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Slovenia-Croatia Border Dispute: From »Drnovšek-Račan« to »Pahor-Kosor« Agreement

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ABSTRACT

Almost two decades of negotiations between Slovenia and Croatia were necessary to conclude an agreement to submit their long-standing land and maritime border dispute to an ad hoc arbitration. The article presents a brief overview of negotiation efforts that first led to initialing in 2001 of the 'Drnovšek-Račan agreement', and the process that followed and finally culminated, with the assistance of the Commission of the EU, in the signing of the 'Pahor-Kosor agreement' in 2009. It examines the contents of the two treaties, comparing the solutions reached therein, taking into account their different nature, as the first represents a bilateral treaty envisaging the final resolution of the border issue, while the second only establishes a third party – an ad hoc arbitral tribunal – and envisages future procedure in which it will decide on the disputed questions between the two States. Furthermore, it is argued that the conclusion of the Pahor-Kosor agreement took place in particular political circumstances, when both States, with identical strategic goals realized their interrelatedness and seized a special momentum which enabled the leaderships of the two countries to find a balanced solution and convincingly defend it before their respective domestic publics.

KEY WORDS

Slovenia-Croatia border dispute, land border, maritime delimitation, negotiations, arbitration

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Introduction

Slovenia and Croatia, two neighboring countries, one already in and the other at the doorsteps of the European Union, have been ever since their independence engaged in resolution of open bilateral issues that arose following the dissolution of the SFRY. Among these[2], and probably the most burdensome for the otherwise good neighborly relations, is the long-standing territorial and maritime border dispute between the two States[3]. The predecessor State never introduced delimitations of the maritime areas between former republics, which is why after the dissolution of the SFRY, the new independent States established on its territory could not declare, as they did with the administrative land borders between the former republics, taking into account the general international law principle of *uti possidetis iuris*[4], that the previous maritime delimitations shall become Sate borders at sea.

A decade of negotiations to resolve the territorial dispute between Slovenia and Croatia led to drafting in 2001 of the Treaty between the Republic of Slovenia and the Republic of Croatia on the Common State Border, which is also known as 'the Drnovšek-Račan agreement'[5]. This agreement was however only initialed. While Slovenia was willing to sign it, Croatia refused to do so and years of further negotiations and third-party assistance

[2] Other two important but still unresolved issues between Slovenia and Croatia relate to the jointly-owned Krško nuclear power plant and the outstanding debts of the no longer existent bank Ljubljanska banka to Croatian depositors.

[3] A plethora of works had been written on the subject-matter of this dispute analyzing it from the perspective of international law (e.g. Degan, Vladimir-Đuro (2007): Consolidation of Legal Principles on Maritime Delimitation: Implications for the Dispute between Slovenia and Croatia in the North Adriatic. Chinese Journal of International Law 6: 601-628; Vidmar, Srecko ''Lucky" (2002): Compulsory Inter-State Arbitration of Territorial Disputes. Denver Journal of International Law and Policy 31: 87-111; Arnaut, Damir (2002): Stormy Waters on the Way to the High Seas. The Case of the Territorial Sea delimitation Between Croatia and Slovenia. Ocean and Coastal Law Journal 8: 21-61; Avbelj, Matej and Letnar Černič, Jernej (2007): The Conundrum of the Piran Bay. Slovenia v. Croatia—The Case of Maritime Delimitation. Journal of International Law & Policy V (6): 1-19; Zgonec-Rožej, Miša (2003): Reševanje mejnega spora med republiko Slovenijo in Republiko Hrvaško. Pravnik 58 (9/12): 593-620; Celar, Branko (2004): Mednarodnopravne možnosti rešitve mejnega spora med Republiko Slovenijo in Republiko Hrvaško. X. dnevi javnega prava, Portorož, 14.-16. junij 2004. Inštitut za javno upravo: 539-557 – the list is by no means exhaustive).

