Maritime Delimitation between the Republic of Croatia and the Republic of Slovenia in the Bay of Piran

Perišić, Petra

DOI: 10.20472/LPC.2018.002.010

PETRA PERISIC

Faculty of Law University of Rijeka, Croatia

MARITIME DELIMITATION BETWEEN THE REPUBLIC OF CROATIA AND THE REPUBLIC OF SLOVENIA IN THE BAY OF PIRAN

Abstract:

After the dissolution of the Federal Socialist Republic of Yugoslavia, Croatia and Slovenia – former socialist republics and now independent states – had to define their interstate borders. Since there were no maritime boundaries in Yugoslavia between the republics, an uti possidetis principle, which had been used for determining land borders, could not have been applied at sea. It was therefore on states to agree on the maritime delimitation.

Croatia and Slovenia, however, were not able to settle their dispute by diplomatic negotiations and they agreed to submit the dispute for arbitration. However, during the course of the proceedings, Slovenia got involved into an ex parte communication with one of the members of the Arbitral Tribunal, which resulted in Croatia's withdrawal from the proceedings.

The Tribunal nevertheless decided that it had jurisdiction to continue with the proceedings and ultimately decided on the merits of the case. Croatia refuses to implement the Tribunal's decision, while Slovenia insists on its implementation. It is yet to be seen how the settlement of this dispute will proceed, however it is interesting and legally challenging to analyze the Tribunal's award, which introduces a rather unusual solution to the delimitation issue.

Keywords:

arbitration, maritime delimitation, bay, uti possidetis, junction

1. Introduction

After the dissolution of the Federal Socialist Republic of Yugoslavia, Croatia and Slovenia – former socialist republics and now independent states – had to define their interstate borders. With respect to the land boundary, there was not much controversy because previous administrative borders had, according to the *uti possidetis* principle, become the interstate ones. On the sea, however, there were no borders on which *uti possidetis* principle could have been applied, so the maritime delimitation line had to be determined by an agreement between the two states.

Contrary to the Slovenia's claim that it had "no territorial disputes with neighboring states or the neighboring Republic of Croatia",[1] a dispute over the sea delimitation arose. Croatia advocated the application of an equidistance line, as provided by the Article 15 of the 1982 Law of the Sea Convention.[2] Slovenia, on the other hand, was of the opinion that the application of an equidistance line would be "unjust, unnatural and contrary to the historical and present realities in the Bay of Piran".[3] In its 1993 Memorandum on the Bay of Piran, it set out two requirements: first is the "sovereignty and jurisdiction" of Slovenia over the entire waters of the Bay, and second is the establishment of a direct link between Slovenian territorial waters and the High Seas.[4]

Disagreement between the states could not have been overcome by diplomatic negotiations. In 2001, prime ministers of Croatia and Slovenia came closest to reaching an agreement when they drafted the so-called "Racan-Drnovsek Agreement".[5] However, since the said Agreement was to a large extent in favor of Slovenian interests, it was rejected by the Foreign Affairs Committee of the Croatian Parliament and has therefore never been ratified by Croatia.[6]

In further negotiations Croatia started to advocate a settlement of the dispute before an international judicial body, which would apply international law. Slovenia, however, was not inclined to settle the dispute by applying exclusively international law and thus advocated the settlement of the dispute by arbitration. By blocking Croatia's accession to the European Union, Slovenia managed to negotiate settlement of the dispute by

[1] Badinter Commission, Opinion No. 7, p. 1512. For the analysis of the work of the Badinter Commission, see: Craven, M.C.R.: The European Community Arbitration Commission on Yugoslavia, British Yearbook of International Law, vol. 66, 1995, p. 333; Terrett, S.: The Dissolution of Yugoslavia and the Badinter Arbitration Commission: A Contextual Study of Peace-Making Efforts in the Post-Cold War World, Routledge Revivals, 2017.

[2] United Nations Convention on the Law of the Sea, available at: http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

[3] Vukas, B.: Maritime Delimitation in a Semi-enclosed Sea: The Case of the Adriatic Sea, p. 211, in: Lagoni, R., Vignes, D. (ed.): Maritime Delimitation, Martinus Nijhoff Publishers, Leiden/Boston, 2006.

[4] Ibid.

[5] Text of the Agreement available at: http://www.vlada.si/fileadmin/dokumenti/si/projekti/2010/Arbitrazni_sporazum/4.b_Drnovsek-Racan_EN.pdf.

[6] More on the „Racan-Drnovsek Agreement" and other attempts of solving the dispute by diplomatic negotiations in: Bickl, Th.: Reconstructing the Intractable: The Croatia-Slovenia Border Dispute and its Implications for the EU Enlargement, Croatian Political Science Review, vol. 54, no. 4, 2017, p. 7.

arbitration. Upon the conclusion of the Arbitration Agreement in 2009, Slovenia lifted its blockade to the Croatian EU accession process.

