



PERMANENT MISSION OF THE REPUBLIC OF CROATIA TO THE UNITED NATIONS

820 Second Avenue, 19th Floor
New York, N.Y. 10017 USA

Tel: (212) 986-1585
Fax: (212) 986-2011

No. 55/2016

The Permanent Mission of the Republic of Croatia to the United Nations presents its compliments to the Permanent Missions and Permanent Observer Missions accredited to the United Nations and with reference to the arbitration between Croatia and Slovenia to resolve the two states' territorial and maritime border dispute at an *ad hoc* Arbitral Tribunal, has the honour to state the following position of the Croatian Government:

By its actions, the Republic of Slovenia has caused irreparable harm to the arbitration process and the work of the Arbitral Tribunal, committing at the same time material breach of the Arbitration Agreement. The Republic of Croatia, in order to protect its legitimate interests and rights, reacted to the breach by ceasing to apply the Arbitration Agreement and initiating its termination. The Republic of Croatia expects that the Arbitral Tribunal terminates its work without delay and expresses its willingness to work with the Republic of Slovenia in the spirit of good neighbourly relations to resolve the matter in accordance with international law.

The Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia was signed on 4 November 2009. It entered into force on 29 November 2010. Following the appointment of the President of the Arbitral Tribunal and its members, the two States submitted three rounds of written pleadings – on 11 February 2013, 11 November 2013 and on 26 March 2014. Oral hearings were held in The Hague from 2 to 13 June 2014.

Throughout the proceedings Croatia has acted in good faith in carrying out and respecting all obligations under the Arbitration Agreement. Croatia invested significant resources to ensure that the proceedings would succeed and bring about a final determination of the state border between the two States. On the other hand, Slovenia has clearly breached the provisions of the Arbitration Agreement and undermined the role, the trustworthiness and the authority of the Arbitral Tribunal. Slovenia has irrevocably corrupted the proceedings and the sound administration of justice. As a result, the process has been fundamentally tainted and no award issued under these legally and ethically completely compromised proceedings could be considered as effective, authoritative or credible.

**Permanent Missions and Permanent Observer Missions
to the United Nations
New York**

This first indication of Slovenia's regrettable actions came as early as in February 2013, when the Slovenian Parliament, in authorising Slovenia's first written submission in the arbitration, adopted a public decision with the effect that Slovenia would not recognize an award that did not meet its expectations. (In express terms, Slovenia's parliamentary decision stated that Slovenia "will consider any decision of the (...) Tribunal that would not ensure [its] territorial contact (...) with the High Seas (...) as a decision ultra vires (in violation of the mandate of the Arbitral Tribunal).") This decision, while indicative of Slovenia's further intentions, was for all intents and purposes a negation of the Arbitration Agreement.

In April 2015, following reports throughout the Slovenian media that Slovenia had "unofficial" information about the Tribunal's award and that it had communicated certain messages to the Tribunal, which were not found in the official verbatim of the proceedings, Croatia approached the Arbitral Tribunal and informed it of its concerns that Slovenia might have a "separate channel" of communication with the Tribunal. The Tribunal investigated the matter and assured Croatia that there were no reasons for concern.

In July 2015, in manifest contradiction with those assurances, recordings of telephone conversations between a member of the Arbitral Tribunal and the Agent of Slovenia were made public. Transcripts of recordings plainly revealed that confidential information about the Tribunal's deliberations had been disclosed to Slovenia and that Slovenia had been continuously and meticulously informed about internal deliberations of the Arbitral Tribunal. Further, the transcripts and recordings demonstrated that the Member of the Tribunal had requested the production of additional arguments and evidence from the Agent of Slovenia, that Slovenia had provided such arguments and evidence, and that these were then made available to the Tribunal. In this way, the factual record of the case was changed well after the closing of the oral hearings. The Member of the Tribunal and the Agent of Slovenia also colluded to conceal the true source of these documents and the Member of the Tribunal presented to the Arbitral Tribunal these documents, prepared by the Slovenian side, as being produced by himself, thus including them into the official records of the proceedings.

Slovenia has neither denied, nor challenged acts revealed by these recordings.

These actions have irrevocably tainted and irreparably damaged the entire process. It is impossible to conclude that the arbitrators have not been influenced by Slovenia's actions and by materials made available to them through the actions of the arbitrator serving as a conduit for Slovenia. The grave wrong that has occurred cannot be repaired by tinkering with the procedure, or merely replacing one or two arbitrators. The entire process has been profoundly and irreversibly corrupted and stripped of basic credibility and integrity required for third party dispute settlement.

