joined; meeting-place."[42] However, since Slovenia – due to its geographic location and 'restrictions' of the applicable rules of international law of the sea – does not have a territorial contact with the High Seas, what options did the Tribunal have in determining a 'meeting place'? In other words, should 'Slovenia's Junction to the High Seas' be

[34] Ibid.
[35] Ibid.
[36] A. Sarvarian & R. Baker, *Arbitration between Croatia and Slovenia: Leaks, Wiretaps, Scandal (Part 2)*, August 7 2015, EJIL:Talk! https://www.ejiltalk.org/arbitration-between-croatia-and-slovenia-leaks-wiretaps-scandal-part-2/ (18 November 2019).
[37] Ibid.
[38] 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, Case No. 2012-04, Final Award (hereinafter: Final Award 2017), 9 June 2017, https://pcacases.com/web/sendAttach/2172 (19 November 2019).
[39] Case-457/18 Republic of Slovenia v. Republic of Croatia (EU:C:2020:65), .
[40] CJEU Press Release No. 9/20, Republic of Slovenia v. Republic of Croatia (Case-457/18), 31 January 2020 https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/cp200009en.pdf (31 January 2020).
[41] Degan 2019, p. 32.
[42] The Compact Oxford English Dictionary 1987, p. 903.

interpreted as a physical connection, corridor or an access to the High Seas?

The High Seas are open to all states and all states are entitled to exercise the freedoms of the High Seas.[43] The desire not to be cut off from access to the High Seas was understandable and not controversial whatsoever. However, what has been seen by some as controversial in this case was the question whether that access should be territorial or not.[44] The controversy of territorial contact lies in the beforementioned geographical location of Slovenia and its impossibility to reach the High Seas. Slovenia's entire territorial sea boundary is adjacent to the territorial seas of two countries – either Croatia or Italy. Moreover, the length of the area between Slovenia's baseline and the High Seas exceeds the limit of 12 nautical miles (NM), required for the breadth of territorial sea.[45] Therefore, if the standard definition of junction is to be applied in this case and Slovenia's junction becomes its territorial connection or a 'meeting place' with the High Seas, but through the Croatian territorial sea, what influence would it have on Croatian sovereignty in that area?

Since sovereignty is never to be taken lightly, these issues encouraged further discussions in both countries. It became apparent that finding the answer to what the Junction means would not be a simple task to achieve, since the parties have been deeply divided over its meaning. Even more so, both states enclosed unilateral statements to the Arbitration Agreement. Croatia claimed that nothing in the Arbitration Agreement "shall be understood as Croatia's consent to Slovenia's claim to its territorial contact with the High Seas."[46] Slovenia, on the other hand, emphasized that "the task of the Tribunal is to establish territorial Junction of Slovenian territorial sea with the High Seas, therefore the right for the contact with the High Seas, which Slovenia has on the day of independence on June 25th, 1991."[47]

Slovenia has been repeating that position during the arbitration process, holding the view that the 'Junction to the High Seas' means "a direct junction without having to pass through the territorial sea of another state."[48] Slovenia asserted that the right of innocent passage "through the territorial sea of Croatia has never been acceptable" since it could be temporarily suspended.[49] On the other hand, the necessity of economic, security, and safety interests requires that maritime traffic to and from Slovenia's port of Koper should be "subject to no restrictions, impediments, or delays."[50] Slovenia also noted that even though coastal states were entitled to a territorial sea up to a maximum breadth of 12 NM from its coast or baselines, they "cannot claim the maximum entitlement if special circumstances exist."[51] In Slovenia's view, such circumstances do exist in this particular case. Slovenia also claimed that the emphasis of these special circumstances was the very *raison d'être* of both the reference to the Junction in Article 3(1)(b) of the Arbitration Agreement and the inclusion of equity and the principle of good neighbourly relations in the applicable law.[52] Therefore, in order to take these very special circumstances of the case into consideration, while – in Slovenia's opinion – no legal obstacle exists on partly limiting the extent of Croatia's territorial sea, Slovenia proposed the Junction as a corridor of the High Seas, 3 NM wide, between its territorial sea and the

[43] See 1982 UN Convention on the Law of the Sea, 1833 UNTS 397 (hereinafter: 1982 UNCLOS), Art. 87.
[44] Vidas 2009, p. 32.
[45] 1982 UNCLOS Art. 3.
[46] https://narodne-novine.nn.hr/clanci/medunarodni/full/2009_11_12_140.html (19 November 2019).
[47] Text in Slovenian, available in Uradni list Republike Slovenije-Mednarodne pogodbe, No. 11/16.7.2010, p. 574, http://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/2010-02-0085?sop=2010-02-0085 (19 November 2019).
[48] Final Award 2017, para. 1028.
[49] Ibid. para. 1029.
[50] Ibid. para. 1030.
[51] Ibid. para. 1056.
[52] Arbitration Agreement 2009, Art. 4(1)(b).