2. Arbitration Agreement

In the analysis of the Arbitration Agreement, several provisions are of particular importance. The first one deals with the task of the Arbitral Tribunal. Parties have authorized the Tribunal to determine three issues: first is the course of the maritime and land boundary between the Republic of Slovenia and the Republic of Croatia, second is the Slovenia's junction to the High Seas and third is the regime for the use of the relevant maritime areas.[7]

The most controversial issue was the one related to the Slovenia's junction to the High Seas. Namely, after the conclusion of the Agreement, Croatia and Slovenia interpreted the word *junction* in different ways, Croatia claiming that it stood for a legal regime at sea, while Slovenia considered it to be a direct territorial link between its territorial waters and the High Seas. To formalize its standpoint, Croatia made an Interpretative Declaration[8] in which it declared that "nothing in the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia shall be understood as Croatia's consent to Slovenia's claim to its territorial contact with the High Seas".[9] Slovenia responded to this with its own Declaration, in which it disagreed with the content of the Croatian Statement and declared that it had no legal effect.[10] Slovenia further added that it was the task of the Tribunal to determine Slovenia's junction to the High Seas, which in Slovenia's view, meant the territorial contact of the Slovenia's territorial sea with the High Seas.[11] Apparently, the disagreement on the interpretation of *junction* was a result of the omission of the parties to specify the meaning of this term in the Agreement. Yet, it is quite likely that the use of this rather vague expression was no coincidence. Insertion of a more specific term into the text of the Agreement would no doubt lead to its non-acceptance by one of the parties.

Another significant provision in the Agreement was the one determining the applicable law. The Tribunal should, in this regard, apply "rules and principles of international law" when determining the course of the maritime and land boundary between Croatia and Slovenia.[12] On the other hand, when determining junction and the regime for the use of the relevant maritime areas, the Tribunal should apply, in addition to

[7] Article 3 of the Arbitration Agreement. Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, Official Gazette of the Republic of Croatia, no. 12/2009.

[8] On Interpretative Declarations see: Guide to Practice on Reservations to Treaties, ILC Report, 2011, 63rd Session, A/66/10.

[9] *Supra* note 7.

[10] Final Award 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, 29 June 2017, PCA Case No.2012-04, para. 135.

[11] Final Award, para. 135.

[12] Article 4 of the Arbitration Agreement. *Supra* note 7.

international law, “equity and the principle of good neighborly relations in order to achieve a fair and just result”.[13] By introducing into the Arbitration Agreement “equity” and “the principle of good neighborly relations” (which should no doubt generally govern all interstate relations, but is unclear in what way it should influence the determination of an interstate border), the Tribunal had been authorized by the parties to go outside of the scope of international law when deciding on the merits of the case.

The parties have agreed that the award by the Tribunal shall be binding on both of them and shall constitute a definitive settlement of the dispute.[14] Slovenia for its part undertook an obligation to lift its reservations with regard to negotiation process for the Croatian accession to the EU.[15]

Finally, the Arbitration Agreement contains a “stand-still” provision, which says that both parties shall refrain from any action or statement which might intensify the dispute or jeopardize the work of the Arbitral Tribunal.[16] As much as such an obligation of states might seem rather self-understandable, it needs to be outlined in light of the further developments in the arbitral proceedings, which will be discussed later on.

3. Violation of the proceedings and the Arbitral Tribunal’s decision on jurisdiction

We shall not go into details about the course of the proceedings of the Arbitral Tribunal[17] because they are of no particular relevance for the analysis of the case, but will rather focus on the relevant events that led to the violation of the arbitral proceedings and consequently Croatia’s withdrawal from the proceedings.

In 2015 Croatia informed the Tribunal that statements given by some highly-ranked Slovenian politicians suggested that Slovenia might have had an access to confidential information related to the Tribunal’s deliberations. Allegations of the *ex parte* communication were confirmed when the transcripts of telephone communication between the Slovenian agent and the *ad hoc* judge appointed by Slovenia were published in Serbian and Croatian newspapers. The transcripts revealed arrangements of the two persons involved on how to influence the members of the Tribunal to rule in Slovenia’s favor. They also concerned the provision of

[13] Ibid.

[14] Article 7 of the Arbitration Agreement. *Supra* note 7.

[15] Article 9 of the Arbitration Agreement. *Supra* note 7. Reservations were indeed lifted and Croatia entered the EU in 2013.

[16] Article 10 of the Arbitration Agreement. *Supra* note 7.