[4] This course of events was recommended also by the Arbitration Commission of the International Conference on the Former Yugoslavia of 11 January 1992 (so-called Badinter Commission) in its advisory Opinion No. 3 ('…if nothing happens to the contrary, the former borders assume the character of borders protected by international law. This is the conclusion resulting from the principle of the territorial *status quo* and particularly the principle *uti possidetis iuris*…').

[5] It is so called after the two Prime Ministers of Slovenia and Croatia at the time, Janez Drnovšek and Ivica Račan.

were necessary before a new treaty, the Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia, the so-called 'Pahor-Kosor agreement'[6] (hereinafter referred to also as: the Arbitration Agreement), could be concluded with the aim to finally resolve this long-standing dispute.

This article presents a brief overview of negotiation efforts that led to the drafting and initialing or conclusion of the Drnovšek-Račan and Pahor-Kosor agreements, respectively. It continues with a short description of the dispute and thereafter focuses on the selected aspects of the contents of both agreements. It seeks to offer a comparison of solutions reached in both of them, to the extent such comparisons, due to their different nature, are at all possible. While the first one represents a bilateral treaty envisaging the final resolution of the border issue, the second one only establishes a third party – an *ad hoc* arbitral tribunal – and envisages the procedure in which it will reach a binding decision on the disputed questions between the two States. Furthermore, it is argued that the compromise reflected in the Pahor-Kosor agreement was possible as a consequence of particular political circumstances existing at the relevant time. Namely, both States, with identical strategic goals - resolution of the border dispute and the EU membership for Croatia – realized their interrelatedness and seized a special momentum which enabled the leaderships of the two countries to find a balanced solution and convincingly present it as such to their respective domestic public, which was a precondition for success[7].

The two decades of attempts to resolve the border dispute

The history of efforts to peacefully resolve the dispute between Slovenia and Croatia regarding the maritime boundary and land border can be in

[6] After the Prime Ministers of both States concluding it, Borut Pahor and Jadranka Kosor.

[7] Some examples of legal writings following the conclusion of the Pahor-Kosor agreement published in Slovenia include: Arah, Metka (2010): Arbitraža – da ali ne?. Pravna praksa 22 (Priloga): II-VII; Bučar, France (2009): Arbitražni postopek – kaj tvegamo in kaj smemo tvegati. Pravna praksa (Priloga) 45: VI-VII; Drenik, Simona (2009): Arbitražni sporazum: potek pogajanj in dosežene rešitve. Pravna praksa (Priloga) 45: II-V; Krivic, Matevž (2010): Zavajanje s pobožnimi željami po kopenski meji do Savudrije. Pravna praksa 21: 8-9; Letnar Černič, Jernej (2009): Premislek o 3. členu Arbitražnega sporazuma med RS in RH. Pravna praksa 47: 16-17; Sancin, Vasilka (2009): Sosedstvo je vzajemna reč. Pravna praksa 39: 3; Sancin, Vasilka (2009): Kompromis med Slovenijo in Hrvaško. Pravna praksa 45 (Priloga): VII-X; Škrk, Mirjam (2009): Al' prav se piše pravizhnost ali pravičnost?. Pravna praksa 26: 6-7.

general divided into two main phases: the first one started in 1992 with the establishment of the first working groups to deal with the border issues[8] and lasted until 2001, when the the Drnovšek-Račan Agreement was initialed by the heads of delegations of both sides, and the second that commenced afterwards and lasted until the conclusion of the Pahor-Kosor Agreement in 2010. During these years Slovenia and Croatia, in accordance with the fundamental international law principle of peaceful settlement of international disputes[9], used or proposed the use of several different means of peaceful settlement of disputes, independently or in combination, including negotiations, mediation, conciliation, judicial settlement, and finally agreed to an *ad hoc* arbitration.