High Seas.[53]

Croatia contested Slovenia's claims, emphasizing that the understanding of Slovenia's Junction must be denied if it represents a claim to a territorial contact with the High Seas.[54] It also asserted that from the moment of its independence, "the High Seas and Slovenia are in any event separated from each other by a certain maritime area lying in-between and belonging to one or other of two third states."[55] Since that area exceeded 12 NM, "regardless of how the Tribunal determines the land and maritime boundary in the Bay,"[56] and Slovenia's territorial sea "does not and cannot stretch as far as to reach the High Seas," Slovenia is geographically deprived of having territorial or geographical contact with the High Seas.[57] On the other hand – Croatia claimed – Slovenia "has always enjoyed uninterrupted access to the High Seas," that has never been suspended, not even during the years of the Homeland War.[58] Therefore, by giving the term of Junction "more functional and purposive meaning,"[59] Croatia concluded that 'Junction' can only be understood as non-suspendable and secure maritime access between the High Seas and Slovenian territorial sea.[60]

Since it was evident that the parties are deeply divided over the question of Junction, the Tribunal decided to approach the interpretation of the Arbitration Agreement "in accordance with the rules of international law on treaty interpretation."[61] It finally offered its own, single interpretation of Junction. In its conclusion, the term 'Junction' signifies the "physical location of a connection between two or more areas."[62] In this particular case it represents the "connection between the territorial sea of Slovenia and an area beyond the territorial seas of Croatia and Italy".[63] Since the term may be understood to mean "either a geographical point or line, without spatial extension, or an area,"[64] the Tribunal decided that the Junction in this particular case is an *area* of approximately 2,5 NM wide.[65] That area is situated in the Croatian territorial sea, immediately adjacent to the boundary established by the Osimo Treaty and determined by five geodetic lines that join six points.[66]

[53] Final Award 2017, paras. 1028, 1057, 1058, 1059.
[54] Ibid. para. 1047.
[55] Ibid. paras. 1025, 1052.
[56] Ibid. para. 1021.
[57] Ibid. para. 1048.
[58] Ibid. para. 1036. See also Degan 2019, p. 54.
[59] N. Bankes, *The Maritime Aspects of the Award in the Arbitration between Croatia and Slovenia,* 2017, http://site.uit.no/jclos/2017/07/19/the-maritime-aspects-of-the-award-in-the-arbitration-between-croatia-and-slovenia/ (14 November 2019).
[60] Final Award 2017, para. 1027.
[61] Ibid. paras. 1075, 1076.
[62] Ibid. para. 1076.
[63] Ibid.
[64] Ibid. para. 1077.
[65] See also Degan 2019, p. 56.
[66] Final Award 2017, para. 1083.

Source: Final Award 2017, p. 347.

Therefore, contrary to Slovenia's proposal that the Junction should be a corridor of the High Seas, the Tribunal decided not to change sovereignty in this area[67] – the Junction area is to be settled in Croatian territorial waters.

4. What regime should be applied in the Junction area?

The authority of the Tribunal to create such a unique, "hybrid," *sui generis* regime could be derived from one of its tasks established by the Arbitration Agreement: the one to determine "the regime for the use of the relevant maritime areas," which also includes the regime of the Junction area. One could agree that by establishing a "Junction area"[68] instead of a "Junction" the Tribunal "has conflated the second and third tasks entrusted to it."[69] Looking at it this way, within the authority to determine 'Slovenia's Junction to the High Seas', it was not questionable whether the Tribunal was going to do so or not, but rather what direction it was going to take in that determination. Since the use of 'ordinary' maritime areas is prescribed by relevant international law of the sea, that particular task referred to the possibility that some 'ordinary' areas were going to be recreated in a somewhat different manner. That is what has been decided in this case. The area of the Junction is still Croatian territory, but the rights and obligations given to Croatia, Slovenia, and/or other countries are different from those that are 'normally' exercised in the territorial sea of the coastal state.

