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Reconstructing the Intractable: The Croatia-Slovenia Border Dispute and Its Implications for EU Enlargement

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Summary

This study seeks to reconstruct two crucial phases in the management of the protracted territorial conflict between Croatia and Slovenia over the common State border: (i) The causal mechanisms of the genesis of the Arbitration Agreement during the Croatian accession negotiations with the EU 2008/2009, and (ii) the conflict dynamics during the subsequent arbitration procedure before the Permanent Court of Arbitration (PCA) 2012-2017. The method employed is process tracing based on elite interviews (politicians and civil servants) and informal documents. The arbitral award from 29 June 2017 is the end of a formal process, but not of the substantive dispute. Bilateral conflict between an EU Member State (Slovenia) and a Candidate Country (Croatia at the time) creates *de facto* add-on political conditionality. The Croatia-Slovenia case has profound implications on the SFRY successor States and EU enlargement in the Western Balkans.

Keywords: EU Enlargement, Arbitration, Croatia, Slovenia, Serbia

Introduction

The border[1] dispute between Croatia and Slovenia as an inter-State conflict over territory in Piran Bay and the Gulf of Trieste,[2] and along the common land border, has

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[2] Piran Bay is located in the Gulf of Trieste. The mouth of Piran Bay expands to 3.2 nautical miles (Grbec, 2014: 169; PCA Final Award, 2017: 2) equaling 4.8 kilometres. There are three riparian States to the Gulf of Trieste: Italy, Slovenia, and Croatia, see fig. 1 on p. 15.

been locked at a critical stage. With the Final Award of the Permanent Court of Arbitration (PCA) rendered on 29 June 2017, and the fundamental disagreement over its recognition between Slovenia and Croatia, the conflict appears as protracted as ever. This comes regardless of the fact that the arbitration procedure was supposed to constitute a final and binding settlement in the first place.

To be sure, the sobering state of affairs is a mere by-product of the dissolution of Yugoslavia in 1991. The fact that the boundaries of the republics of the Socialist Federal Republic of Yugoslavia (SFRY) had not been established in legal terms, neither on land nor at sea, but were of an administrative nature,[3] has proven a remarkably rock-solid source of conflict between Croatia and Slovenia, two of Yugoslavia's successor States, 26 years on.

A purely bilateral issue in the initial phase after 1991, the conflict later turned into a power struggle between Slovenia as an EU Member and Croatia as a Candidate Country during Croatia's EU accession negotiations in 2008/2009. In a grand diplomatic exercise the settlement of the conflict was finally externalized to an arbitral tribunal (PCA). Croatia withdrew from the arbitration procedure at the end of July 2015 following a major disruption due to a leaked intelligence recording of a conversation between a Slovenian government representative and the then tribunal member appointed by Slovenia (*ex parte* communication). As a result, both the PCA's Partial Award (30 June 2016) denying Croatia's withdrawal (see III.) and the Final Award (29 June 2017) have failed to command the recognition of Zagreb.

Argument and Aim of the Article

Bilateral conflict becomes a *de facto add-on* of political conditionality when it has to be resolved *during* EU accession negotiations. The set-up EU Member State (Slovenia) versus Candidate Country (Croatia) was a prototype situation in 2008/2009, and the Final Award of the arbitration procedure on 29 June 2017 may be seen as the formal end of that process, whilst the substantive conflict is set to continue.

[3] The inter-republican borders were not determined by legal acts, neither by the federal parliament nor by the parliaments of the republics (Dragićević et al., 2013: 10; Milenkoski and Talevski, 2001: 93; Radan, 2000: 7; PCA Final Award, 2017: 9; 84-108). The land boundary was *de facto* governed by the limits of the cadastral units of the municipalities or regions in the border areas of the SFRY republics. This 'cadastral delimitation', or 'administrative border', became the land border after the independence declarations of Croatia and Slovenia on 25 June 1991. At various spots, however, the cadastral records have proven overlapping. As for the sea boundary, the territorial SFRY waters were fully integrated, i.e. there was no internal allocation of territorial waters by republics notwithstanding practical arrangements for policing or fishing. This left the question of maritime delimitation at the time of independence fully open (interview with senior Croatian civil servant, August 2016; interview with senior Slovenian civil servant, October 2016).

The particular salience of this case is the hitherto non-existent situation of two EU Member States facing an unresolved major *territorial and maritime* conflict. Prior to Croatia's EU accession on 1 July 2013, this very conflict had led to a blockade of the accession negotiations of one party to the conflict (Croatia) by the other party who was already an EU member (Slovenia) in an asymmetric power relationship, thus creating some coercive momentum to 'solve' the conflict *during* Croatia's accession negotiations. These features are unique in the history of EU enlargement. More recently, a similar pattern of bilateral issues introduced into accession negotiations has appeared to emerge in the ongoing negotiations between the EU and Serbia (interview with Tanja Miščević, November 2016; interview with Tomáš Prouza, September 2017).[4] At EU level, it is widely perceived that "outstanding bilateral disputes should not have a detrimental effect on the accession process of any country in the Western Balkans" (interview with David McAllister MEP, September 2017).

This study provides an analysis of how the deadlock in the Croatia-Slovenia border issue came about. The aim is to trace the causal mechanisms of "the unfolding of events and situations over time" (Collier, 2011: 824). This is achieved by looking into the actions and behaviour of (i) the agents and institutions of Slovenia and Croatia as parties to the conflict, (ii) the third parties involved in the management of the conflict *within* the EU framework, such as the European Commission and the respective EU Council Presidencies, and (iii) the externalized arbitration procedure at the PCA. Conclusions with regard to bilateral affairs, EU-internal issues, and EU enlargement will pin-point a few matters of urgency.

Analytical Framework

This piece of analytical process tracing is informed by a set of theory-based research deliberations from the following strands of conflict theory. In a nutshell, they contain:

a) *conflict issues* looking into the origins of a conflict, the issues at stake, and the real interests behind the parties' positions (Fischer et al., 2012; Azar, 1990; Burton, 1996);

[4] Croatia, in the first half of 2016, put in reservations on opening chapters 23 (Judiciary and fundamental rights) and 24 (Justice, freedom and security) on the grounds that the Serbian law on war-crime jurisdiction *inter alia* interfered with the sovereignty of other States. Zagreb also had reservations vis-à-vis the non-implementation of a guaranteed seat for the Croatian minority in the Serbian Parliament, and with regard to Serbia's co-operation with the ICTY. The blockade lasted from April to July 2016 and could only be resolved through high-level talks involving the EU Commissioner for enlargement, the Croatian foreign minister, and the Dutch foreign minister representing the Dutch EU Presidency (interview with Member State E civil servant, October 2016; interview with Member State F civil servant, November 2016; the civil servants worked in the Council Working Group on Enlargement COELA in 2016).

b) *conflict dynamics*, assuming that a conflict is not static, tracing periods of protraction or relaxation, deadlocks, or face-saving opportunities (Galtung, 1996);

c) *conflict management* in terms of the conditions under which third parties become involved, the timing for such initiatives, and the issue of what type of third party does get involved, why, and in what role (Bercovitch and Houston, 1996; Zartman and de Soto, 2010; Keohane et al., 2000);

d) *actors in the conflict* focusing on who ran, escalated or dampened the conflict, on the behavioural conduct of the parties and the third parties, and on who initiated bilateral or third-party-involvement phases; and finally

e) *EU power issues*, from both a rationalist and constructivist angle, looking into voluntary and coercive aspects in the resolution efforts, and issues particularly sensitive to national identity or legitimacy concerns (Schimmelfennig, 2008; Schimmelfennig and Sedelmeier, 2004; Freyburg and Richter, 2010; Noutcheva, 2012).

Method

The method employed in this single-case or "within-case" (Bennett, 2010: 207; Collier, 2011: 823) study is inductive, research-based *process tracing* (Trampusch and Palier, 2016: 2). It is understood as "the systematic examination of diagnostic evidence selected and analyzed in light of research questions and hypotheses posed by the investigator" (Collier, 2011: 823), and the discovery of "who knew what, when, and what they did in response" (Bennett, 2010: 209) in a diachronic way (Gerring, 2011: 7).[5]

Elite interviews with a relatively small sample of respondents (*ibid*.: 15) play a central role in process tracing and are at the heart of this study as elite actors are often the only source of first-hand testimony from people directly involved in the events in question (Tansey, 2007). As a result, they ideally produce "oral history" (Grele, 1996) in an impartial way. The author conducted 28 interviews between September 2015 and October 2017.[6]

Documents, in particular draft ones, as a first-hand primary source (Trampusch and Palier, 2016: 6) are an equally useful and indispensable instrument in a process tracer's toolbox to pin-point developments.