[17] For the detailed chronology of the proceedings see: Partial Award 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, 30 June 2016, available at: https://pcacases.com/web/sendAttach/1787.

documents from the Slovenian agent to the *ad hoc* judge, as well as the disclosure of information related to Tribunal's deliberations.[18]

As a response, Croatia invoked Article 60 of the Vienna Convention on the Law of Treaties and decided to terminate the Arbitration Agreement. Article 60 provides that a party to a bilateral treaty is entitled to terminate a treaty or suspend its operation in whole or in part if there has been a material breach of that treaty by the other party.[19] A material breach in the present case refers to a violation of a provision essential to the accomplishment of the object or purpose of the treaty.[20] Croatia stressed that the most fundamental principles of arbitral procedure – including procedural fairness, due process, equality of arms and independence – have been violated.[21] In addition, Croatia invoked violations of Arbitral Agreement itself, more precisely its Article 6, which guarantees confidentiality of the proceedings, and Article 10, which, as outlined earlier, obliges parties to refrain from actions or statements which might intensify the dispute or jeopardize the work of the Tribunal.[22] Due to all this, Croatia was of the opinion that the Tribunal was no longer in a position to accomplish its main tasks from the Arbitral Agreement and that "no award issued under these legally and ethically completely compromised proceedings could be considered as effective, authoritative or credible".[23] Slovenia objected to Croatia's actions and advocated the continuation of the proceedings.

The Vienna Convention on the Law of Treaties provides the procedure to be followed in case of termination of a treaty and specifically addresses the situation of other party objecting to such termination. In that respect, the Convention provides that in such a situation the parties shall seek a solution through the peaceful means of dispute settlement indicated in Article 33 of the UN Charter.[24] The Convention further provides the procedure in case the dispute remains unresolved within the period of twelve months following the date the objection was raised. The procedure involves referring the dispute to the International Court of Justice or to the Secretary-General in accordance with the Annex to the Convention.[25] It is not familiar to this author whether any of the said actions have been undertaken.

[18] Excerpts from Recordings of Conversations between Jernej Sekolec, Member of the Tribunal, and Simona Drenik, agent of the Republic of Slovenia, available at the official web-site of the Croatian Ministry of Foreign and European Affairs: http://www.mvep.hr/files/file/dokumenti/arbitraza/hr/150820-excerpts-from-recordings-between-dr-sekolec-and-mr-drenik-14082015.pdf. See also: Sarvarian, A., Baker, R.: Arbitration between Croatia and Slovenia: Leaks, Wiretaps, Scandal, EJIL: Talk!, Blog of the European Journal of International Law, available at: https://www.ejiltalk.org/arbitration-between-croatia-and-slovenia-leaks-wiretaps-scandal/#more-13476.

[19] Text of the Vienna Convention on the Law of Treaties available at: https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf.

[20] Article 60 (3) (b) of the Vienna Convention on the Law of Treaties.

[21] *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).

[22] *Supra* note 16.

[23] *Supra* note 21.

[24] Article 65 (3) of the Vienna Convention on the Law of Treaties. *Supra* note 20.

[25] Article 66 of the Vienna Convention on the Law of Treaties. *Supra* note 20.

After the violation of the proceedings occurred, the continuation of the proceedings came into question. The Arbitral Tribunal has, according to the principle *Kompetenz-Kompetenz*, but also according to the PCA Optional Rules, to the application of which it had been authorized by the Article 6 of the Arbitration Agreement, decided that it was entitled to determine its own jurisdiction. Next, the Tribunal decided that it, once it was recomposed,[26] was authorized to continue the proceedings. Finally, it examined the validity of the termination of the Arbitration Agreement. The Tribunal was of the opinion that no material breach of the Agreement, which would jeopardize the accomplishment of the object and purpose of the treaty, occurred. According to the Tribunal, the object and purpose of the present Arbitral Agreement was twofold: first was settling of a dispute, which yet had to be accomplished and second was the accession of Croatia to the EU, which had already been accomplished.[27] The Tribunal considered that its impartiality and independence are indisputable and that the process should be continued.[28]

In our opinion, the decision by the Tribunal to go on with the proceedings was not the right one. Regardless of whether there had actually been any unlawful influence on the members of the Tribunal, there is a standard in national and international jurisprudence called “appearance of impartiality”. According to this standard, it is not only necessary that the judge is fair and unbiased, but is also necessary that he “makes the parties and the community feel that he is just”.[29] According to the European Court of Human Rights, tribunals in a democratic society must inspire confidence in the public.[30] In the present case, such confidence had been breached and that is why the Tribunal should have at very least been entirely recomposed before the continuation of the proceedings.[31]

Also, the appropriateness of the *Kompetenz-Kompetenz* principle comes into question in situations such as this one. Namely, if the tribunal has to decide on the consequences of its own procedural irregularities, such as the impartiality of its members, under the principle of *nemo judex in causa sua*, the tribunal should not be

[26] After the resignation of the compromised *ac hoc* judge appointed by Slovenia, Jernej Sekolec, and the *ad hoc* judge appointed by Croatia, Budislav Vukas, the Tribunal consisted of the three previously elected judges, Bruno Simma, Vaughn Lowe and Gilbert Guillaume, and the two newly elected, Rolf Einar Fife and Nicolas Michel. Slovenia had initially replaced Sekolec by Ronny Abraham, the president of the International Court of Justice, but he resigned after the resignation of judge Vukas and Croatia’s termination of the Arbitration Agreement.

