

CROATIA V. SLOVENIA

A Case Summary for the
Maritime Dispute Resolution Project



U.S.-ASIA LAW INSTITUTE
NEW YORK UNIVERSITY SCHOOL OF LAW

Maritime Dispute Resolution Project

Arbitration between the Republic of Croatia and the Republic of Slovenia

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A research project of the
U.S.-Asia Law Institute

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Contents

Project Overview	1
Section I – Background and Summary of the Case.....	2
Section II – Summary of the Key Procedural Steps.....	3
Section III – Summary of Key Substantive Issues	8
A. Competency of Tribunal.....	10
B. Severity of Misconduct.....	11
C. Materiality of Breaches	11
D. Status and Allocation of Bay of Piran.....	12
E. Delimitation of the Territorial Sea.....	12
F. Access to “Junction Area”	13
Section IV – Implementation of the Tribunal’s Decision.....	14
Section V – Conclusions.....	16

Project Overview

This case summary was prepared as part of the U.S.-Asia Law Institute's Maritime Dispute Resolution Project. The institute began the project in 2018 in order to better understand the circumstances in which interstate maritime disputes are successfully resolved and distill lessons for governments.

The two main questions the project seeks to answer are:

- When are international institutional dispute resolution mechanisms effective in resolving maritime disputes?
- What insights can be applied to the maritime disputes in East Asia?

To address these questions, leading international lawyers and legal scholars held workshops to analyze selected disputes from around the world. This and other case studies were prepared for the workshops and are based on the official records.

Citation:

Arbitration between the Republic of Croatia and the Republic of Slovenia, Croatia v Slovenia, Final Award, PCA Case No 2012-04, 29th June 2017, Permanent Court of Arbitration [PCA]

Section I – Background and Summary of the Case

This arbitration case concerns a territorial and maritime dispute between the Republic of Croatia and the Republic of Slovenia, two neighboring states that are located geographically in central Europe along the northeastern shores of the Adriatic Sea. This dispute originated when each of them declared their independence from the Socialist Federated Republic of Yugoslavia on June 21, 1991. As Croatia and Slovenia became sovereign states, questions arose as to what should be their land boundary, how the territorial sea should be allocated between them, and whether the “sea-locked” Slovenia should have any transit rights through Croatia’s territorial sea to access the non-territorial seas of the southern portion of the Adriatic Sea and the greater Mediterranean Sea.

Not unlike many territorial and maritime disputes around the world, attempts by these two states to resolve their border-boundary dispute have been neither one-track nor streamlined. Initially, they sought to negotiate bilaterally without the aid of any outside party. Over time, however, they reached a political consensus to resolve the dispute through a third-party mechanism, ultimately concluding an agreement to pursue arbitration. For nearly two years, their arbitration proceedings with a duly-constituted five-member panel of arbiters followed what could be reasonably characterized as normal practices and procedures. But then information surfaced that the lead agent of one party (i.e., Slovenia) had engaged in improper *ex parte* communications with the arbiter that it had appointed. Over concerns of procedural integrity, Croatia withdrew immediately from participating further in the arbitration proceedings. Nevertheless, a reconstituted panel of arbiters examined the alleged misconduct and decided to proceed to arbitrating the dispute on its merits. In June 2017, the

arbitral tribunal issued an award on the case, which Croatia has repeatedly stated it would not follow.

The Final Award in this case addressed several substantive issues, some of which were land-related in nature and others of which were maritime in nature. Keeping with the focus of this project, this case will not discuss the land-related issues. With regards to the maritime issues in this dispute, the arbitral tribunal delineated how to allocate the internal waters of a bay and associated territorial seas between two succeeding states, primarily through the use of *effectivités* elements used for resolving land sovereignty disputes. In addition, the tribunal utilized legal standards and extra-legal standards to specify the transit and use rights enjoyed by the sea-locked Slovenia.

Section II – Summary of the Key Procedural Steps

Like other international border-boundary disputes, the case between Croatia and Slovenia did not arrive immediately at the forum of arbitration.