In determining the regime for the use of the Junction area, the Tribunal was authorized to apply "international law, equity, and the principle of good neighbourly relations in order to achieve a fair and just result by taking into account all relevant circumstances."[70] With no doubt, a broad choice

[67] See also Degan 2019, p. 57.
[68] Final Award 2017, para. 1081.
[69] Bankes 2017, ibid.
[70] Arbitration Agreement 2009, Art. 4(1)(b).

of law in respect of the Tribunal's tasks was given in that way.[71] As the Tribunal emphasized, the power and duty to determine the regime for the use of the relevant maritime areas actually implies that the "Tribunal is not to regard itself as confined to an indication that the 'regime' in any particular location is whatever it would be if each Party were to assert to the fullest extent its rights under UNCLOS at the relevant distance from the coast."[72] The obligation to achieve "a fair and just result by taking into account all relevant circumstances" includes consideration of the vital interest of the Parties and requires the Tribunal "to consider what modifications might be necessary" in order to achieve that particular result.[73]

Taking into account all the given circumstances, through the content and scope of the freedoms and limitations of communications in the Junction area, the Tribunal, therefore, proposed a very specific regime, previously unknown in the case law of territorial disputes.[74] It represents a combination of different regimes in the narrow stripe of the Croatian territorial sea. The purpose of such a regime is to reconcile both the integrity of the Croatian territorial sea, and Slovenia's freedoms of communication between its territory and the High Seas.

In an attempt to complete that 'mission', the Tribunal proposed freedoms of communication, which apply to "all ships and aircraft, civil and military, of all flags or States of registration,"[75] not just Slovenian. The purpose of that freedom is to allow an "uninterrupted and uninterruptible access to and from Slovenia, including its territorial sea and its airspace."[76] It consists of the freedoms of navigation and overflight as well as of the laying of submarine cables and pipelines and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft, submarine cables, and pipelines.[77] When observed carefully, in Article 58 of the UNCLOS, these freedoms go beyond the right of innocent passage in the territorial sea of the coastal state and are very similar to those applied in the coastal state's exclusive economic zone (beyond and adjacent to its territorial sea). Taking that into account, such a 'transfer' of rights (which 'others' enjoy in the exclusive economic zone) into the area of territorial sea, could be considered as a burden to Croatia's sovereignty. Although the Tribunal did not use these terms, the purpose and similarity is obvious.

The Tribunal provided that the laying of submarine cables and pipelines is subject to the conditions set out in Article 79 of the UNCLOS, including the right of Croatia to establish conditions for such cables and pipelines entering other parts of Croatia's territorial sea. It has to be noted that Article 79 refers to submarine cables and pipelines on the continental shelf. This could be seen as challenging since the "continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend *beyond* its territorial sea,"[78] and the area where the Junction is proposed to be established is *within* the Croatian territorial sea.

However, that provision additionally emphasizes the conclusion that Slovenia is not entitled to enjoy and exercise the rights of the continental shelf outside the line of its territorial sea. Slovenia made a claim to the continental shelf that – in its suggestion – should be settled in the area of the "corridor of the High Seas in which Slovenia invites the Tribunal to restrict Croatia's right to es-

[71] Bankes 2017, ibid.
[72] Final Award 2017, para. 1079. UNCLOS stands, of course, for the 1982 United Nations Convention on the Law of the Sea.
[73] Ibid.
[74] Sancin 2010, p. 108.
[75] Final Award 2017, para. 1124.
[76] Ibid. para. 1123.
[77] Ibid.
[78] UNCLOS Art. 76(1).

tablish a territorial sea."[79] The base for this claim was the identification of the proposed corridor as an area of the High Seas. However, since the Tribunal concluded that the "maritime boundary between Slovenia and Croatia extending from Point A at the mouth of the Bay to Point B of the Treaty of Osimo is the boundary for all purposes,"[80] Slovenia's territorial sea has no contact with the High Seas and consequently Slovenia has no continental shelf. Therefore, the question of continental shelf delimitation did not arise before the Tribunal and there was no need for the Tribunal to establish any particular usage regime.[81]

Without contact with the High Seas, Slovenia has no right to proclaim an exclusive economic zone either. As noted in the Award, freedoms of communication do not include the freedom to explore, exploit, conserve, or manage the natural resources, whether living or non-living, of the waters or the seabed or the subsoil in the Junction area. They also do not include the right to establish and use artificial islands, installations, or structures, the right to engage in marine scientific research, or the right to take measures for the protection or preservation of the marine environment.[82]

However, in order to secure the freedoms of communication, the implementation of the Junction area imposes limits on Croatia's rights. These freedoms are not conditioned upon any criterion of innocent passage. They are not suspendable under any circumstances nor subject to any duty of submarines to navigate on the surface, nor to any costal state controls or requirements "other than those permitted under the legal regime of the exclusive economic zone" in accordance with the UNCLOS.[83] When a ship or aircraft passes through or over the Junction area, Croatia is not entitled to interfere. Exercising the prescribed freedoms in the Junction area – in the Tribunal's view – is not subject to board, arrest, detention, diversion, or any other form of interference by Croatia.[84] Freedoms of communication are exercisable as if they are High Seas freedoms exercisable in an exclusive economic zone.[85] However, knowing that every coastal state is entitled to temporarily suspend the innocent passage of foreign ships in specified areas of its territorial sea[86], the Tribunal's restriction towards Croatia on not being entitled to suspend the rights that are not even exercisable in its territorial sea could be considered as challenging.