[27] Partial Award, paras. 219-220. *Supra* note 17.

[28] Partial Award, para. 227. *Supra* note 17.

[29] Ponder v. Davis, 233 N.C. 699,706, 65 S.E. 2d 356, 360 (1951). See also: Abramson, L. W.: What Every Judge Should Know about the Appearance of Impartiality, Albany Law Review, vol. 79, no. 4, 2017, p. 1579.

[30] Whitfield and others v. The United Kingdom, Judgment of 12 April 2005, Application nos. 46387/99, 48906/99, 57410/00 and 57419/00, para. 43.

[31] For the opinion in favor of non-continuation of the proceedings in the present case, see: Sands, Ph.: 2015 ESIL Annual Conference Final Lecture: Developments in Geopolitics – The End(s) of Judicialization?, EJIL:Talk!, Blog of the European Journal of International Law, available at: https://www.ejiltalk.org/2015-esil-annual-conference-final-lecture-developments-in-geopolitics-the-ends-of-judicialization/. See also: Sarvarian, A., Baker, R.: Arbitration between Croatia and Slovenia (Part 2), ?, EJIL: Talk!, Blog of the European Journal of International Law, available at: https://www.ejiltalk.org/arbitration-between-croatia-and-slovenia-leaks-wiretaps-scandal-part-2/.

the one, or at least not the only one, to make that decision.[32] If it does so, the legitimacy of the arbitral award may be, and in practice is, disputed.[33]

4. Arbitral Award

On 29 June 2017, the Tribunal rendered the decision on the issues set out in Article 3 of the Arbitration Agreement. The land boundary delimitation shall not be dealt with here. In further paragraphs we shall deal with the following maritime delimitation issues: delimitation in the Bay of Piran, delimitation of the territorial sea and the determination of Slovenia's junction to the High Seas.

4.1. Delimitation in the Bay of Piran

When determining the status of the waters within the Bay of Piran, and consequently delimitation in the Bay, the Tribunal had to assess diverging attitudes of the parties. Croatia alleged that waters within the Bay constituted territorial sea and that Article 15 of the Law of the Sea Convention should therefore be applied. Conversely, Slovenia maintained that those waters were internal ones, either on the basis of the Bay being a juridical one or an historic one,[34] entirely under Slovenian sovereignty. Slovenia's claim is unfounded for several reasons. First, it neglects the law of the sea principle that land dominates the sea.[35] In other words, waters adjacent to the Croatian coast cannot be Slovenian internal waters. Second, the Bay may not belong to Slovenia on the ground of it being either a juridical bay or an historic bay. Article 10 of the Law of the Sea Convention, which provides conditions for juridical bays, refers only to bays the coasts of which belong to a single State.[36] This obviously is not the case with Slovenia. Historical bays are also those the coasts of which belong to a single state.[37] The only exception to this is the Gulf of Fonseca, which has the coasts in three states and nevertheless represents the historic bay.[38] This case is, however, not comparable with the Bay of Piran. Namely, the waters in the Gulf of Fonseca are historic waters but represent a condominium of the three states surrounding it – Honduras, Nicaragua and El Salvador. Slovenia, on the other hand, claims the entire Bay to be its own internal waters.

[32] Tzeng, P.: The Annulment of Interstate Arbitral Awards, Kluwer Arbitration Blog, available at: http://arbitrationblog.kluwerarbitration.com/2017/07/01/the-annulment-of-interstate-arbitral-awards/.
[33] Ibid.
[34] Final Award, para. 774.
[35] This principle has been confirmed in numerous judicial decisions, such as: *North Sea Continental Shelf (Federal Republic of Germany v Denmark)* (Merits) [1969] ICJ Rep 3 para. 96; Aegean Sea Continental Shelf Case, 1978 ICJ Rep. 36, para. 86; Qatar v. Bahrain, 2001 ICJ Rep. 97, para. 185.
[36] Article 10 (1) of the Law of the Sea Convention. *Supra* note 2.
[37] More on historic bays in: Perisic, P.: Institut historijskog zaljeva s osvrtom na zahtjev Republike Slovenije za Savudrijskom valom, Zbornik Pravnog fakulteta u Zagrebu, vol. 60, no. 3, 2010, p. 1369.
[38] The historic character of the Gulf was confirmed in two judicial decisions: El Salvador v. Nicaragua, CACJ, Judgment of 9 March 1917, American Journal of International Law, vol. 11, 1917, str. 674; Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), ICJ Reports 1992, p. 351.