[5] It is important to note that qualitative research, such as process tracing, is considered to be informed by theory in order to be able to look for causal mechanisms (Trampusch and Palier, 2016: 6; Lauth, Pickel and Pickel, 2014: 35-36), as without a theory-based approach an analysis rests purely descriptive (Muno, 2016: 84; Falleti, 2006) and may be reduced to "lazy story-telling" (Hedström and Ylikoski, 2010: 59).

[6] The interviewees were 12 politicians and 16 civil servants, national or European Commission, 14 of whom requested to remain anonymous. For a full list see Interviews at the end of the article.

I. The History of the Croatian-Slovenian Border Dispute

This is not the place to look into the history of the North Eastern Adriatic during and before Yugoslav times.[7] Yet, the dismemberment of the SFRY may be seen as a natural starting point for the contemporary conflict between Croatia and Slovenia over the common State border. There were, however, glory days of togetherness in the eve of independence of both countries, not least by way of a joint proposal from October 1990 for a confederation of independent Yugoslav republics (Jović, 2008).[8]

It is useful to recall that the Arbitration Commission of the Conference on Peace in Yugoslavia (Badinter Commission) set up by a special meeting of the EC foreign ministers on 27 August 1991 (the hostilities in Croatia were already in full swing) published their famous Opinion No. 3 on 11 January 1992 stating, *inter alia*, that the former internal SFRY boundaries were to become international boundaries protected by international law (International Legal Materials, 1992). The principle of *uti possidetis* was thus firmly established also in the post-colonial context (Sorel and Mehdi, 1994: 18; Pellet, 1992: 180; for a present-day assessment see PCA Final Award, 2017: 79).[9]

The Bilateral Phase

An early moment of dissenting views on the border emerged at a meeting of a joint working group on 16 March 1993 in Zagreb where Piran Bay (and the peak of Sveta Gera/Trdinov Vrh) became an issue. As for the *sea* border to be delimitated *de novo*, it surfaced that Slovenia claimed sovereignty over the entire bay whilst Croatia opted for a partition of the Bay by equal shares (Cvrtila, 1993: 41). The Slovenian view became official through a Foreign Affairs Committee resolution stating that Slovenia "[should] maintain the sovereignty and jurisdiction over the Bay of Piran as a whole". In addition, "the territorial waters of the Republic of Slovenia [should], at least at a narrow section, join the high seas of the Adriatic" (Memorandum on the Bay of Piran, 7 April 1993: 4-5), the most vital point of national interest for Slovenia (interview with Ivo Vajgl MEP, September 2015). In response to the Slovenian Memorandum, Croatia insisted that the delimitation in the Bay be carried out by the

[7] For an analytical survey in terms of State-building and legitimation during the "Three Yugoslavias" see Ramet (2006); for frontier-making in the Julian Region in particular see Novak (1970) and Lederer (1963); for the complex and troublesome national question in the first years of "Yugoslavia I" see Banac (1988).

[8] Jović demonstrates that the confederation proposal was a tactical move and "a genuine attempt to achieve first a de facto and then a de jure independence without violence" (2008: 251).

[9] For a comprehensive and seminal legal account of the workings and the Opinions of the Badinter Commission see Craven (1996). For a critical view on the application of *uti possidetis* to the SFRY context see Radan (1999).

equidistance method (Sabor resolution "regarding the Determination of the State Border in Piran Bay and the Dragonja River Area", 18 November 1993: 2).

Throughout the 1990s, the Joint Expert Group of the Joint Diplomatic Commission was seeking solutions to the disputed areas of the *land* boundary on a technical/expert level. In late 1994, Slovenia included the three settlements south of the Dragonja (Škudelin, Bužin and Škrile), a strip of land of around 120 hectares along the lower reaches of the river with overlapping claims, in the municipality of Piran (*Official Gazette of the Republic of Slovenia*, No. 60/1994). After a fierce rejection by the Croatian parliament (*Official Gazette of the Republic of Croatia*, No. 71/1994), Slovenia suspended the application of the new law (*Official Gazette of the Republic of Slovenia*, No. 69/1994).

From a Croatian point of view, the initial Slovenian law can be seen as an attempt to annex territory under legal and administrative control of Croatia. Conversely, a Slovenian viewpoint would underline the reassertion of the Slovenian claim over the three hamlets to strengthen its bargaining position in the negotiations with Croatia (Klemenčić and Schofield, 1995: 72; see also Pipan, 2008: 342). The Joint Expert Group produced a report dated 16 December 1996 concluding that nine percent, i.e. 60 km of the joint border, was not aligned (Mixed Slovenian-Croatian Expert Group Report; quoted in PCA Final Award, 2017: 21). The Joint Diplomatic Commission finished its work after the last unsuccessful meeting in July 1998 and negotiations moved to the political level (Sancin, 2010: 96). In 1999, the parties agreed to attempt third-party mediation seeking the good offices of William Perry, a former U.S. Secretary of Defence. Yet, a joint meeting in Washington on 5 May 1999, and visits to Ljubljana and Zagreb in June 1999 produced no results (interview with senior Croatian civil servant, August 2016; interview with senior Slovenian civil servant, October 2016; see also PCA Final Award, 2017: 26).

The Initialed Draft Agreement 2001

What, in retrospect, turned out the most substantial exercise of bilateral diplomacy before 2009 certainly is the initialed[10] Draft Agreement that was reached in July 2001. It had been negotiated between the then prime ministers Janez Drnovšek (Slovenia) and Ivica Račan (Croatia). The negotiations did not come out of the blue, however. They did build on the previous talks at expert and political level in the 1990s. In addition, the recent European Commission progress report for Slovenia had mentioned a settlement over the common State border as an outstanding issue (European Commission Progress Report Slovenia, 2000: 75), and the Croatian side seemed aware that Slovenia was located on the road from Croatia to

[10] The Draft Agreement was initialed by the heads of the two negotiating delegations.

Europe (Arnaut, 2002: 44). In addition, a successful deal on the State border was seen as influencing the two other issues of the joint nuclear power station at Krško (the temporary cut-off of electricity to Croatia on the part of Slovenia) and Ljubljanska Banka (the reimbursement of foreign currency depositors from the SFRY period)[11] in a positive way (interview with senior Croatian civil servant, August 2016).[12] It is important to note from a negotiation point of view that, in early 2001, the two prime ministers who knew each other from the late days of the Yugoslav Federal State Presidency decided to push away the foreign ministers – notwithstanding the preparatory efforts undertaken by them already in 2000 (interview with Alojz Peterle MEP, June 2017) – and tackle the matter personally. The conduct of the negotiations was remarkable as the two prime ministers were negotiating over the text and the maps face to face and alone in the room, while giving feedback to their delegations only every couple of hours (interview with senior Slovenian civil servant from the then Slovenian negotiating team, December 2016).

On substance, the Drnovšek-Račan[13] draft agreement of 17 July 2001[14] represents a fully *negotiated* settlement and a solution *sui generis* with a number of remarkable features:

As for (i) the delimitation at *Piran Bay* and in the *Gulf of Trieste*, the lateral border goes from the outfall of the Dragonja River (St. Odorick's Canal) to the point (on the former SFRY closing line of the bay; PCA Final Award, 2017: 272) which is one fourth of the distance between Cape Savudrija (the Croatian entrance to the Bay) and Cape Madona (the Slovenian entrance at Piran). As a result, roughly three quarters of the Bay go to Slovenia and one quarter goes to Croatia (article 3). From the above point at the mouth of the Bay, the border turns south and runs in an east-west parallel line up to the former Yugoslav-Italian sea border.[15] Article 3 is silent on the nature of the respective waters inside the Bay. However, as the line over the mouth of the Bay is not expressly referred to as the closing line, it appears that the

[11] Many citizens' private foreign-currency deposits were illegally used by the State to cover its demand for foreign-currency reserves. For the SFRY banking system and its need for foreign currency reserves see e.g. Hojnik and Mevel, 2016: 10-11.