Initially, the national governments of these two states attempted to resolve the dispute over their shared land border via bilateral consultations and written exchanges of positions. Less than a year after Croatia and Slovenia each declared their independence from Yugoslavia (June 25, 1991) and joined the United Nations (May 22, 1992), the government of Slovenia proposed a draft agreement to the government of Croatia (March 26, 1992), which sought to settle their land border without addressing their unresolved maritime boundary. Two months later, surveying and mapping experts from the two governments met for the first time to discuss the matter (May 26, 1992). Following this first meeting of these technical experts, the two governments exchanged a series of draft border agreements during the summer and fall of 1992. At this point in the

process, the two governments jointly and formally established an “Experts Group.” The arbitration record is not entirely clear whether the composition of this formal Experts Group was different from the informal “surveying and mapping experts” who had previously met in mid-1992. Nevertheless, the Experts Group held several bilateral meetings between December 1992 and June 1993. One year later, the Experts Group adopted a common report (June 2, 1994), which appeared to summarize the areas of convergence and divergence between the two sides for settling a land border.

Separately but concurrently, the two governments also pronounced their perspectives on their unresolved maritime boundary for the Bay of Piran, a body of water that is adjacent to portions of the two states’ adjoining coastline. During the same period of time that the Experts Group was holding meetings to discuss the unresolved land border, the government of Slovenia unilaterally issued a memorandum about the legal nature of the Bay of Piran and the maritime boundary between the two states (April 7, 1993). Soon thereafter, the Committee on International Relations of Slovenia’s National Assembly adopted “Standpoints and Conclusions” on this same matter (May 26, 1993). But five months later, Croatia’s National Assembly unilaterally issued its own set of “Standpoints” regarding the unresolved maritime border between the two states (November 18, 1993).

Once the technical experts representing Croatia and Slovenia had shared their respective government’s perspectives on the land border thoroughly, the two governments concluded an “Agreement on the Establishment and the Mandate of Joint Bodies for the Identification and Demarcation of the State Border” (July 30, 1993). Pursuant to this bilateral agreement, the two governments established a “Joint/Mixed Diplomatic Commission” to conduct negotiations on the land border and maritime boundary

between the two states. The Diplomatic Commission then established a subsidiary “Joint/Mixed Border Demarcation Commission.” The Border Demarcation Commission then set up a “Joint/Mixed Expert Group” (September 1995), which was composed of geodetic and technical experts, and whose purpose was to identify the contested parts of the land border between the two states. These three joint bodies each held bilateral meetings over the next two years. The Expert Group then issued a report (December 20, 1996), which was adopted by the Border Demarcation Commission. Bilateral meetings continued thereafter, until the Diplomatic Commission met one last time, during which it adopted meeting minutes that contained “Agreed Conclusions” (July 1998).

During these five years of negotiations via Joint/Mixed commissions and groups, the senior political leaders of Croatia and Slovenia also met occasionally and attempted to negotiate elements of their border-boundary dispute. Of note, the prime ministers of the two governments met in September 1995, during which Slovenia’s prime minister proposed a particular allocation of the Bay of Piran, but Croatia’s prime minister rejected that proposal. In October 1997, the foreign ministers of the two governments attempted, but failed, to reach agreement on a settled border. Those senior-level negotiations continued in 1998 and 1999, without successfully yielding an agreement on either the land border or the maritime boundary. Two years later, the prime ministers of the two states intensified their negotiations, resulting in them initialing a draft “Agreement on the Common State Border” (July 20, 2001). The Committee on International Relations in Slovenia’s National Assembly approved this draft agreement, but the Foreign Affairs Committee of Croatia’s Parliament rejected it.