The first era of negotiations

First, the Working Group on Border Issues in 1993 and 1994 managed to identify 53 differences bigger than 50 meters on the disputed land territory. Already in 1993 the two States established a Mixed Diplomatic Commission for Establishment and Demarcation of Slovenia-Croatia Border and Final Treaty on State Border[10]. This commission managed to resolve most of open issues regarding the land border, but failed to find a consensus in four land areas: Prekmurje, Sekuliči, Tomšičeva parcela-Snežnik and Dragonja, and was equally unable to find a solution for the maritime delimitation. While some proposals to divide the disputed land areas in Prekmurje, Sekuliči and Tomšičeva parcela- Snežnik in equal parts (50:50) were exchanged between the two parties, they were unable to find any acceptable proposal for division of Dragonja area and delimitation of maritime areas. However, already in 1995 both States mutually recognized legitimacy of their claims to respect *status quo* on the day of 25 June 1991 – the date of their declaration of independence[11] – on all disputed land areas. Slovenia further claims

[8] In Slovenia: Strokovna delovna skupina za vprašanje meje.

[9] Embodied also in Article 2, paragraph 3 of the Charter of the United Nations (3 Bevans 1153 (1968)) and further elaborated in the Declaration on the Principles of International Law Concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations (GA Res. 2625 (XXV), UN GAOR, 25th Sess., UN Doc. A/RES/25/2625 (1970)).

[10] In Slovenian: Mešana diplomatska komisija za ustanovitev in demarkacijo slovensko-hrvaške meje in končni sporazum o meji.

[11] The obligation to respect the *status quo* derives from the constitutional documents of both States (the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia of 25 June 1991 and the Constitutional Decision on the Sovereignty and Independence of the Republic of Croatia of 25 June 1991) and from the Opinion No. 3 of the Arbitration Commission of the International Conference on the Former Yugoslavia of 11 January 1992. In 2005, the States confirmed their commitment to respect status quo also in the Joint Declaration on Avoidance of Incidents signed by the Slovenian and Croatian Foreign Ministers at Brioni on 10 June 2005.

the right to territorial contact with the High Seas and the right to the integrity of the Bay of Piran (under its sovereignty), while Croatia claims a right to territorial contact with the territorial sea of Italy and requests an equidistant line to be applied for the maritime delimitation in the Bay of Piran. Recognition of legitimacy of these claims was also a leitmotiv in negotiations for the conclusion of the Drnovšek-Račan Agreement. When the Mixed Diplomatic Commission finished its work after its last unsuccessful meeting in 1998, the bilateral talks continued in the political arena at the level of Foreign Ministers of both countries[12].

In 1999, an attempt was made to try to resolve the dispute with the assistance of a third party, but a former U.S. Defense Secretary William Perry who was chosen as a mediator failed in his endeavors.

In 2001, bilateral negotiations continued at the level of the resumed Mixed Diplomatic Commission, and after unsuccessful conclusion of talks, intensive negotiations evolved at the level of heads of government through the special negotiating delegation. This led on the 20 July 2001 to initialing of the Drnovšek-Račan agreement, following its unanimous endorsement by the two governments the day before. However, in September 2002 the then Croatian Prime Minister sent a letter to the Prime Minister of Slovenia stating that Croatia could not pursue the conclusion of the Drnovšek-Račan agreement and that initialing of it that had already taken place had no legal effect[13].

There were no bilateral negotiations pursued between the two States in the years to follow (2001-2005) and it was only after a number of incidents in the disputed areas that the Foreign Ministers of Slovenia and Croatia on 10 June 2005 at Brioni signed a joint declaration, the so-called Brioni declaration on the avoidance of incidents. Its purpose was not to solve the border issue, but to ensure respect for the *status quo* as at 25 June 1991 in order to avoid further incidents[14].

[12] http://www.vlada.si/si/teme_in_projekti/arbitrazni_sporazum/zgodovina_resevanja_vprasanja_meje/PType/95/(18 October 2010).

[13] Ibid.