[12] The Krško dispute was solved in December 2015 by means of investor-state arbitration, see Arbitral Award ARB/05/24 HEP vs. Slovenia. The Ljubljanska Banka case was to some extent solved through the Ališič judgement of the European Court of Human Rights in July 2014 ordering that Slovenia set up a compensation scheme.

[13] In alphabetical order. In Croatia, the draft agreement is usually referred to as Račan-Drnovšek.

[14] English translation (Slovenian Foreign Ministry) of the draft text initialed by the two heads of the negotiating delegations.

[15] Treaty of Osimo 1975 delimitating the territorial waters of Italy and Yugoslavia. Both Slovenia and Croatia have declared to inherit the respective sea border strip of Yugoslavia. Italy did not object (Klemenčić and Topalović, 2009: 313-314).

status of the waters inside the Bay is considered the respective territorial sea (as opposed to internal waters).[16]

With regard to (ii) *access to the high seas* for Slovenia, a novel approach was agreed on: a "junction" between the territorial sea of Slovenia and the high seas was created by means of a high-seas corridor through the Croatian territorial sea (article 4). As a by-product, the corridor created a triangular enclave of Croatian territorial sea maintaining the country's sea border with Italy (article 5). No sovereign rights were accorded to either State as for the corridor's water column under the sea surface, its seabed and its subsoil (article 4, para. 5). In terms of the international law of the sea, both a corridor between the territorial sea of a State and the high seas, and a quasi-extraterritorial triangle strip of territorial sea were unheard of at the time (see fig. 1).

As for (iii) the *land border*, the three hamlets south of the Dragonja were finally accorded to Croatia, to name but one prominent example.[17] All other disputed spots along the border, such as Trdinov Vrh/Sveta Gera, or the Hotiza-Sveti Martin area along the Mura River, were resolved, too. Annex II of the Draft Agreement contains a verbal description of the border linking 85 points from the tripoint at the border to Hungary to the outfall of the Dragonja into Piran Bay.

It is vital to note that the initialed (Draft) Agreement never entered into force. The Foreign Affairs Committee of the Croatian Parliament rejected the text, so it was never signed by Račan and could obviously not undergo ratification in the Sabor (letter from Račan to Drnovšek, 3 September 2002; see also PCA Final Award, 2017: 26).

In retrospect, several reasons may be identified:

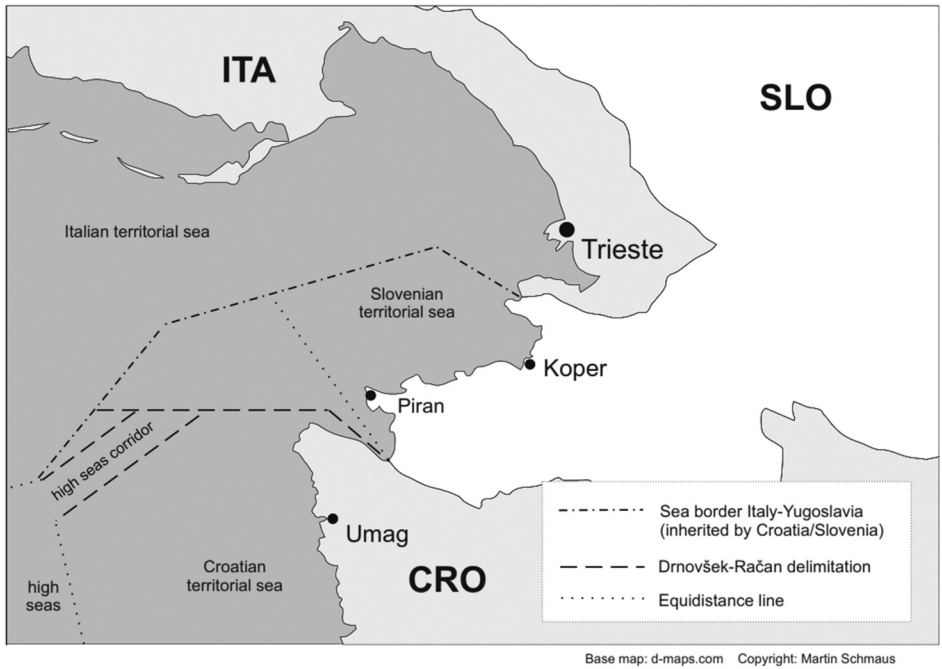
(i) the agreement may, on its substantive provisions, have been too innovative in terms of the hitherto unknown corridor solution, and there were legal doubts as to whether a Croatian triangle enclave disjointed from the rest of the Croatian territorial sea would be recognized by Italy (Arnaut, 2014: 149; see also Grbec, 2014: 176);

(ii) virtually the entire Croatian legal expert establishment was against the text, not least because they had all favored the equidistance line in the Bay, and had not been consulted ahead of and during the negotiations in the first place (see also letter from Račan to Drnovšek, 3 September 2002);

[16] It is important to note that, unlike in the territorial sea, there is no right to innocent passage for foreign vessels in internal waters (see Tanaka, 2015: 78-81; Rothwell and Stephens, 2016: 55-59).

[17] Trading the Dragonja strip in last-minute to secure the approval of the Croatian delegation sparked some fierce criticism and opposition in Slovenia (interview with Alojz Peterle MEP, November 2015).

Figure 1. Maritime Delimitation in Piran Bay and the Gulf of Trieste According to the 2001 Draft Agreement (Schematic View)



(iii) Drnovšek, having secured the support of the opposition (mainly Janša's SDS) on his part, had overestimated the command of domestic support for the deal on the part of Račan (interview with senior Slovenian civil servant from the 2001 Slovenian negotiating team, December 2016). Račan had indeed failed to persuade all coalition parties, most notably Budiša's HSLS/CSLP (interview with Vesna Pusić, February 2017), and the major opposition party HDZ (interview with Ivo Sanader, May 2016);

(iv) the traumatic experience on Croatia's other borders with Serbia and Bosnia-Hercegovina between 1991 and 1995 had created a solid sensitivity towards territorial issues (Klemenčić and Schofield, 1995: 71-72), in particular with regard to the Homeland War (see Koska and Matan, 2017: 129-131; Lamont, 2015: 72-74) when Croatia lost around 20.000 lives (all told, military and civilian deaths; Jović, 2011: 36). The repercussions of the Homeland War led to the Sabor Declaration from October 2000 stating that the country "led a just and legitimate, defensive and liberating, and not an aggressive and conquering war [...] in which it defended its territory [...]", and that therefore "[t]he fundamental values of the Homeland War

are unambiguously accepted by the entire Croatian people and all Croatian citizens" (*Official Gazette of the Republic of Croatia*, No. 102/2000).[18]

In September 2002, Račan sent a letter to Drnovšek saying that the Agreement was no longer a basis for a solution and that he was unable to sign it. Rather, he would propose arbitration to solve the dispute (letter from Račan to Drnovšek, 3 September 2002).

The Bled Agreement 2007

Only in the summer of 2007 was an attempt for a new solution made. The Slovenian Prime Minister Janez Janša and his Croatian counterpart Ivo Sanader met in Bled on 26 August and agreed to submit the dispute to the International Court of Justice (ICJ). Janša, on his part, had not consulted anyone prior to his decision to move away from the Draft Agreement of 2001 (interview with senior Slovenian civil servant from the 2001 Slovenian negotiating team, December 2016). The Bled Agreement tasked a joint team of legal experts with the drafting of the mandate for the Court (Office of the Prime Minister of Slovenia's tape-recording transcript of the Janša statement at the press conference, 26 August 2007: 1).

However, the putting together of the mandate for the ICJ proved a rocky road. Drafts were exchanged following a joint meeting of the expert groups in June 2008, and somewhat unexpectedly, the disagreement over which body exactly the dispute was supposed to be submitted to re-surfaced. This is evident from a Slovenian draft of the Special Agreement, i.e. the mandate for the judicial body, where there is talk of three options ("International Court of Justice in The Hague/Permanent Court of Arbitration/Ad-hoc Arbitration") in virtually any of the draft articles (Special Agreement, undated). Conversely, a Croatian draft exclusively refers to the ICJ (Special Agreement between the government of the Republic of Croatia and the government of the Republic of Slovenia on the submission of the boundary dispute between the two States to the International Court of Justice, September 2008). By early 2009, the positions had further hardened, and Slovenia withdrew its members from the expert groups in March 2009 (PCA Final Award, 2017: 31).