Eventually, efforts by the two states to resolve their border-boundary dispute shifted from bilateral negotiations to the use of a

third-party mechanism. During the foreign minister negotiations in 1998-1999, Croatia became the first of the two parties to adopt a political position that the border-boundary dispute should be submitted to a third-party for resolution. Thereafter, the first effort by both parties to actually pursue the assistance of a third party occurred in 1999, when the two governments agreed to submit their territorial sea dispute to mediation facilitated by Dr. William Perry, the former U.S. secretary of defense. These mediation meetings occurred in July and November 1999, but were unsuccessful. After Croatia rejected the draft “Agreement on the Common State Border” in 2001, its government’s position was that the dispute should be referred to international adjudication.

Between 2002 and 2009, the two governments engaged in a series of negotiations that steered their dispute to resolution by a third party. Croatia’s prime minister proposed to Slovenia’s prime minister that the land border dispute be resolved by binding arbitration (September 3, 2002). Thereafter, the government of Croatia proposed on several occasions between 2003 and 2005 that the dispute be resolved by international adjudication at the International Court of Justice, but the government of Slovenia maintained a preference to resolve it by diplomatic negotiations. In 2007, the two governments reached agreement in principle that their border-boundary dispute should be referred to the International Court of Justice. But during follow-on negotiations by a “Mixed Group of Legal Experts” about the specific terms for that adjudicatory process, Slovenia shifted the discussion to using *ad hoc* arbitration, in order to accommodate “applicable principles broader than the pure application of international law.” By the end of 2008, however, Croatia had rejected Slovenia’s proposal to arbitrate their border-boundary dispute.

What altered the trajectory of these negotiations in 2009 was not a change of heart by either government, but rather the externality of

both states joining the European Union. While Slovenia had already become a member of the European Union in May 2004, Croatia had not yet joined by the end of 2008 but still sought to do so. With Slovenia leveraging its influence as an existing member to scrutinize the accession process for Croatia, the European Union's Commissioner for Enlargement launched an initiative in January 2009 to facilitate the resolution of Croatia-Slovenia border-boundary dispute, in order to harmonize relations between an existing member and a prospective member of the intergovernmental organization. While Croatia continued to maintain the political position of resolving this dispute by the International Court of Justice, the Commissioner for Enlargement provided the two governments with a Draft Agreement on Settlement (April 22, 2009), which notably outlined the compromise of an arbitral tribunal to resolve the border-boundary dispute. In mid-2009, the prime ministers of the two governments resumed bilateral negotiations, and thereafter agreed upon (October 26, 2009) and signed (November 4, 2009) the final text of the Arbitration Agreement. Upon review and adoptive actions by the national legislatures of the two states, the Arbitration Agreement entered into force one year later (November 29, 2010).

Given that the two states were bound by the Arbitration Agreement under the international law of treaties, it is worth highlighting several of the key provisions of that agreement. First, the specified tasks of the arbitral tribunal were not limited purely to the maritime aspects of the dispute, but rather included resolving both the land and maritime aspects of the dispute. Second, the tribunal was empowered not only to apply international law, but also to consider other factors including equity and the "principle of good neighborly relations." Third, the two parties mutually declared the critical date of their border-boundary dispute to be June 25, 1991 (i.e., the date when the two states declared independence), which reduced the number of unilateral acts as being relevant to the arbitration and

discouraged either side from engaging in additional unilateral acts during the arbitration process. Fourth, the two parties preemptively bolstered the final outcome of the arbitration, by specifying that a majority of the tribunal members would make decisions, by prohibiting the issuance of individual or dissenting opinions by members, by expressly stating that awards “shall be binding” on the parties, and by mandating the parties to implement the arbitral award within six months. Fifth, the parties assured one another that they would not worsen the dispute, by agreeing they would refrain from any action or statement that might intensify the dispute or jeopardize the work of the arbitral tribunal. If each of these provisions of the Croatia-Slovenia agreement provides a good practice for other states to follow to resolve similar border-boundary disputes by arbitration, then the combination of these five provisions could arguably serve as a best practice of arbitration procedures for resolving such disputes.