[14] It is important to briefly mention another development that is essentially related to the border dispute. Namely, in October 2003 Croatia proclaimed the Croatian ecological and fisheries protection zone (EFPZ) and declared as its provisional boundary towards Italy the boundary established by the Agreement between the government of the SFRY and the Government of the Italian Republic on the delimitation of the continental shelf between the two States of 8 January 1968, to which Croatia claims to be a successor State. After the protests by both, Slovenia and Italy, and several

In July 2007 Slovenia proposed to Croatia that the border dispute be resolved through conciliation proceedings before the Court of Conciliation and Arbitration of the Organization for Security and Cooperation in Europe (OSCE), but Croatia rejected this option. Soon afterwards, in early August 2007, Croatia proposed to Slovenia that the dispute be submitted to the International Tribunal on the Law of the Sea (ITLOS) in Hamburg. This proposal was however unacceptable to Slovenia, as Slovenia insists on the comprehensive global resolution of border dispute which would include not only maritime delimitation, but also the final determination of the land border in disputed areas.

Aware of the reached impasse in bilateral negotiations, the two States continued their endeavors to find a mutually acceptable solution for inclusion of the third party. This led, in August 2007, to a principled informal agreement between the Prime Ministers of both countries (Janez Janša and Ivo Sanader) – the so-called Bled agreement – which envisaged the submission of the dispute to international judicial body, such as the International Court of Justice (ICJ). As a consequence of this development the two States appointed the Slovenian-Croatian team of legal experts, which was supposed to draft a special agreement for submission of the dispute to the arbitration or the ICJ. The team was however, even after four meetings, unable to make any substantial progress due to the major differences regarding the main elements of the agreement. When the Slovenian Government on the basis of the report on the negotiations in March 2009 noted that the Slovenian part of the group was within a given mandate unable to implement key elements of Slovenia it concluded that the resumption of negotiations is no longer appropriate. Thus, the Slovenian part of this group ceased to function.

A major turning point in the resolution of the border dispute was the decision of the Slovene government in September 2008, just before parliamentary elections in Slovenia, to block the accession negotiations of Croatia with the EU. The reason for this decision was the belief that some Croatian actions in this pre-accession process constitute prejudices to the detriment of Slovenia with regard to the final resolution of the border dispute. The new Slovenian government, taking office in December 2008, tried to get,

talks and decisions on this matter, the implementation of the EFPZ for the EU Member States was finally postponed. Slovenia, however, in October 2005 declared its own ecological protection zone (Zakon o razglasitvi zaščitne ekološke cone in epikontinentalnem pasu Republike Slovenije, published in: Official Gazette of the Republic of Slovenia, No. 93/20005).

with the assistance of the French government, assurances from Croatia that it will eliminate all the prejudices from their pre-accession documentation which would enable Slovenia to lift the blockade, but it was not until July 2009, after the change in the position of the Prime Minister of Croatia[15], that the talks gained a new momentum and the Prime Minister Kosor agreed to address this issue.

The second era of negotiations

A new series of negotiations started in January 2009 on the initiative of the then EU Commissioner for Enlargement Mr. Olli Rehn. Several tripartite meetings (Slovenia, Croatia and the EU Commission) were held in Brussels. The first proposal in March 2009 to submit the dispute to mediation was rejected by Croatia. Commissioner Rehn further proposed to submit the dispute for a resolution to an ad hoc arbitration, to what Slovenia in principle agreed, but Croatia insisted on submitting the dispute for the resolution to the International Court of Justice.

One month later, in April 2009, Commissioner Rehn proposed the draft agreement to submit the dispute to an ad hoc arbitration (the first Rehn's proposal). Croatia has accepted the proposal this time and Slovenia suggested some amendments. Then, the Rehn's second proposal was presented to the Parties in June 2009. The text has taken into account amendments Slovenia suggested to the Rehn's first proposal, but Croatia opposing such amendments in June 2009 withdrew from further talks.

It was in July 2009, at the Castle Trakošćan when Prime Ministers Borut Pahor and Jadranka Kosor met again and agreed on further talks on the basis of three principles: withdrawal of Croatian prejudices in the pre-accession process, Slovenian consent to Croatia's continuation of the pre-accession process where the obstacles were prejudices to the resolution of the border dispute and the need to reach an agreement on the resolution of the border dispute.