The disagreement on substantive issues of the mandate for judicial adjudication is exemplary for the loaded task of negotiating such a mandate. As Keohane et al. note, the legal norms and requirements as the core issues of a mandate tend to be precisely fixed. Thus, the fiercest kind of bargaining usually ensues over the terms of a third-party judicial body (Keohane et al., 2000: 461-462; 470).

[18] Dolenec (2013: 131) argues that only through the late re-integration of the former Homeland War territory was Croatia's State-building project completed, and that "this enabled the development of a glorified narrative surrounding the founding of the nation".

II. The Genesis of the Arbitration Agreement 2008/2009

France took over the EU Presidency on 1 July 2008. In October 2008, the Slovenian approach of blocking the ongoing EU accession negotiations in a number of areas with Croatia materialized (interview with Member State C civil servant, January 2017). The 'reservations' concerned eleven negotiating chapters on the grounds that the documents submitted by Croatia "prejudice[d] the definition of the border between Slovenia and Croatia" (Information on prejudices in certain negotiating chapters of accession negotiations for Croatia's membership of the EU, Slovenian non paper, 18 December 2008: 1; see also PCA Partial Award, 2016: 3).

The Slovenian paper lists the Croatian legislative acts and implementing legislation as predetermining the common State border, such as the Croatian Territories of Counties, Cities and Municipalities Act referring to, *inter alia*, the three hamlets on the left bank of the Dragonja, or an implementing regulation of the Croatian Marine Fisheries Act mentioning the equidistance line in Piran Bay (Information on prejudices, 2008: 2-3). Croatia considered this approach unfair, as most of the implementing regulations were not part of the Croatian accession documents, and the Slovenian reservations therefore must have been largely based on additional Slovenian screening of Croatian implementing legislation (interview with a former member of the Croatian negotiating team, November 2015).

Still, the Slovenian reservations did not lead to a complete standstill in the chapters concerned, as the screening of the Croatian legislation by the European Commission continued at expert level. Further, other chapters could be opened or provisionally closed as foreseen. The tactics of Slovenia were widely considered strategically and skillfully allotted, ranging from debates at ministerial level to behind-the-scenes action such as getting points off the agenda of the Council Working Group on Enlargement COELA (interview with European Commission civil servant involved in the accession negotiations with Croatia, January 2016).

Yet, the Slovenian case was "a novelty of a country using her status of Member State to enforce its position vis-à-vis a Candidate Country" (interview with European Commission civil servant involved in the accession negotiations with Croatia, January 2016). The reaction amongst the EU Member States was predominantly unenthusiastic (interview with Member State A civil servant, June 2016). "A lot of good-will was lost as the Slovenes had played it rather clumsily not putting much effort into explaining the situation" (interview with Member State B civil servant, December 2016; both were COELA members in 2008/2009). There was not a lot of support for the Slovenian position, and the French EU Presidency initially took a firmly critical stance towards it (interview with European Commission civil servant involved in the accession negotiations with Croatia, January 2016). A few Member States, however, saw the Slovenian call for access to the high seas somewhat justi-

fied in a wider historical context going back to times of the Habsburg Empire (interview with Karel Schwarzenberg, September 2017).

In the final stages of its Presidency France actively pursued defusing the conflict at the ambassador level. The idea was to have an exchange of letters between the Presidency and Croatia stating that "no statement made by Croatia [...] may be relied upon Croatia in any procedure relating to the settlement of the border issue between Slovenia and Croatia in such a way as to imply acceptance [...] by any Member State of the EU". In addition, Slovenian consent to documents and positions in relation to Croatia's EU accession "referring to the border issue between Croatia and Slovenia cannot be interpreted [...] as committing Slovenia and its position regarding this issue" (Presidency's proposal, 15 December 2008). The above letter and the positive reply of Croatia was supposed to function "as a disclaimer" and be part of the accession documents. Slovenia, however, would not accept such a solution (interview with Member State C civil servant from COELA 2008, January 2017).

Such were the circumstances when the European Commission started assuming a mediating role in January 2009. Olli Rehn, the then European Commissioner for Enlargement, went on a sentiment-finding mission to Ljubljana and Zagreb, as he was determined to "avoid a major new frozen conflict in the Western Balkans". He met prime minister Pahor and President Turk in Ljubljana over lunch, and prime minister Sanader and President Mesić in Zagreb for dinner. Whilst Rehn was facing a mix of rational concern and a pretty emotional stance towards the other country respectively, there was all but enthusiasm for his idea of mediation (interview with Olli Rehn, October 2015; interview with a Rehn Cabinet member who was with him on that trip, November 2015). Still, a first confidential draft dated 26 January 2009 was circulated to the parties outlining the basic elements of a mediation exercise performed by a "Senior Experts Group" (SEG) who would make recommendations that Croatia and Slovenia were supposed to respect. The Slovenian reservations were supposed to be lifted as soon as the countries made the declaration on mandating the SEG (Basic elements for a joint statement on European facilitation on the border issue between Slovenia and Croatia, European Commission note, 26 January 2009). As both Croatia and Slovenia appeared not to accept the SEG approach spelt out in more detail in February and March (Draft joint declaration, 20 February 2009; Draft agreement on [SEG] arbitration, 24 March 2009), the phase for setting up a specific arbitral tribunal began (interview with Olli Rehn, October 2015). The Commission had learnt that "a judicial procedure was indispensable for the Croats", whereas taking on board some kind of discretionary powers for the tribunal would be vital for the Slovenes (interview with Frank Hoffmeister, then European Commission Legal Service, June 2016; see also PCA Final Award, 2017: 33).

Rehn I

The first draft for the later Arbitration Agreement, known as 'Rehn I', aiming at establishing and mandating an Arbitral Tribunal, was circulated to the parties on 23 April 2009. The gist of the core provisions was as follows:

- Composition of the Arbitral Tribunal (article 2): the parties appoint by agreement a president and two other members. In addition, each party appoints a further member.[19]
- Task of the Arbitral Tribunal (article 3): the determination of (i) the maritime border (in Piran Bay and in the Gulf of Trieste) and the land border, and (ii) the regime for the use of the maritime areas and Slovenia's "contact" to the high seas.
- Applicable law (article 4): the maritime and land border will be determined by "the rules and principles of international law", i.e. by codified international law and related case law. The regime for the use of the maritime areas and the link of Slovenia to the high seas will be determined "by international law, equity and the principle of good neighborly relations in order to achieve a fair and just result [...]" (Draft Agreement on Dispute Settlement, 24 April 2009).

It is crucial to note that the difference between *international law* and *equity*, generally, is such that the judicial body has substantially wider discretionary powers under equity than if it exclusively applied international law. This distinction, subtle as it may read, has been the *core legal issue of dispute*. In practical terms: the more leeway there is for the legal deliberations of the Tribunal, the greater the potential for maritime territorial concessions in favour of Slovenia compared to what it could be expected to enjoy under the strict application of international law with the latter being closer to Croatia's position. It follows that for the delimitation of the waters in Piran Bay and for the territorial sea border the provisions of the United Nations Convention on the Law of the Sea (UNCLOS)[20] apply, whereas for the

[19] So-called party-appointed members of a tribunal are to increase the parties' trust and involvement in the work of the tribunal. The parties are each entitled to nominate a personality of their choice. The party-appointed member, however, must act independently. This concept is taken from commercial arbitration (see e.g. Lew, 1980: 260).

[20] Article 15 of the UNCLOS stipulates that "where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, 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 breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith." This provision has, through case law, come to be referred to as the equidistance/special circumstances method (Tanaka, 2015: 225-227; Rothwell and Stephens, 2016: 427-436).

access of Slovenia to the high seas a wider set of legal deliberations is available to the Tribunal.