Section III – Summary of Key Substantive Issues

In the arbitration case between Croatia and Slovenia, the arbitral tribunal would have likely issued just one “Final” award to address substantive issues if the case had proceeded as planned. However, unforeseen developments arose during the proceedings, which are discussed in more detail below. These developments necessitated the tribunal also issuing a “Partial” award to address questions surrounding the integrity of the process.

For nearly two years, the arbitration proceedings of this matter followed what could be reasonably characterized as normal practices and procedures. But information then surfaced about potential misconduct by one of the parties in the case, Slovenia. In early 2015, Slovenia’s foreign minister made comments in two interviews with Slovenian television journalists, during which the

foreign minister stated: (a) he “had a meeting last year in The Hague” and “made it very clear to the Arbitral Tribunal” about Slovenia’s position on an issue (January 7, 2015), and (b) he “had ‘unofficial information’ that the arbitral tribunal would determine that the Republic of Slovenia had contact with the high seas” (April 30, 2015). The implications of these remarks led the government of Croatia to forward a formal letter to the arbitral tribunal requesting the government of Slovenia to explain them. Less than two months later, newspapers in Serbia and Croatia published transcripts and audio files of two telephone conversations between the lead agent of Slovenia’s government for the arbitration and the Slovenia-appointed member of the arbitral tribunal (July 22, 2015). During these *ex parte* conversations, the Slovenia-appointed member revealed details from the confidential conversations within the tribunal and preliminary conclusions on the issues pending before the tribunal. Additionally, Slovenia’s lead agent provided unattributed documents to the Slovenia-appointed member for the purpose of influencing other members of the tribunal and recommended ways for the appointed member to shape the views of other tribunal members. Within a week of these conversations becoming public, the government of Croatia discontinued its participation in the arbitration (July 31, 2015). In the months following thereafter, the arbitral tribunal was recomposed with several new members, held a hearing on the integrity issues (March 16, 2016), and issued a Partial Award focused on three such issues (June 30, 2016).

Once the integrity issues were addressed, the tribunal proceeded with consideration of the arbitration case on its merits in late 2016. The government of Croatia was no longer participating in the arbitration proceedings. But it is important to note that Croatia had already participated fully with presenting its case on the merits. More than three years prior, both Croatia and Slovenia had submitted their Memorials and accompanying documents to the

tribunal (February 11, 2013). Thereafter, both Croatia and Slovenia had filed their Counter-Memorials and accompanying documents (November 11, 2013). From June 2 to 13, 2014, both Croatia and Slovenia appeared before, presented arguments to, and answered questions from the tribunal at the Peace Palace, in The Hague. Thus, although Croatia refused to participate in the proceedings after mid-2015 when Slovenia's misconduct surfaced, it had already enjoyed the opportunity for its perspective to be heard by the arbitral tribunal. The tribunal issued its Final Award on June 29, 2017.

Regardless of whether the issues addressed by the tribunal's Partial Award and Final Award in the case should be characterized as "substantive" or "procedural," each of them was "key" in the effort to resolve the border-boundary dispute between these two states. Moreover, each provides lessons for other states to consider for resolving similar disputes in a proper and competent manner. Therefore, six issues addressed by the arbitral tribunal's two awards are summarized below.

A. Competency of Tribunal

The first issue addressed by the arbitral tribunal in its Partial Award was whether the tribunal was competent to assess the issues raised by Slovenia's misconduct. The tribunal invoked the general principle of international law reflected in long-standing jurisprudence that "an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction." The tribunal observed that this principle is necessary, or else "any party to an arbitration, in objecting to the jurisdiction of a tribunal, would be able to stop the proceedings and thus could escape its obligation to arbitrate." The tribunal found that Croatia's decision to terminate the Arbitration Agreement "does not deprive the

Tribunal of that jurisdiction.” Accordingly, the tribunal concluded that it retained jurisdiction to determine whether Croatia had lawfully terminated the Arbitration Agreement.