Such conduct amounts to a repudiation of the Arbitration Agreement, and a rejection of the most fundamental principles that govern the integrity of international proceedings such as this. Under international law, these acts, including those of the Agent of Slovenia, are directly attributable to Slovenia. In accordance with the Vienna Convention on the Law of Treaties, they constitute material breach of a treaty, entitling Croatia to seek its termination and suspend its operation.

Accordingly, and to protect its rights under international law, subsequent to a unanimous decision of the Croatian Parliament, on 30 July 2015 Croatia initiated the procedure to terminate the Arbitration Agreement, ceased to apply it and withdrew from the arbitration process. Slovenia objected and the question of termination of the Arbitration Agreement is to be resolved bilaterally “through the means indicated in article 33 of the Charter of the United Nations”, as foreseen by the Vienna Convention on the Law of Treaties. The Convention also avails Croatia of another mechanism, i.e. conciliation, to resolve the question of termination of the Arbitration Agreement. Nevertheless, the Vienna Convention on the Law of Treaties does not provide a role for the Arbitral Tribunal in this process.

As for the arbitration process itself, Croatia submits that – to assure the sound administration of justice, and for legal and ethical reasons – the Arbitral Tribunal should terminate its work with immediate effect. An international adjudicatory process as tainted and compromised as this cannot reasonably continue in any form. Any award it might give would lack essential authority, and propel the parties to an interminable dispute. Such an award could never be implemented, or enforced. Consequently, any effort to continue this arbitration would be futile and counterproductive.

Immediate termination of these compromised proceedings is of paramount importance for peaceful settlement of disputes between states and the system of international adjudication as a whole, as it is for the bilateral relations between Croatia and Slovenia. It also has the potential of reassuring the many states with unresolved bilateral issues – in Southeast Europe and elsewhere – that their disputes shall indeed be resolved competently, independently and impartially, thus reaffirming their confidence in international adjudication that meets all appropriate legal and ethical standards. The adverse consequences of Slovenia’s actions are widely recognised. In this context, Croatia notes that the prompt resignation of the President of the International Court of Justice (ICJ) from this Arbitral Tribunal confirms its concerns. The President of the ICJ, after initially accepting appointment by Slovenia to replace the Member of the Tribunal directly involved in the wrongdoing with the Agent of Slovenia – resigned on 3 August 2015, having served on the Tribunal for just six days. In resigning, he stated that he “agreed to be appointed to the Arbitral Tribunal (...) in the hope that this appointment would help restore confidence between the Parties and the Arbitral Tribunal and to allow the process to continue normally, with the consent of both Parties”, but decided to resign when he came to appreciate that “the current situation cannot meet that expectation”.

In December 2015, the Arbitral Tribunal requested further written submissions from the two States on the most recent developments and scheduled an additional oral hearing for 17 March 2016. Since Croatia withdrew from the proceedings, it did not formally react to these communiqués: it will not do so, and will not participate in the oral hearing. The Arbitral Tribunal is aware of Croatia's position. At the time when it initiated the termination of the Arbitration Agreement and ceased to apply it, Croatia provided the Tribunal with all the relevant information on the recent events, allowing it to decide on the termination of its work.

This arbitration cannot resolve the outstanding border issue between the two States. Croatia has invited Slovenia to discuss other modalities to settle the outstanding border issues in accordance with international law and in the spirit of good neighbourly relations stands ready to resolve the matter bilaterally, as many states have done so far, or refer it to a different international judicial body.

In the meantime, the border between the two States has existed as an international border for twenty-five years and normal everyday life of people living on both sides of the border functions well, with full local border cooperation. At sea, pursuant to the International Maritime Organization's navigational routes in the Northern Adriatic, all vessels enjoy unimpeded access to and from Slovenian ports, which register continuous rise in passenger and cargo throughput. The two States are members of the European Union and NATO. Therefore, there exist no pressing obstacles which should prevent the two States from creating conditions for a constructive exchange on the way forward, leaving behind a failed arbitration process which endangers their bilateral relations and the confidence of States in international adjudication.

The Permanent Mission of the Republic of Croatia to the United Nations avails itself of this opportunity to renew to the Permanent Missions and Permanent Observer Missions accredited to the United Nations the assurances of its highest consideration.



New York, 16 March 2016