Nevertheless, while having a passage through the Junction area, ships and aircrafts are obliged to comply with Croatian laws and regulations.[87] The Tribunal emphasized that Croatia remains entitled to adopt laws and regulations applicable to foreign ships and aircraft in the Junction area, "giving effect to the generally accepted international standards in accordance with UNCLOS Article 39(2) and (3)."[88] These provisions refer to the duties of ships and aircrafts while exercising the right of transit passage. The Tribunal also underlined that Croatia's rights to enforce its laws and regulations in all other areas of its territorial sea and other maritime zones remain unchanged in accordance with the UNCLOS. It notably means that Croatia remains entitled to take enforcement actions outside the Junction area for the violations of its law that had been committed within that area.[89] In addition, the Tribunal considered it as necessary for Croatia to be engaged in responding to requests made by the master of a ship or other persons authorized by the flag State for the assistance in the Junction area, as well as to retain the right of exercising powers in respect of maritime

[79] Final Award 2017, para. 1084.
[80] Ibid. para. 1103.
[81] Ibid. para. 1141.
[82] Ibid. para. 1126.
[83] Ibid. para. 1127.
[84] Ibid. para. 1129.
[85] Ibid. para. 1128.
[86] UNCLOS Art. 25(3).
[87] Final Award 2017, para. 1130.
[88] Ibid. para. 1130.
[89] Ibid. para. 1131.

casualties.[90]

5. Conclusion

While, on the one hand, trying to allow the freedoms of communication, the content of which is not usually enforceable in territorial sea of the coastal state, and to preserve the integrity of Croatian territorial sea, on the other, it is evident that the Tribunal decided to propose an interesting solution – an uncommon *sui generis* system of the Junction area as a specific 'transit zone' between Slovenia's territorial sea and the High Seas.

This system has been seen by some authors as a "creative and balanced resolution of the contradicting interests,"[91] which "offers Slovenia the guaranteed EEZ-fashioned access that it sought"[92] while "limiting the authority of Croatia within its territorial sea as little as possible."[93] One could also assert that "Slovenia is in full functional meaning assured the Junction to the High Seas."[94] However, looking at Slovenia's arguments during the arbitration, the Junction area – as defined and proposed by the Tribunal – does not represent Slovenia's requested territorial connection with the High Seas. It further means that Slovenia has no right to proclaim an exclusive economic zone or a contiguous zone, nor that the rights arisen from the continental shelf could be exercised by Slovenia. The impossibility of its territorial sea to 'touch' the waters of the High Seas simply means that – regardless of the idea of the Arbitration Tribunal to mitigate the consequences of boxing-in effect[95] – it represents an insurmountable obstacle determined by its geographic position and applicable rules of international law of the sea. The Junction, which – in Slovenia's proposition – was supposed to create a territorial contact between its territorial sea and the High Seas, remains part of the Croatian territorial sea.

Nevertheless, although the sovereignty over the Junction area – in the application of the proposed system – is not to be changed, Croatia's rights and their enforcement on that small portion of the sea would be modified in a challenging hybrid manner. Croatian sovereignty over the Junction area would be exercised not in accordance with the relevant international rules applicable in the territorial sea. As mentioned before, since the sovereignty issue is never to be taken lightly, this could be perceived as a limiting factor.

However, despite the different and divided positions towards the implementation of the Final Award, its proposals could be considered as a framework for further negotiations, which consequently could pave the way and encourage the achievement of the final agreement. As noted by the Award,[96] its provisions, including those for the Junction area, shall subsist unless and until they are modified by another agreement concluded between Croatia and Slovenia. Since the CJEU declared that it lacks jurisdiction to rule on the action brought by Slovenia against Croatia, and encouraged the states "to strive sincerely to bring about a definitive legal solution consistent with international law, in order to ensure the effective and unhindered application of EU law,"[97] it remains to be seen

[90] Ibid. para. 1132.
[91] E. Petrič, *"Junction area" – a new legal regime, Permanent Court of Arbitration (PCA), Case No. 2012-04 (Slovenia v. Croatia)*, Czech Yearbook of International Law, Vol. 8, 2017, p. 375.
[92] Bankes 2017, ibid.
[93] Ibid.
[94] Petrič 2017, p. 376.
[95] Final Award 2017, paras. 1012, 1014.
[96] Ibid. para. 1139.
[97] CJEU Press Release No. 9/20, Republic of Slovenia v. Republic of Croatia (C-457/18), 31 January 2020 https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/cp200009en.pdf (31 January 2020).

which further steps are going to be taken and whether the final solution – whenever it comes along – will embrace the proposal(s) from the Final Award, including those regarding Slovenia's Junction to the High Seas.