After their meeting on 11 September 2009 in Ljubljana, Prime Minister Kosor sent a written statement to the Swedish Presidency of the Council of the EU, in which she declared that no document, map, or any other unilateral act adopted after 25 June 1991 will have any legal effect on the final settlement of the border dispute. Thus, Slovenia lifted its blockade at the

[15] After the resignation of Ivo Sanader from this position.

next Intergovernmental Accession Conference to the relevant negotiation chapters. In addition, the two Prime Ministers agreed that the negotiations on resolving the border dispute will continue based on the second Rehn's proposal. The agreement was finally signed by the two Prime Ministers in Stockholm on 4 November 2009 and then submitted to the ratification processes in both States. Croatia ratified the agreement on 29 October 2009, while Slovenia first had to wait for the opinion of the Constitutional Court, which was rendered on 18 March 2010[16] and found that the agreement is not inconsistent with Slovene constitutional order. The Slovenian Parliament ratified the agreement on 19 April 2010[17]. However, the agreement still needed to undergo a legislative referendum which was scheduled for the 6 June 2010. After the turnout of 42,66% and 51,54% of voters voting for the agreement[18], the request for the subsequent review of constitutionality was submitted to the Constitutional Court, which in its Opinion from 7 October 2010[19] reaffirmed its previous conclusions and found that the agreement is not inconsistent with the Slovene Constitution. Thus, all the internal procedures related to the enforcement of the Arbitration agreement had been successfully concluded in both States. According to Article 11, paragraph 2, of the Arbitration agreement, they proceeded with the exchange of diplomatic notes expressing their consent to be bound by it[20]. The agreement entered into force on 29 November 2010, the first day of the week following the exchange of such diplomatic notes.

However, when ratifying the treaty in their national parliaments, both States adopted and included in their internal acts of ratifications unilat-

[16] Rm-1/09-30, Official Gazette, No. 25/2010. In Opinion the Constitutional Court decided that Article 3 (1) (a), Article 4 (a), and Article 7 (2) and (3) of the Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia are not inconsistent with Article 4 of the Constitution of the Republic of Slovenia in conjunction with Section II of the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia. See: http://www.us-rs.si/en/news/headlines/the-opinion-of-the-constitutional-court-on-the-con/ (18 October 2010).

[17] Zakon o ratifikaciji Arbitražnega sporazuma med Vlado Republike Slovenije in Vlado Republike Hrvaške, published in Official Gazette of the Republic of Slovenia, No. 57/10, International agreements, No. 11/10.

[18] See the report of the State Electoral Commission available at: http://www.dvk.gov.si/AS2010/dokumenti/porocilo.pdf

[19] U-I-180/10-13.

[20] Some views on the possible ways to proceed with this last stage have been discussed in: Sancin, Vasilka (2010): Začetek veljavnosti Arbitražnega sporazuma. Pravna praksa 24-25: 18-20.

eral statements relating to the Arbitration Agreement[21]. In its statement which is included in Article 3 of the Croatia's act of ratification[22], Croatia claims that it has jointly with Slovenia on 27 October 2009 informed the Presidency of the Council of the European Union and the United States of America, about the following statement: "Nothing in the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia shall be understood as Croatia's consent to Slovenia's claim to its territorial contact with the high seas"[23]. Slovenia immediately denied that such common message was ever delivered to the aforementioned actors, opposed such interpretation of the Arbitration Agreement and in response to Croatia's unilateral statement adopted its own unilateral statement and included it in Article 3 of its act of ratification of the Arbitration Agreement[24]. Moreover, diplomatic representatives of both, the USA and Sweden, in interviews broadcasted in Slovene media expressly denied that they ever received any such message from Slovenia and Croatia.

[21] On the legal questions that arise in this respect see: Sancin, Vasilka (2009): Enostranske izjave k dvostranskim mednarodnim pogodbam. Pravna praksa 46: 16-17.

[22] Zakon o potvrđivanju Sporazuma o arbitraži između Vlade Republike Hrvatske i Vlade Republike Slovenije, published in: Official Gazette of the Republic of Croatia, International agreements, No. 12/2009 (27. 11. 2009).