B. Severity of Misconduct

The second issue addressed by the arbitral tribunal in its Partial Award was whether Slovenia’s misconduct had tainted the proceedings in such a way that the proceedings could not go further. At the outset of this portion of the analysis, the tribunal acknowledged, “International courts and tribunals have rarely been faced with situations comparable to the present one.” The tribunal then reviewed the remedial actions taken after Slovenia’s misconduct had surfaced, including the resignation of Slovenia’s lead agent, the resignation of several tribunal members and the selection of replacement members by the tribunal’s president (i.e., rather than selection by the parties). As such, the tribunal determined that it had been “properly recomposed” and that the “procedural balance between the Parties” had been “secured.”

C. Materiality of Breaches

The third issue addressed by the arbitral tribunal in its Partial Award was whether there had been a material breach of the Arbitration Agreement by Slovenia, thereby entitling Croatia to terminate the agreement. The tribunal cited the definition of “material breach” under international law, as reflected in Article 60 of the Vienna Convention on the Law of Treaties. Applying that legal standard to the circumstances of this situation, the tribunal concluded that Slovenia’s breaches of the Arbitration Agreement did not “render the continuation of the proceedings impossible” and did not “defeat the object and purpose” of the agreement. Consequently, the tribunal determined that Croatia was not entitled to terminate

the Arbitration Agreement and the agreement remained in force as a matter of international law.

D. Status and Allocation of Bay of Piran

Devoting the first 173 of the 373 total pages in the Final Award to the land-related issued of the border-boundary dispute, the arbitral tribunal then turned its attention to analyzing the first of three maritime-related issues of the dispute. This first maritime issue involved the status and allocation of a body of water adjacent to portions of the two states' adjoining coastline, which the parties alternately referred to as the "Bay of Savudrija/Piran" (by Croatia) and the "Bay of Piran" (by Slovenia). First, the arbitral tribunal reviewed the historical record concerning this body of water and applied Article 7 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone (Territorial Sea Convention) and Article 10 of the U.N. Convention on the Law of the Sea (UNCLOS). The tribunal determined that the Bay of Piran constituted internal waters prior to the dissolution of the Socialist Federated Republic of Yugoslavia and that dissolution "did not have any effect on altering the acquired status." Second, the arbitral tribunal applied the legal principles of *uti possidetis* and *effectivités* to post-dissolution actions by the governments of Croatia and Slovenia within the Bay of Piran. The tribunal determined that Slovenia had exercised relatively greater – but not exclusive – control over the waters within the Bay, and therefore drew a maritime boundary within the Bay that allocated a larger portion of those internal waters to Slovenia (i.e., approximately 80%-20% allocation).

E. Delimitation of the Territorial Sea

The second maritime issue addressed by the arbitral tribunal in the Final Award involved the delimitation of the territorial sea between Croatia and Slovenia. The tribunal applied Article 12 of the

Territorial Sea Convention and Article 15 of the UNCLOS, and considered long-standing jurisprudence of international tribunals for delimiting territorial sea boundaries (i.e., a starting point of an equidistant line, followed by a consideration of any “special circumstances” that warrant modifying that equidistant line). The tribunal determined that the equidistant line for the territorial seas of Croatia and Slovenia must be modified in order to “attenuate” the “boxing in” effect of Slovenia’s maritime zones. More specifically, the tribunal sought “only to ensure that the drawing of the maritime boundary...does not disproportionately exacerbate Slovenia’s boxed-in condition.” Consequently, the tribunal modified the territorial sea boundary between Croatia and Slovenia accordingly.

F. Access to “Junction Area”

After allocating the internal waters and delimiting the territorial sea boundary, the arbitral tribunal addressed a third maritime issue in the Final Award, which the tribunal and the two parties referred to as the “junction to the high sea.” The tribunal concluded that this phrase as used in the parties’ Arbitration Agreement was somewhat imprecise, given that none of the waters in question were high seas within the meaning of the term under the UNCLOS. The tribunal pointed out that the whole of Slovenia’s territorial sea boundary is adjacent to the territorial sea of either Croatia or nearby Italy, so there was no corridor of “high seas” where the freedoms referred to in Article 87 of the UNCLOS exists as a matter of law. But the parties’ Arbitration Agreement empowered the arbitral tribunal to apply “international law, equity and the principle of good neighborly relations in order to achieve a fair and just result by taking into account all relevant circumstances.” The tribunal adhered to that broad mandate. Recognizing the unusual geography of the northern Adriatic Sea plus Slovenia’s vital national interest of having access by sea and by air, the arbitral tribunal determined

that all ships and aircraft of all States enjoy *as a matter of equity* the same rights of access to and from Slovenia in the “junction area” that they enjoy *as a matter of law* on the high seas.