In spite of the fact that the waters within the Bay were not *entirely* Slovenian internal waters, the Tribunal was of the opinion that they indeed were internal.[39] They had that status in Yugoslavia, for the Bay fulfilled the preconditions for the juridical bay, and – according to the Tribunal – they retained it after 1991.[40] The Tribunal further noted that the fact that Article 10 of the Law of the Sea Convention refers only to bays the coasts of which belong to a single state does not mean that pluristatal bays may not have the status of internal waters.[41]

Having determined that the waters within the Bay are internal ones, the Tribunal went on to apply the principle of *uti possidetis*. Since there was no formal division of the Bay between the two Republics prior to the dissolution of Yugoslavia, the Tribunal had to examine the ***effectivités*** on the date of independence, mainly those relating to regulation of fisheries and police patrol.[42] With regard to fishing, the Tribunal examined a fishing reserve in the Bay. Both states created a fishing reserve in the Bay, but the Tribunal concluded that the fishing reserve was of limited interest for Croatia, which established it fourteen years after Slovenia, did not adopt any regulation concerning the reserve and did not organize its management.[43] However, the Tribunal found that municipalities of both states asked each other for the consent when fixing the limits of the fishing reserve.[44] This served as a proof that neither state had the exclusive jurisdiction to establish such a reserve.[45]

In proving the ***effectivités*** regarding police patrols in the Bay, Croatia submitted that it exercised control south-west of the median line, while Slovenia contended that it did so over the whole Bay, with the exception of a narrow strip of water along the Croatian coast.[46] The Tribunal established that the Bay was patrolled by the two Slovenian police vessels and that at least on two occasions the Slovenian authorities drew the attention of the Croatian authorities to the risks of illegal immigration or smuggling originating from their coast and requested action in that respect.[47]

Croatia tried to prove the existence of the activities of its police in the Bay by referring to the incident of the Italian tanker *Nonno Ugo*. It submitted that the vessel grounded on the Croatian coast of the Bay, was inspected by a Croatian safety of navigation inspector, that Croatian authorities ordered to the ship owner to commence rescue operations within 48 hours in order to avoid pollution and finally approved a proposal made for the removal of oil from the ship.[48] These assertions by Croatia were not disputed by the Tribunal, however it noted that the incident was first detected by the

[39] Final Award, para. 883.
[40] Ibid.
[41] Final Award, para. 884.
[42] Final Award, para. 888.
[43] Final Award, paras. 892, 894, 901.
[44] Final Award, para. 895.
[45] Final Award, para. 897.
[46] Final Award, para. 902.
[47] Final Award, para. 904.
[48] Final Award, para. 905.

Slovenian authorities and that a patrol boat of the Koper station arrived on the spot shortly after the incident.[49] The Tribunal observes that for weeks nothing was done to eliminate the danger of pollution and it was on the initiative of Slovenia that a meeting of all the interested parties, including Croatia, was held to consider the measures to be taken.[50]

It was concluded by the Tribunal that Slovenia was generally more involved in the activities in the Bay. However, no conclusion could be drawn from what the parties had presented with respect to Slovenian *effectivités* in the immediate vicinity of the Croatian coast or to Croatian *effectivités* in the rest of the Bay.[51] The Tribunal was, however, convinced that Croatia did not exercise jurisdiction over the whole area south of the median line. According to that, and taking into account the *effectivités* of both states in the Bay, the Tribunal was of the opinion that the delimitation is to follow a line situated between the lines advanced by the parties.[52]The delimitation line was drawn to join the end of the land boundary in the mouth of the Dragonja River to a point on the closing line of the Bay, which is at a distance from Cape Madona (Slovenia) that is three times the distance from that same point to Cape Savudrija (Croatia).[53] Delimitation line drawn by the Tribunal corresponds to the one determined in the "Racan – Drnovsek Agreement".[54]

4.2. Delimitation of the territorial sea

Departing from the closing line drawn across the mouth of the Bay, the Tribunal had to determine the line delimiting the territorial seas of the two states.