[23] Available at: http://narodne-novine.nn.hr/medunarodni/default.aspx (30. 10. 2010).

[24] Slovenia's statement in Article 3 reads in the original:
»3. člen
Republika Slovenija ob izmenjavi diplomatske note, s katero izrazi svoje soglasje, da jo sporazum zavezuje, Republiki Hrvaški sporoči naslednjo izjavo:
»Ob upoštevanju suverene pravice vsake države, da daje enostranske izjave in ob tem, da je bila Republika Slovenija seznanjena z namero Republike Hrvaške, da poda enostransko izjavo k Arbitražnemu sporazumu med Vlado Republike Slovenije in Vlado Republike Hrvaške, podpisanem v Stockholmu dne 4. novembra 2009, Republika Slovenija izjavlja, da se ni strinjala z izjavo Republike Hrvaške z dne 9.2009 niti z njeno vsebino.«.
Republika Slovenija izjavlja, da v skladu z mednarodnim pravom enostranska izjava, podana v zvezi z arbitražnim sporazumom nima učinka na njegovo vsebino in da izjava Republike Hrvaške z dne 9.2009 nima nobenega učinka za arbitražni postopek.
Republika Slovenija izjavlja, da je naloga arbitražnega sodišča določiti ozemeljski stik teritorialnega morja Republike Slovenije z odprtim morjem (stik Slovenije z odprtim morjem), torej ohranitev pravice Slovenije do stika z odprtim morjem, ki ga je imela na dan osamosvojitve 25. junija 1991.
Republika Slovenija tudi izjavlja, da se arbitražni sporazum razlaga v skladu z običajnim pomenom izrazov v določbah samega sporazuma.« Available at: http://www.uradni-list.si/_pdf/2010/Mp/m2010057.pdf (30. 10. 2010).

What is actually in dispute?

Even though it is far better known to the general public that the disputed area represents a maritime area in the northern Adriatic, and in particular, but not exclusively, the Bay of Piran, there are also sections of the land border that are still disputed. The extent of the disputed land border however remains unclear (as described above). Thus, it remains to be seen, what the two States will submit as the subject matter of dispute to the Arbitral Tribunal and what will be included in their respective claims.

Decision on the land border on the coast of the two parties is however crucial for determination of the base point for the maritime border. Since the relevant coast of the parties in dispute play a major role in determining the maritime border, a special geographical situation of the disputed area should not be overlooked. Relevant coasts are two adjacent coasts, which are in specific situation due to their concavity and the fact that they are located in the semi-enclosed Adriatic Sea. Other delimitations, including provisional ones, in the Adriatic Sea between other States could therefore shed some light on the different approaches adopted by the States in the area and contribute to a better understanding of the regional dimension. Among others the historical developments in this area are of central importance to achieve an equitable solution. Relevant events date back centuries and the Arbitral Tribunal will need to address them accordingly, keeping in mind that the critical date agreed upon in the Arbitration Agreement is 25 June 1991.

The contents of the two agreements and their comparison

The Drnovšek-Račan agreement, in addition to the preamble, contains 30 articles divided into VIII parts.

Part I refered to the Subject of the treaty and envisaged this to be the determination of the maritime boundary and the establishment of the course of border on land between the Contracting Parties, as well as the principle of demarcation, maintenance and restoration of the State border[25]. The State border between Slovenia and Croatia was defined as the surface perpendicular to the line of the border on the surface of the Earth dividing

[25] Article 1.

the territory of the two States, their air space, subsoil, and any above and underground structures and installations[26].

In Part II, dealing with the determination of the state border at sea, it provided the geographical coordinates for the border at sea[27], envisaged the junction of the Slovenia's territorial sea to the High Sea[28] and the junction between the Croatia's and Italy's territorial sea[29].