Section IV – Implementation of the Tribunal’s Decision

As mentioned previously, the two states involved in this case concluded a binding agreement governing their arbitration, which was tailored for the specific circumstances of their border-boundary dispute and contained express provisions for ensuring the results of the arbitration would be implemented by the parties. In particular, Article 7 of the Croatia-Slovenia Arbitration Agreement states: “The Parties shall take all necessary steps to implement the award, including by revising national legislation, as necessary, within six months after the adoption of the award.” Given that the arbitral tribunal issued its Final Award on June 29, 2017, the governments of Croatia and Slovenia were obligated under Article 7 of the Arbitration Agreement to implement the award by December 29, 2017.

Due to the improper conduct by Slovenia during the arbitration proceedings, Croatia has not implemented the Final Award of the arbitral tribunal. After Slovenia’s misconduct surfaced and prior to the arbitral tribunal issuing its Final Award, the government of Croatia notified the government of Slovenia that it was terminating its obligations under the Arbitration Agreement (July 30, 2015). Concurrently, the government of Croatia informed the arbitral tribunal that it could not “further continue the process [of the present arbitration] in good faith.” During the final weeks leading up to the six-month implementation deadline, the prime ministers of Croatia and Slovenia met in Zagreb and discussed the effect of Final Award between the parties (December 19, 2017). Of note,

Croatia's Prime Minister reiterated at that meeting that his state's government continued to reject the tribunal's ruling.

In contrast, Slovenia has taken actions to implement the tribunal's Final Award. Prior to the six-month implementation deadline, Slovenia's prime minister held a press conference, during which he stated, "We intend to implement the ruling." During the Zagreb meeting between the two states' prime ministers, Slovenia's prime minister stated that "implementation is the only option." On the six-month anniversary of the Final Award, *The Slovenia Times* reported that the government of Slovenia had started implementing the Award, but only for the maritime boundary. Having already enacted national laws to implement the boundary, the government of Slovenia issued fisheries regulations going into effect on the six-month anniversary, which allowed Croatian fishermen to fish in Slovenia's territorial sea but required them to obtain Slovenian permits to do so. Additionally, Slovenia's foreign minister sent two diplomatic notes to the government of Croatia: one called for a bilateral dialogue to implement the Final Award, while the other protested against Croatia's violations of the maritime boundary set by the Final Award.

Subsequent to the six-month implementation deadline, the government of Slovenia has attempted to increase legal and political pressure on the government of Croatia to implement the Final Award. Given that the two states are now members of the European Union, Slovenia filed an action against Croatia before the European Commission (March 16, 2018), complaining that Croatia is violating its obligations under European Union treaty law by refusing to implement the Final Award of the arbitral tribunal. Thereafter, Slovenia brought a legal action against Croatia in the European Union Court of Justice (July 13, 2018), arguing the same violation of European Union treaty law. At the present date, this legal action is pending before that court. Meanwhile, Slovenia's

foreign minister raised the issue during meetings with U.S. Secretary of State Mike Pompeo and National Security Advisor John Bolton during a recent visit to Washington (December 14, 2018). Nevertheless, the arbitral tribunal's Final Award has not yet been fully implemented (i.e., by both parties).

Section V – Conclusions

This case provides several lessons for the successful resolution of maritime disputes.