It seems appropriate at the outset to cite Article 15 of the Law of the Sea Convention, which provides criteria for delimiting territorial sea between the states. Article 15 says that in the absence of the agreement between the states, neither of them is entitled to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breath of the territorial seas of each of the two states is measured. The median line will, however, not be applied where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two states in a different manner.[55]

In the practice of the International Court of Justice, the delimitation was conducted in a manner that the Court first constructed a provisional equidistance line and then explored the existence of special circumstances. In the end, the Court applied the proportionality test in order to see whether the effect of the delimitation line was such

[49] Final Award, para. 906.
[50] Ibid.
[51] Final Award, para. 907.
[52] Final Award, para. 912.
[53] Ibid.
[54] See *supra*, note 5.
[55] See *supra*, note 2.

that the parties' respective shares of the relevant area were markedly disproportionate to the lengths of their relevant coasts.[56]

In the present case, Croatia advocated the application of the equidistance/median line, while Slovenia emphasized the existence of a historic title and other special circumstances as a ground for departing from the median line criterion. As special circumstances, Slovenia referred to the "squeezing effect", the coastal concavity, the "cut-off" effect and the security and navigation interests.[57]

In its deliberations, the Tribunal took into account two principles. The first one is the natural prolongation principle. The Tribunal referred here to the North Sea Continental Shelf cases, in which the International Court of Justice said that delimitations are to be effected „in such a way as to leave as much as possible to each party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without enchroachment on the natural prolongation of the land territory of the other party".[58] The second principle is that, in the words of the International Court of Justice, "the effects of an incidental special feature from which an unjustifiable difference of treatment could result" should be abated when affecting a maritime delimitation. The Tribunal noted that in circumstances where particular geographic features or configurations have a greatly exaggerated or magnified effect upon delimitation, the delimitation should seek to mitigate that effect.[59]

Although the Tribunal did not consider that the great difference between the lengths of the coastal fronts of Croatia and Slovenia was a special circumstance in terms of departing from the equidistance line, nor did it establish the existence of historic titles, it did, however, consider that certain features of the coastal configuration in the present case would produce an exaggeratedly adverse effect if the strict equidistance line would be applied and found that they indeed did constitute a special circumstance.[60] The special circumstance is that at the entrance point of the Bay the coastline of Croatia turns sharply southwards, so that the basepoints that control the equidistance line are located on a very small stretch of coast whose general north-facing direction is different from the general south-facing direction of much the greater part of the Croatian coastline and deflect the equidistance line very significantly towards the north, greatly exaggerating the "boxed-in" nature of Slovenia's maritime zone.[61] The Tribunal, therefore, decided to take the geographical configuration as a special circumstance which, in order to avoid the "boxing-in" and "cut-off" effect,

[56] Final Award, citing Maritime Dispute (Peru V. Chile), Judgment, ICJ Reports 2014, p. 3 at p. 66, para. 180, citing Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, ICJ Reports 2009, p. 61 at pp. 101-03, paras. 115-22; Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, ICJ Reports 2012, p. 624 at pp. 695-96.
[57] Final Award, paras. 965-988.
[58] Final Award, citing Nort Sea Continental Shelf Case, *supra* note 35, p. 53, para 101.
[59] Final Award, citing Nort Sea Continental Shelf Case, *supra* note 35, p. 49, para 89.
[60] Final Award, para. 1011.
[61] Ibid.

justifies departure from the equidistance line.[62] Even though Slovenia has, by the modification of the equidistance line, got a part of the territorial sea which would be Croatian if the strict equidistance line had been applied, it can hardly be claimed that the so-called "boxing-in" effect has been avoided. It is simply a consequence of the geographical position of Slovenia.

4.3. Determination of Slovenia's junction to the High Seas

Probably the most challenging task the Arbitral Tribunal was entrusted with by the Arbitration Agreement was the determination of the Slovenia's junction to the High Seas. Ever since the beginning of the territorial dispute between the two states, one of the two main Slovenia's requirements was the direct contact of its territorial waters with the High Seas. By acquiring such a direct link to the High Seas, Slovenia would avoid exercising the right of innocent passage[63] through Croatian territorial waters. Croatia, on the other hand, submitted that the right of innocent passage allowed Slovenia to enjoy uninterrupted access to the High Seas, which has never – even during the Homeland war – been suspended.[64]

The Tribunal first had to determine the meaning of junction, as parties strongly disagreed on that issue. The Tribunal explored an ordinary meaning of the term, in accordance with the Vienna Convention on the Law of Treaties.[65] It concluded that it represented "a place where two or more things come together or join".[66] It is, according to the Tribunal, the physical location of a connection between two or more areas.[67] In the present case, it represented the connection between the territorial sea of Slovenia and an area beyond the territorial seas of Croatia and Italy.[68] The Tribunal, therefore, did not accept Croatia's suggestion that the term meant a destination or a direction.[69] It added that junction might mean either a point or a line, or an area. In the present case, junction represents an area and is referred to as the "Junction Area".[70]

Having determined the meaning of junction, the Tribunal next had to determine the location of the Junction Area. It first must be emphasized that Slovenia's territorial sea is in no point adjacent to the High Seas. Taking that into account, the Tribunal established the Junction Area as a 2.5 NM wide strip in Croatia's territorial sea, immediately adjacent to the boundary laid down by the Treaty of Osimo.[71] The Tribunal considered this to be a compromise solution, inasmuch both the integrity of

[62] Final Award, paras.1012, 1014.
[63] On the right of innocent passage see Art. 17 *et seq*. of the Law of the Sea Convention, *supra* note 2.
[64] Final Award, para. 1036.
[65] Article 31 of the Vienna Convention on the Law of Treaties. *Supra* note 19.
[66] Final award, para. 1073, referring to the Oxford English Dictionary, Webster's Dictionary, Collins English Dictionary, Cambridge Dictionaries Online and Chamber's 21st Century Dictionary.
[67] Final Award, para. 1076.
[68] Final Award, para. 1076.
[69] Final Award, para. 1073.
[70] Final Award, paras. 1077, 1081.
[71] Final Award, para. 1083.