Croatia approved of 'Rehn I' on the understanding that it was presented to the parties on a "take-it-or-leave-it" basis (interview with senior Croatian civil servant, January 2017). The Croatian green light also included a positive Sabor vote on the Draft Agreement across political groups and it was hailed by the domestic media (Internal note Ministry of Foreign Affairs Croatia, 2012: 4). There was no vote in the Slovenian parliament. Instead, the government sent various amendments to Rehn, the most far-reaching being that (i) article 3 would mandate the Tribunal to determine Slovenia's "territorial [sic] contact" with the high seas together with the land and maritime boundary, and not as a second step after the land and maritime boundary as foreseen in 'Rehn I'. Further, (ii) the applicable law in article 4 would, according to another Slovenian amendment, require the Tribunal to "decide *ex aequo et bono* [sic]". It must be noted that *ex aequo et bono* means a deliberation result freely arrived at outside any legal framework. Slovenia also proposed to modify article 9 in a way as to only lift its reservations by the time of the entry into force of the agreement (Slovenian amendments of 15 May 2009 to the Draft Agreement on Dispute Settlement of 24 April 2009, emphasis added; see also Information on the amendments proposed by the Republic of Slovenia, 25 May 2009). This would have implied a considerable amount of time providing for the respective ratification (potentially also subject to a referendum).

Rehn II

The European Commission presented a slightly modified version, labelled 'Rehn II', on 12 June 2009. Not many of the Slovenian amendments appear to have been taken up on substance. Article 3 was amended to the effect that the high seas link for Slovenia was newly termed "junction", a noticeable departure from "contact", and it was placed as a separate item after the maritime and land border item, and followed by the third item of the use of the relevant maritime areas. 'Rehn II' also included a redraft of article 2 (composition of the Arbitral Tribunal) where there was now talk of "a list of candidates established by the [...] European Commission" the parties were supposed to choose from (Draft Agreement on Dispute Settlement, 12 June 2009).

The idea behind "junction" was to have a term "sufficiently neutral and unclear, so that it was acceptable to both sides" (interview with Frank Hoffmeister, then EU Commission Legal Service, June 2016). Croatia approved of the term as it was seen as considerably short of a physical link or of an extension of the Slovenian territorial sea at the expense of the Croatian one. "Junction" may be seen as somewhat opposed to what had been suggested by "territorial contact" in 'Rehn I' in the

first place. Then again, Slovenia could claim that the fact that the link to the high seas was now a separate item did reflect the prominence of the matter and the spirit of its amendments. In any event, Croatia rejected 'Rehn II' for reasons of principle. The Sabor had already accepted 'Rehn I' which was considered a "grand step forward" as it had moved away from the SEG approach largely based on political criteria to a proper judicial procedure mainly based on international law (Internal note Ministry of Foreign Affairs Croatia, 2012: 3-4). Zagreb cancelled a planned trilateral meeting in Brussels at short notice (PCA Final Award, 2017: 38). As a result, the EU Commission suspended further discussions on 16 June (European Commission internal note, undated).

The Road to Stockholm

Sanader resigned in early July 2009, largely on the grounds that he had not managed to lift the Slovenian blockade and that, after all, the EU accession of Croatia had always meant a "life-time project" to him (interview with Ivo Sanader, May 2016).[21] Jadranka Kosor became the new Croatian prime minister. Bilateral relations entered a new period, and the subsequent phase of the negotiations over the Draft Agreement on Dispute Settlement was predominantly conducted on the bilateral level with the European Commission playing a less active role, but kept in the loop at all times (e.g. Swedish Ministry for Foreign Affairs fax to Rehn, 25 September 2009; internal e-mail European Commission, 29 October 2009). Borut Pahor, the Slovenian prime minister, phoned his new counterpart and they met on 31 July at Trakošćan Castle. The meeting was well prepared beforehand on a common understanding that it was time to create a win-win situation and to establish a new level of personal trust (interview with senior Slovenian civil servant, June 2017; internal note Ministry of Foreign Affairs Croatia, 2012: 6). The game-changer appears to have been to reverse the order of tackling the two main issues. Instead of solving the border issue first and subsequently lifting the blockade, the new approach now was to remove the Slovenian reservations by clearing the potentially pre-judging aspects of the Croatian accession documents first to subsequently be able to agree on the terms of the arbitration agreement in a less heated atmosphere.

The Swedish EU Presidency in the second half of 2009 was seen as a remarkably valuable facilitator in that respect by both parties (interview with senior Slovenian civil servant, January 2017; interview with senior Croatian civil servant, January 2017). The Swedish diplomacy appeared well aware of the sensitivities of

[21] Later he faced a trial for corruption around the privatization of the oil and gas company INA and the sale of INA shares to the Hungarian energy company MOL (Sokolić, 2016: 82); in July 2015, however, the Croatian Constitutional Court annulled the corruption conviction and ordered a retrial (Habazin, 2015: 2) which is ongoing at the time of writing.

the parties and of the challenges ahead. What helped, perhaps, is the long-standing Swedish policy to work in favor of EU enlargement which in this particular case appeared "a bit of a political mine-field" (interview with Frank Belfrage, State Secretary in the Foreign Ministry of Sweden in charge of the file at the time, April 2017). At the actual meeting in Trakošćan Castle on 31 July, there was a solid tête-à-tête in which it became clear that Kosor and Pahor were on good terms with one another. A joint understanding was developing that the issue had to be solved at the prime minister level and that arbitration was the right way to do it (interview with Jadranka Kosor, June 2016; interview with Borut Pahor, June 2017).

The following points were agreed on: (i) the Slovenian reservations would be lifted as soon as Kosor sent a letter to the Swedish Presidency clearing the issue of the allegedly pre-judging Croatian accession documents; (ii) the letter would be drafted by a "Silent Diplomacy Group";[22] (iii) negotiations on the Arbitration Agreement would resume on the basis of 'Rehn II' as soon as the Slovenian blockade was lifted; (iv) Croatia insisted on a statement on the Arbitration Agreement not pre-judging "territorial contact" of Slovenia with the high seas; and (v) the Arbitral Tribunal's award should be rendered after Croatia's accession to the EU (interview with senior Slovenian civil servant, January 2017; internal note Ministry of Foreign Affairs Croatia, 2012: 5).

The drafting of the letter was by no means a walk in the park given the still existing level of suspicion and sensitivities on either side. However, the level of personal trust between the negotiators was constantly growing and it was crucial for the Swedish Presidency to feed the notion of "joint ownership" of an agreement on both the letter and the final Arbitration Agreement (interview with Frank Belfrage, State Secretary in the Foreign Ministry of Sweden in charge of the file at the time, April 2017). The letter was finally sent to the Swedish prime minister Frederik Reinfeldt minutes before the meeting of Pahor and Kosor in Ljubljana on 11 September 2009. It read:

> In this context, with the aim of addressing Slovenia's reservations on several negotiating chapters, on behalf of the Croatian Government, I would like to declare that no document in our accession negotiations with the European Union can prejudge the final resolution of the border dispute between Croatia and Slovenia.
>
> The resolution, or the way of resolution of the border dispute will be pursued through the continuation of the talks between Croatia and Slovenia facilitated by the European Union. It was also agreed that both sides will continue negotiations on border dispute settlement with the understanding [...] to submit the border dis-

[22] The Group was composed of State Secretary Iztok Mirošič and foreign policy advisor Marko Makovec (Slovenia), and State Secretary Davor Božinović and foreign policy advisor Davor Stier (Croatia).

> pute to the Arbitral Tribunal [...] (Letter from Prime Minister Kosor to Prime Minister Reinfeldt, 11 September 2009).

Kosor and Pahor managed to sustain their good terms at the Ljubljana meeting despite the fierce respective domestic opposition to the compromise. They announced that the Slovenian reservations would now be officially lifted and that the talks over the Arbitration Agreement would resume. Both issues materialized on 4 October when the respective negotiating chapters with Croatia were opened or closed at an Intergovernmental Conference (IGC) in Brussels. There were three outstanding issues for the consecutive meetings: the composition of the Arbitral Tribunal, the non-prejudging issue for the Slovenian territorial contact, and the timelines for the Tribunal. Whereas the issue of non-prejudgement could only be resolved by means of a unilateral declaration by the Sabor at the occasion of the Croatian ratification of the Arbitration Agreement, the two other issues had to be resolved in the text of the Agreement itself. The President of the International Court of Justice (ICJ) was attributed the last instance of the appointment procedure to secure qualified judges as members for the Tribunal (article 2). As for timelines, a new compromise provision was inserted into article 11 stipulating that all timelines relating to the arbitration procedure would start at the day of signing Croatia's EU Accession Treaty. The de-coupling of Croatian EU accession from the arbitration procedure was largely seen as the main "face-saving opportunity" for both parties (interview with senior Croatian civil servant, January 2017; interview with senior Slovenian civil servant, June 2017; see also PCA Final Award, 2017: 40-41).