First, the resolution of a maritime dispute via international arbitration can be a long and winding road, but that circuitous process is not necessarily bad. Consider that the life of the Croatia-Slovenia dispute was 26 years: beginning in June 1991 (when the dispute crystallized) and ending in June 2017 (when the arbitral tribunal issued the Final Award). Within those twenty-six years, the two claimants devoted 10 years (1992-2001) attempting to resolve the dispute by negotiations at multiple levels (i.e., prime ministers, foreign ministers, technical experts, legal experts), followed by another eight years (2002-2009) redirecting their efforts towards putting their dispute before a third-party dispute mechanism. Once the parties agreed to submit the dispute to an arbitral tribunal, this third phase spanned another eight years (2009-2017). Yet through a shared experience during most of those years, the claimants communicated, postured, and eventually settled their way into a process in which each felt their interests would be heard, and a position in which each felt the final outcome would be equitable.

Second, the terms of an arbitration agreement are critical for setting the tribunal and the parties up for success. Claimants are able to tailor their arrangement for the particular circumstances which they faced in their specific dispute. Some third-party mechanisms have inherent limitations of competency and jurisdiction to resolve

narrow categories of disputes; for example, the International Tribunal for the Law of the Sea and arbitral tribunals established under the UNCLOS can adjudicate only certain types of maritime disputes. In contrast, Croatia and Slovenia empowered an *ad hoc* arbitral tribunal to render decisions on both territorial and maritime aspects of their dispute. Moreover, they were able to specify what should be the appropriate criteria or standards to apply for resolving their dispute. In other words, Croatia and Slovenia authorized the arbitral tribunal to apply not only international law, including but not limited to the law of the sea, but also other, extra-legal factors. Thus, just as the two parties would have retained the discretion to apply both legal standards and extra-legal factors if they had negotiated a solution to their dispute, they similarly empowered a third-party to explore and develop a creative solution that was about more than mere application of international law.

Third, misconduct by one party to an international maritime dispute can quickly unravel any success of a cooperative effort by both parties to utilize a third-party mechanism for resolving that dispute. Croatia and Slovenia devoted nearly a quarter century to finding a mutually acceptable way to resolve their dispute and positioning a third party to resolve that dispute for them. The number of work hours consumed by government officials and billable hours by attorneys representing them in this effort were surely significant. The political risk incurred and political capital expended by the government leaders of these two nations is incalculable. Notwithstanding those tangible and intangible investments for a solution, the simple but egregious misconduct by either one or a few government officials employed by a claimant caused the other claimant to lose faith in the process entirely and walk away from it immediately. While the Final Award by the arbitral tribunal might be *de jure* binding on both parties, the reality of the rules-based international order and this situation shows that that same award can be *de facto* ineffectual if one party refuses to

respect and comply with it. International justice depends upon the consent of the states involved. As this situation between Croatia and Slovenia demonstrates, such consent can be persistently fragile and preserving it can be quite challenging, regardless of how well-reasoned the third party might be in ruling on procedural and substantive issues of the dispute.

Fourth, the implementation of a binding arbitration ruling can involve a party or the parties utilizing creative means to leverage available elements of the rules-based international system. Given the potential disparity in third-party adjudication that is *de jure* binding but *de facto* ineffectual, the parties to the dispute must explore possible options for enforcing or implementing an adjudicated solution. For example, in this situation, Slovenia coupled the legally binding nature of the tribunal's ruling with the additional legal obligations shared by both claimants as member of the European Union to adhere to international law in their relations with fellow members. The success of this creative approach is yet to be determined. Assuming it were to succeed either partially or fully, employing a similar approach is not necessarily available to claimants in territorial and maritime disputes for states located elsewhere in the world, given some of the unique characteristics of the European Union. For example, contrast the nature of the European Union with the nature of the Association of South East Asia Nations (ASEAN), and the nonexistence of any common regional government organization in northeast Asia. Thus, claimant states in either of those sub-regions would lack this particular creative means for enforcing a binding ruling against one of its neighbors. But that does not necessarily mean that they lack any means. States must be able and willing to think unconventionally to uphold the rules-based international system.



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