Croatia's territorial sea and Slovenia's freedoms of communication between its territory and the High Seas would be secured.[72]

The freedoms of communication granted to Slovenia in the Junction Area, established for the purposes of uninterrupted and uninterruptible access to and from Slovenia, consist in the freedoms of navigation and overflight and 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, cables and submarine cables and pipelines.[73] The right refers not only to Slovenian ships and aircraft, but to those of all states.[74]

The freedoms of communication, on the other hand, 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. Likewise, they do not include the right to establish and use artificial islands, installations or structures, or the right to engage in marine scientific research, or the right to take measures for the protection or preservation of the marine environment.[75]

The freedoms of communication differ from the right of innocent passage in a way that they are not conditioned upon any criterion of innocence and are not suspendable under any circumstances.[76] Submarine vessels are under no duty to navigate on the surface.[77] The legal regime thus established corresponds to the one of the exclusive economic zone, as defined in the Law of the Sea Convention.

With respect to jurisdiction over ships and aircraft exercising the freedoms of communication, the Tribunal considered that they should not be subject to boarding, arrest, detention, diversion or any other form of interference by Croatia while in the Junction Area.[78] The Tribunal considered that Croatia retains the right to prescribe laws and regulations in the Junction Area, but is on the other hand not entitled to enforce them.[79] The Award, however, does not affect the right of Croatia to take enforcement action outside the Junction Area, including for actions that did take place in that Area.[80]

The regime of the Junction Area clearly represents an innovative regime established by the Arbitral Tribunal. It provides to third states the rights characteristic of the

[72] Final Award, para. 1123.
[73] Final Award, para. 1123.
[74] Final Award, para. 1124.
[75] Final Award, para. 1126.
[76] Final Award, para. 1127.
[77] Final Award, para. 1127.
[78] Final Award, para. 1129.
[79] Croatia retains the right to respond to a request by the master of a ship or by a diplomatic agent or consular officer of the flag state for the assistance of the Croatian authorities. It also retains the right to exercise powers under Article 221 of the Law of the Sea Convention in respect of maritime causalities. Final Award, paras. 1130-31.
[80] Final Award, para. 1131.

exclusive economic zone in the territorial sea of the coastal state. Croatia as a coastal state may prescribe laws and regulations, but is not entitled to enforce them in the Junction Area. It derives from all this that Croatia formally retains the Junction Area as a part of its territorial sea, but in practice is deprived of exercising jurisdiction that a coastal state, according to the Law of the Sea Convention, enjoys in its territorial sea.

5. Conclusion

Twenty-seven years after the proclamation of independence, Croatia and Slovenia have still not settled the maritime delimitation dispute resulting from the dissolution of Yugoslavia. It now seems they have come full circle with the attempts to resolve it.

Once they realized that diplomatic negotiations did not lead to the dispute settlement, it would have been the best decision to bring the dispute before the International Court of Justice – the Court with a rich practice in settling maritime disputes. Unfortunately, the states could not agree on that. Croatia signed the Arbitration Agreement to eliminate the only remaining obstacle to its EU accession, although arbitration was not what it wanted. Were it not for the violation of the proceedings by Slovenia, Croatia would have to implement the arbitral award, regardless of its possible discontent with its content. However, the violation of the proceedings gave Croatia no alternative but to terminate the Agreement. It is indeed difficult to imagine how a state could continue to participate in the arbitral proceedings after what had happened.

In spite of the fact that Croatia did not participate in the proceedings after the violation occurred, the Tribunal delivered the Award. Croatia refuses to implement it. Slovenia, on the other hand, insists on its implementation and claims it would sue Croatia before the Court of Justice of the European Union for the breach of European law.

No matter what future legal and political steps may be taken, the settlement of the dispute between the two states will necessarily have to be based on their compromise. This means that neither party will be entirely satisfied with the decision and will have to give up on some of its claims. The present Award by the Arbitral Tribunal might be one such compromise solution. Since Croatia refuses to implement it for the abovementioned reasons, there are suggestions that solutions from the Award be used as a basis for future negotiations. Such scenario is quite likely, just like “Racan-Drnovsek” Agreement inspired some of the solutions in this Arbitral Award. But should this happen, Croatia must be aware that it might be a step forward for Slovenia to try to achieve what it initially wanted and what was not granted to it by this Award – a direct physical contact of its territorial sea with the High Seas and consequently entitlement to a continental shelf, as well as the possibility of proclamation of other legal regimes, in accordance with the Law of the Sea Convention.