The Arbitration Agreement was finally signed by the two prime ministers and witnessed by Reinfeldt on 4 November 2009 in Stockholm. Croatia ratified the Arbitration Agreement together with the unilateral Declaration on 20 November 2009, the Slovenian parliament ratified it on 19 April 2010 together with a Declaration in disagreement with Croatia's Declaration. After the legislative referendum in Slovenia on 6 June 2010, the Arbitration Agreement entered into force on 29 November 2010. On 25 May 2011, the Agreement was jointly submitted to the Secretary General of the United Nations (PCA Final Award, 2017: 43-46).

III. The Arbitration Procedure Before the PCA 2012-2017

The Treaty of Accession of the Republic of Croatia to the European Union was signed in December 2011 in Brussels triggering the timeline for the arbitration procedure.

At a meeting with Rehn's successor as European Commissioner for Enlargement, Stefan Füle, in early January 2012 in Brussels, the two foreign ministers agreed on two of the three independent judges. Remarkably, at the hand-over of the respective envelopes by Žbogar (Slovenia) and Pusić (Croatia) it turned out that

they both favoured Gilbert Guillaume and Vaughan Lowe as the first two candidates from a list drawn up by the European Commission.[23] A few days later, the two foreign ministers met bilaterally and agreed on the third independent tribunal member Bruno Simma in what both sides describe as a relaxed and constructive meeting (interview with Vesna Pusić, February 2017; interview with senior Slovenian civil servant, January 2017). By the end of the month, the two sides had nominated their respective party-appointed tribunal members Jernej Sekolec (Slovenia) and Budislav Vukas (Croatia), so that the Tribunal was completed (PCA Final Award, 2017: 47).

The Hearing 2014

Following three rounds of seminal written submissions (memorials, counter-memorials, and replies to the counter-memorials) by the two parties between February 2013 and May 2014, a two-week hearing was held at the seat of the Permanent Court of Arbitration in The Hague in June 2014 (*ibid*.: 48-50).

Croatia, on the part of foreign minister Pusić, emphasized the government's confidence in the Tribunal and the hope that the Award may strengthen international law. Croatia's Agent and Counsel stressed that according to articles 3 and 4 of the Arbitration Agreement the maritime and land boundary was to be determined first and exclusively by applying international law. Only then could the Tribunal go on to devise Slovenia's junction to the high seas. Regarding the latter, international law was not to be contained, but "supplemented" by equity and the principle of good neighborly relations. The vital interests of Croatia were not limited to EU membership, as claimed by Slovenia, but also concerned Croatia's territorial integrity including her territorial sea (PCA press release, 17 June 2014: 1-2).

Slovenia, on the part of her Agents and foreign minister Erjavec, stressed that the country's vital interest was "direct geographical contact" to the high seas, a notion considered vital for the country's economic, navigational and security interests, and a symbol of freedom and part of its identity as a sea-faring nation and a riparian State to the Adriatic. This vital interest was a "*sine qua non*" by the time the Arbitration Agreement was signed in 2009. The vital interest of Croatia to become an EU Member had already been met by that Agreement in the first place. Slovenia also referred to its historic fishing rights in Croatia's territorial sea off the coast of Istria which could be secured though the junction to the high seas (*ibid*.: 3-4).

[23] Olli Rehn had previously provided a list of eight names in a letter to both foreign ministers on 11 June 2009: Marie Gotton Jacobson (Sweden), Georg Nolte (Germany), Sir Michael Wood (UK), Einar Fife (Norway), Johan Gerrit Lammers (Netherlands), Erik Franckx (Belgium), Robert Badinter (France), and Nicolas Michel (Switzerland) (speaking note for European Commission civil servant for a meeting in the European Parliament, 10 November 2009).

The Summer of Disruption 2015 and the Partial Award 2016

At the end of April and June 2015, Croatia expressed its concern about previous statements of the Slovenian foreign minister from January, April and June of that year respectively, in which he had been confident that the deliberations of the Tribunal were going in Slovenia's favor. The Tribunal, in a letter from 5 May 2015, expressed its concern over the suggestion that one party might have access to confidential information related to the Tribunal's deliberation and reminded the parties that they were to refrain from *ex parte* communication. The Tribunal informed the parties on 9 July that the Final Award was going to be rendered on 17 December 2015 (PCA Partial Award, 2016: 5-6).

On 22 July 2015, transcripts and audio files of two telephone conversations appeared in the Croatian newspaper *Večernji list* and in the Serbian newspaper *Newsweek Srbija* "reportedly involving the arbitrator appointed by Slovenia, [...] Jernej Sekolec, and one of Slovenia's Agents [...] occur[ing] on 15 November 2014 and 11 January 2015 [...]" (*ibid*.: 13).[24]

On 30 July 2015, Croatia notified Slovenia that Ljubljana was, in Zagreb's view, in material breach of the Arbitration Agreement from 2009 which thus entitled Croatia to terminate the Agreement with reference to article 60(1) of the Vienna Convention of the Law of Treaties. The Sabor unanimously adopted a resolution calling on the government to withdraw from the arbitration procedure on 29 July 2015 (*ibid*.: 17; letter from Croatian foreign minister Pusić to European Commission Vice-President Timmermans, 30 July 2015). As Slovenia objected to the Croatian termination request,[25] the Tribunal suspended its consideration of the border dispute as such, and instead started considering the legality of the termination request first. In its Partial Award from 30 June 2016 – following another hearing on 17 March 2016 on the legality of the Croatian withdrawal to which Croatia did not appear – it found that (i) Slovenia did violate the Arbitration Agreement, but not to such an extent that a termination would be justified, (ii) the files introduced by Sekolec contained no new facts which were not already there at the written or oral pleadings, (iii) the Agreement remained in force, and (iv) the recomposed Tribunal[26]

[24] The recordings reveal that Sekolec talked about arbitrators' preliminary views on contested issues, such as the delimitation in Piran Bay and along the lower reaches of the Dragonja, that the two attempted to identify opportunities through which additional influence could be exerted on the Tribunal, and that Sekolec received documents from the Slovenian Agent for submission as his own to the other arbitrators (PCA Partial Award, 2016: 14-16).

[25] For the legal arguments of the parties see PCA Partial Award, 2016: 20-36.

[26] Sekolec had resigned on 23 July (the Slovenian Agent had also resigned), Vukas had done so on 30 July 2015. On 3 August, Judge Abraham who had been newly nominated by Slovenia resigned. Both parties did not nominate party-appointed successors, so the Tribunal itself nomi-

whose ability was unaffected to render a Final Award impartially would start considering the merits of the case *de novo* (PCA Partial Award, 2016: 36-58).[27]

Ilić (2017) argues that arbitrator impartiality and procedural fairness were not given enough weight in the Tribunal's Partial Award deliberations, and that the consequences of *ex parte* communication in the form of replacing the party-appointed arbitrators, as in the Croatia v. Slovenia case, were relatively slight with regard to the sought-after award, i.e. the main elements foreseen in the Arbitration Agreement: (i) delimitation in the Bay, and (ii) access to the high seas for Slovenia.

The Final Award 2017

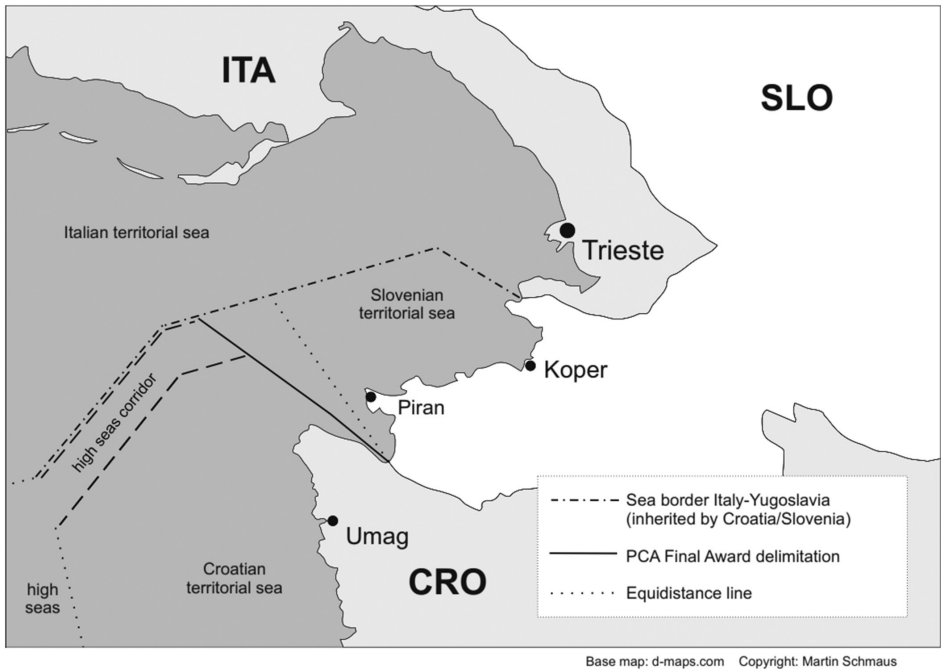
On 29 June 2017, the Tribunal issued the Final Award. As for (i) the delimitation in *Piran Bay* and in the *Gulf of Trieste*, the Tribunal decided that the status of the Bay was internal waters (see footnote 16) and delimitated the Bay on the basis of the actual management (joint fishing reserve) and control (by vessels from Koper police station) of the Bay (*uti possidetis effectivités*) at the date of independence. As a result, the Tribunal apportioned roughly three quarters of the Bay to Slovenia and one quarter to Croatia. Remarkably, the Tribunal expressly adopted the delimitation line in the Bay foreseen by the Drnovšek-Račan Draft Agreement of 2001 (PCA Final Award, 2017: 267-281; see also I. above). The territorial sea was delimitated by means of the equidistance/special circumstances method (see also footnote 20) taking into consideration the configuration and direction of the Croatian coastline. As a result, the equidistance line was somewhat modified in Slovenia's favor to also account for the "boxed-in" nature of Slovenia's maritime zone (PCA Final Award, 2017: 311-324).

With regard to (ii) Slovenia's "*junction to the high seas*", the Tribunal created a "Junction Area" along Croatia's territorial sea border with Italy, notably an area within the Croatian territorial sea, in which vessels and aircraft enjoy the same

nated Rolf Einar Fife and Nicolas Michel on 25 September (PCA Final Award, 2017: 53-54). EC President Juncker and Vice-President Timmermans, in a letter to prime ministers Cerar and Milanović, stated that unresolved border disputes had an impact on the application of EU law, and expressed their expectation that both parties would respect the forthcoming final ruling of the Tribunal (letter Juncker/Timmermans, 30 September 2015). Milanović replied that "I do not believe that there was any impact on EU law, and that the Tribunal should dissolve itself" (letter Milanović to Juncker/Timmermans, 1 October 2015).

[27] Croatia had also questioned the jurisdiction of the Tribunal to rule in its own matter (*la compétence de la compétence*). The Tribunal noted that international courts or tribunals do indeed possess inherent jurisdiction to determine their own jurisdiction citing, *inter alia*, the Tadić case before the ICTY and various ICJ and arbitration cases (PCA Partial Award, 2016: 37-41). For a critical view on the PCA's decision with regard to arbitrator impartiality and procedural fairness see Ilić (2017).

Figure 2. Maritime Delimitation in Piran Bay and the Gulf of Trieste According to the PCA Final Award 2017 (Schematic View)



navigational rights to and from Slovenia as on the high seas. As for the (iii) *regime* of the Junction Area, the Tribunal stated that the freedom of communication in the Junction Area excluded exploration, exploitation or the management of living or non-living natural resources of the waters, the seabed and its subsoil. The freedom of passage, the Tribunal noted, was not to be suspended by Croatia under any circumstances (*ibid*.: 360-364; see fig. 2).

The disputed (iv) land border spots were cleared using the principle of legal title (*uti possidetis juris*) derived from the cadastral limits. Where no title could be established, the factual control of the area (*uti possidetis effectivités*) served as a basis for the Tribunal's decision. A full survey regrettably is beyond the scope of this paper. To name but a few prominent spots, the three hamlets in the Dragonja strip south of the river were allocated to Croatia as the river was considered the boundary, the Brezovec-del hamlet in the Hotiza/Sveti Martin area was confirmed to be Slovenian, and the peak of Sveta Gera/Trdinov Vrh the Tribunal considered Croatian territory (*ibid*.: 114-238).

On the day of the PCA Final Award, the Slovenian prime minister Miro Cerar said at a press conference in Ljubljana:

> In accordance with the arbitration ruling we will first call on the Republic of Croatia to pursue joint implementation. To this end, [...] we will shortly [...] be sending the Croatian side a formal call for dialogue regarding fulfillment and implementation of the ruling within a reasonable time frame [...] (Slovenian Prime Minister's Office press release, 29 June 2017).

At a press conference on the same day in Zagreb, the Croatian prime minister Andrej Plenković said:

> The first and most important message of the Croatian government is that today's arbitration decision does not bind us in any way, nor are we thinking about applying its contents. The second message is that Croatia adopted its position on the arbitration very clearly and unambiguously in parliament two years ago today [...] (Croatian Prime Minister's press release, 29 June 2017).

Some Member States, the U.S. and the European Commission subsequently stuck out their heads by taking a position. The Benelux Prime Ministers stressed "the importance of the rule of law as the foundation upon which the EU is built [...]" calling "on both sides to respect the arbitration award in a constructive spirit" (Joint Benelux Statement on Croatia-Slovenia arbitration award, 4 July 2017). A German Foreign Ministry statement said that "[...] preserving the integrity of international courts and tribunals is in the common interest of all states. EU member states must play an exemplary role in this" (German Foreign Ministry press release, 30 June 2017). The British Embassy in Zagreb, upon request, gave a statement to the Croatian media saying that the UK "support[ed] the Tribunal process [and] the lawful resolution of disputes", but that "the bilateral dispute was a matter for the Croatian and Slovenian Governments, which the UK wishes to see solved" and that "it is for the two parties to decide themselves how that is achieved" (UK Embassy Zagreb statement, 30 June 2017). The U.S. Embassies in Ljubljana and Zagreb issued a statement saying "we are not taking sides in this dispute. It is up to [the] two countries, both EU members and NATO allies, to resolve this bilateral issue, and we are hopeful they can do so" (U.S. Embassy in Slovenia Statement, 29 June 2017).[28] European Commission Vice-President Timmermans said that he "expects both parties to implement [the ruling]" (EC Daily News, 5 July 2017). It must be noted in this context that the entire Slovenian political and diplomatic elite had been engaged in "silent diplomacy" over the preceding months to highlight the importance of the PCA ruling (interview with Tanja Fajon MEP, November 2016).

[28] The identical text featured in the statement of the U.S. Embassy in Zagreb on 30 July 2017.

On 12 July 2017, Cerar and Plenković discussed the way forward in a 40-minute tête-à-tête meeting in Ljubljana, agreed to keep in touch on the border issue, not to raise tensions, refrain from any unilateral acts, and to continue the dialogue on their next meeting agreed to be held in Zagreb in September. In the second part of the meeting, held in a friendly and open atmosphere, the delegations were tasked with preparatory work for the Zagreb meeting on the border issue and on all other open bilateral issues (interview with senior civil servant present at the meeting).

Whilst there appears to have been some sense of de-escalation at the above bilateral Ljubljana meeting, things soon re-escalated, however. At a Council meeting of the Organization for Economic Co-operation and Development (OECD) in Paris on 8 September, Slovenia and Hungary objected to Croatia's bid for OECD membership. Slovenia opposed the Croatian bid on the grounds that Zagreb was not implementing the arbitral award on the border (STA news, 8 September 2017).[29] Furthermore, on 15 September, Slovenia filed a lawsuit against the European Commission for granting Croatia the derogation right to use "Teran" on wine labels of Croatian Istrian wines with "Teran" originally being a Slovenian Protected Designation of Origin (STA news, 15 September 2017; European Commission news, 19 May 2017).