REFERENCES

Abramson, L. W.: What Every Judge Should Know about the Appearance of Impartiality, Albany Law Review, vol. 79, no. 4, 2017, p. 1579.

Aegean Sea Continental Shelf Case, ICJ Reports 1978, p. 36.

Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, Official Gazette of the Republic of Croatia, no. 12/2009.

Bickl, Th.: Reconstructing the Intractable: The Croatia-Slovenia Border Dispute and its Implications for the EU Enlargement, Croatian Political Science Review, vol. 54, no. 4, 2017, p. 7-39.

Craven, M. C. R.: The European Community Arbitration Commission on Yugoslavia, British Yearbook of International Law, vol. 66, 1995, p. 333-413.

El Salvador v. Nicaragua, CACJ, Judgment of 9 March 1917, American Journal of International Law, vol. 11, 1917.

Excerpts from Recordings of Conversations between Jernej Sekolec and Simona Drenik, available at: http://www.mvep.hr/files/file/dokumenti/arbitraza/hr/150820-excerpts-from-recordings-between-dr-sekolec-and-mr-drenik-14082015.pdf.

Final Award in the Matter of an Arbitration under the Arbitration Agreement between the Government of Croatia and the Government of the Republic of Slovenia, 29 June 2017, PCA Case No.2012-04.

Guide to Practice on Reservations to Treaties, ILC Report, 2011, 63rd Session, A/66/10.

Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), ICJ Reports 1992, p. 351.

Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, ICJ Reports 2009, p. 61.

Maritime Dispute (Peru V. Chile), Judgment, ICJ Reports 2014, p. 3.

North Sea Continental Shelf (Federal Republic of Germany v Denmark), Judgment, ICJ Reports 1969, p. 3.

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).

Partial Award 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, 30 June 2016, available at: https://pcacases.com/web/sendAttach/1787.

Perisic, P.: Institut historijskog zaljeva s osvrtom na zahtjev Republike Slovenije za Savudrijskom valom, Zbornik Pravnog fakulteta u Zagrebu, vol. 60, no. 3, 2010, p. 1369.

Ponder v. Davis, 233 N.C. 699,706, 65 S.E. 2d 356, 360 (1951).

Qatar v. Bahrain, ICJ Reports 2001, p. 97.

Racan - Drnovsek Agreement, available at: http://www.vlada.si/fileadmin/dokumenti/si/projekti/2010/Arbitrazni_sporazum/4.b_Drnovsek-Racan_EN.pdf.

Sands, Ph.: 2015 ESIL Annual Conference Final Lecture: Developments in Geopolitics – The End(s) of Judicialization?, EJIL: Talk!, Blog of the European Journal of International Law, available at: https://www.ejiltalk.org/2015-esil-annual-conference-final-lecture-developments-in-geopolitics-the-ends-of-judicialization/.

Sarvarian, A., Baker, R.: Arbitration between Croatia and Slovenia: Leaks, Wiretaps, Scandal, EJIL: Talk!, Blog of the European Journal of International Law, available at: https://www.ejiltalk.org/arbitration-between-croatia-and-slovenia-leaks-wiretaps-scandal/#more-13476.

Sarvarian, A., Baker, R.: Arbitration between Croatia and Slovenia (Part 2)?, EJIL: Talk!, Blog of the European Journal of International Law, available at: https://www.ejiltalk.org/arbitration-between-croatia-and-slovenia-leaks-wiretaps-scandal-part-2/.

Terrett, S.: The Dissolution of Yugoslavia and the Badinter Arbitration Commission: A Contextual Study of Peace-Making Efforts in the Post-Cold War World, Routledge Revivals, 2017.

Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, ICJ Reports 2012, p. 624.

Tzeng, P.: The Annulment of Interstate Arbitral Awards, Kluwer Arbitration Blog, available at: http://arbitrationblog.kluwerarbitration.com/2017/07/01/the-annulment-of-interstate-arbitral-awards/.

United Nations Convention on the Law of the Sea, available at: http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (last accessed 07 May 2018).

Vienna Convention on the Law of the Treaties, available at: https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf.

Vukas, B.: Maritime Delimitation in a Semi-enclosed Sea: The Case of the Adriatic Sea, p. 211, in: Lagoni, R., Vignes, D. (ed.): Maritime Delimitation, Martinus Nijhoff Publishers, Leiden/Boston, 2006.

Whitfield and others v. The United Kingdom, Judgment of 12 April 2005, Application nos. 46387/99, 48906/99, 57410/00 and 57419/00, para. 43.

.