On the sidelines of the UN General Assembly in New York on 19 September, Plenković and Cerar agreed to hold the bilateral follow-up meeting in Zagreb on 27 September. Two days later, however, Plenković, in his speech before the UN referring to the *ex parte* communication during the arbitration procedure, publicly accused Slovenia of "undermining the rule of law" (Address at the 72nd Session of the General Assembly, 21 September 2017: 6),[30] which led Cerar, who apparently took

[29] Hungary's objection was related to Croatia's arrest warrant vis-à-vis the CEO of Hungary's energy company MOL (MTI news, 11 September 2017; see also footnote 21).

[30] The Croatian prime minister, *inter alia*, said the following: "We believe that disputes should be resolved through peaceful means and in conformity with international law. It is of the utmost importance that all international adjudications meet the highest legal standards and fully respect their relevant rules. Compromising the impartiality or independence of international adjudicators and tribunals, as was the case in the *terminated* Arbitration Process between Croatia and Slovenia, *makes their decisions legally void* and left Croatia with no choice other than to withdraw from the arbitration process. We consider that this example of *undermining the rule of law* is a discouragement for States considering third-party dispute settlement" (Address UN General Assembly Session, 21 September 2017: 5-6; emphasis added). One must keep in mind that the Tribunal, in its Partial Award, found that (i) Slovenia did violate the Arbitration Agreement, but not to such an extent that a termination would be justified, (ii) the files introduced by Sekolec contained no new facts which were not already there at the written or oral pleadings, (iii) the Arbitration Agreement remained in force, and (iv) the recomposed Tribunal's ability to render a Final Award impartially was unaffected (PCA Partial Award, 2016: 36-58).

this statement as an offence, to cancel his foreseen visit to Zagreb as his counterpart's words had destroyed the basis for bilateral dialogue (TV SLO1 Odmevi, 21 September 2017).

IV. Conclusion

Looking back, the bilateral relations between Croatia and Slovenia soon proved tainted by the border conflict. Whilst the initial efforts after 1991 to tackle the overlapping cadastral records along the *land* border appeared not entirely fruitless at expert level, it soon became clear that especially the *sea* border required some real endeavors at the political level.

Only ten years after the independence of Croatia and Slovenia was a heroic effort made. In an unprecedented spirit of collaboration, mutual trust, and with a unique negotiation methodology, the two prime ministers embarked on and seemed to have achieved a fully negotiated settlement in the summer of 2001. A lack of domestic support in Croatia and the country's traumatic experience in the Homeland War, however, appear to be the main causes for the failure of the Drnovšek-Račan Draft Agreement.

In terms of conflict issues and the underlying real interests of the parties, it appears fair to say that the Croatia-Slovenia border case is a conflict between (territorial) *sovereignty* and *security* (of access to the high seas) where a 'compromise' is extremely difficult to achieve, even if the political will was there on both sides, as, besides, it has become historically loaded over time.

Another voluntary effort in 2007 demonstrates that the submission of a dispute to a third-party judicial body (as opposed to aiming at a negotiated settlement) is impossible if the opposing positions – strict application of international law versus discretionary powers for a settlement containing extra-legal deliberations – cannot be relaxed whilst drafting the mandate for a judicial procedure. It only became possible under the coercive momentum created by the Slovenian blockade of the Croatian EU accession negotiations in 2008/2009. Far from being the ideal place for the solution of a bilateral conflict, skilled facilitation by the EU Commission, the Swedish Presidency, and not least a temporary revival of the bilateral collaborative spirit seemed to have created a somewhat face-saving solution on the eve of Croatian EU accession.

An arbitration procedure that temporarily imploded leading to the uncompromising walk-away of Croatia from the third-party conflict resolution process, however, resulted in a re-escalation of the conflict and leaves the border dispute yet again in fairly troubled waters.

Bilateral and EU-Internal Implications

This is not the place for fortune telling, and it remains to be seen whether the PCA Award can in one way or the other serve as an inspirational basis for a final bilateral agreement after all these years of constant finger-wagging to no avail. After the 'New York incident' from September 2017, and a few months into the general election in Slovenia in the spring or early summer of 2018, usually not a good time for 'concessions' in bilateral issues anyway, the prospects of a bilateral implementation agreement on the border in the upcoming months appear rather distant. In a similar vein, having to overcome the spirit of the unanimous Sabor vote from July 2015 (on leaving the arbitration procedure) would require a cross-party feat of strength in Croatia, most certainly not a walk in the park either. There is perhaps a window of opportunity in the second half of 2018, i.e. after the general election in Slovenia. Yet, at the time of writing, no momentum for further high-level dialogue on a future agreement on the common State border appears to be in sight.

With regard to the EU level, it is worth noting that there is an implementation deadline for the PCA Award of six months in article 7(3) of the Arbitration Agreement. The European Commission already made it clear that it assumed jurisdiction over the Award, that the arbitration ruling had some direct effect on the implementation of EU law, and that the Commission may well ask the European Court of Justice (ECJ) for preliminary rulings on this matter (European Commission meeting minutes, 4 July 2017: 21).

To that end, a provision of the Croatian EU Accession Treaty is likely to surface. It contains a reference to the full implementation of the arbitral award in the definition of the Croatian and Slovenian territorial sea for the purposes of the EU Fisheries Policy (Treaty of Accession of the Republic of Croatia to the EU, *Official Journal of the European Union*, L112/10, 2012, Annex III.5).

The beginning of 2018 is thus ear-marked as a potential first phase of hard-and-fast EU impact where the European Commission, in its role as 'Guardian of the Treaties', could find itself under pressure to start formal proceedings vis-à-vis Croatia (the Slovenian government aims at being ready for implementation by the end of December 2017; interview with senior Slovenian civil servant, October 2017) on the grounds of non-implementation of the PCA Award – regardless of any (currently rather unlikely) progress on the bilateral front. Yet, such EU Commission action (which Croatia opposes as it does not recognize the arbitral award), justified as it may well be from a legal-political point of view, would be prone to aggravate an already tense situation, and would naturally offer little room for manoeuvre with regard to a face-saving and de-escalating way forward. Alternatively, Slovenia may itself want to take (legal) action and bring the matter before the ECJ in order to obtain clarification.

Implications on EU Enlargement

The impact on EU enlargement is deeply profound. Most EU Candidate Countries in the Western Balkans share the 'conflict heritage of Yugoslavia'. Bilateral disputes include

(i) territorial issues (such as the sea border between Croatia and Montenegro at Prevlaka/Kotor Bay, the sea border between Croatia and Bosnia-Hercegovina at Neum and BiH's access through Croatian internal waters to the high seas, and the land border between Croatia and Serbia along the Danube), and

(ii) grave matters confined to the violent break-up of the SFRY, such as conflicting views on war-crime jurisdiction in the case of Croatia and Serbia, and, indirectly, the long-ranging dispute between Greece and FYROM/Macedonia over the State name and related historic claims.

It takes little imagination to acknowledge that any of those bilateral issues must be solved *ahead* of EU accession to avoid Member States from using their 'inside-the-club' status to enforce their position vis-à-vis Candidate Countries through outright blackmailing. If there is one lesson to be learned from the accession negotiations of Croatia and, tentatively, also from those of Serbia (the Croatian reservations from early 2016 related to the *opening* of Chapters; the *closing* of Chapters is still to come), it is that if the EU sticks to the present operational design of dealing with bilateral questions in the context of accession negotiations, we run the risk of having to forget about EU enlargement for the foreseeable future.

In conclusion, the settlement of bilateral conflict ought to be more expressly added to the EU's political criteria for accession, and *de-coupled* from the accession negotiations. Third-party conflict resolution may still be the way forward, although the experience with the Croatia-Slovenia case may be seen as sobering. Thus, mandates to submit disputes to judicial third-party resolution ought to be supplemented by express confidentiality and independence provisions, however, to reduce the potential for the frustration of arbitral procedures in the future. For, ultimately, without the good will of the parties to a conflict and without the absence of direct coercion, further EU enlargement in the Western Balkans is very likely to become little more than wishful thinking.

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