Part III was drafted to regulate the land border. Article 6 thus dealt with the establishment of the land border course and provided that the land border shall be the border between the two republics as parts of the former SFRY, running from the three-borders-point between the contracting parties and Hungary to the Adriatic Sea. The maps (on a scale of 1:25,000) for all of these determinations were included in Annexes I, II and III and it was specifically stated that where the description of the state border does not correspond to the map, the verbal description shall prevail. Drnovšek-Račan agreement envisaged the exchange of areas, which occurred on the occasion of mutual establishment of the state border, but this was supposed to have no effect on any rights of natural or legal entities under the law of property and law of obligations with regard to land and other immovable property, included in such an exchange. Holders of rights under the law of property and law of obligations were supposed to use such property in accordance with a special agreement between the contracting parties[30]. Articles 8, 9, 10, 11, 12 and 13 dealt with demarcation of the course of the state border, principles of demarcation of the state border course, maintenance and restoration of the state border, inalterability of the state border course, unity of border markers and belt along the line of the border, respectively. Expenses related to demarcation, maintenance and restoration of the state border were to be ensured by the contracting parties in comparable amounts[31]. Articles 15, 16, 17 and 18 provided provisions dealing with obligations of owners, users, administrators and other holders of rights under the law of property and law of obligations, compensation for dam-

[26] Article 2.

[27] Article 3.

[28] Article 4. In paragraph 5 it stated that no sovereign rights may be acquired in relation to the water column under the sea surface in the area of the junction and that the contracting parties shall, in their mutual relations refrain from exercising sovereign rights in the seabed and the relevant subsoil under the sea surface of the junction.

[29] Article 5.

[30] Article 7.

[31] Article 14.

age, demarcation, maintenance and restoration of the three-borders-point and protection of markers, respectively.

Part IV envisaged joint regimes, which were to be agreed in special agreements between the contracting parties. Special emphasis in this respect was given to the protection of natural environment along the entire course of the state border and particularly in the protected areas[32], while the special benefits were envisaged for the inhabitants of the settlements Mlini-Škrile, Bužini and Škodelin[33].

In Part V, entitled Joint Bodies, the contracting parties envisaged the set up of the Permanent Slovenian-Croatian Commission for the State Border, responsible for the implementation of the Drnovšek-Račan agreement[34], its tasks and working methods[35], establishment of joint technical groups by the Commission[36] and a provision on permissible deviations (for not more than 50 meters) from the line determined by this agreement in order to adjust the state border to the logical geographic and economic conditions[37].

Settlement of disputes between the contracting parties was regulated by Part VI, which envisaged, first negotiations, and second, if the contracting parties fail to reach an agreement within six months from the date of receiving the initiative for negotiations, the submission of the dispute to arbitration at the request by either party. The arbitration tribunal was to be set up on a case-by-case basis. Each contracting party was supposed to appoint two arbitrators two months after receiving the request for arbitration. The appointed four arbitrators were then, in subsequent two months, supposed to select a national of a third country as a chairperson of the arbitration tribunal, after he/she has been approved by both contracting parties. Should these appointments not have been made within envisaged deadlines, either contracting parties could have requested the President of the ICJ to make the necessary appointments. The arbitration tribunal was meant to make final and binding decisions by the majority of votes. Each contracting party was supposed to cover the expenses of its arbitrators and

[32] Article 19.
[33] Article 20.
[34] Article 21.
[35] Article 22
[36] Article 23.
[37] Article 24.

its representation in the arbitral procedure, while the remaining costs were to be covered by both States in equal shares. When defining the rules of the procedure, the arbitration tribunal was to take into consideration also the Model Rules on Arbitral Procedure drawn up by the United Nations International Law Commission[38].

Transitional provisions included in Part VII provided for the transfer of the entry in the land register[39], exemption from administrative fees[40] and making of cartographic documentation[41].

Final provisions in Part VIII envisaged that Annexes I, II and III form an integral part of the agreement[42] and the date for its entry into force – the date of the receipt of the last of the notifications by which the contracting parties notify each other through diplomatic channels that the conditions for the entry into force of this agreement under their respective laws have been fulfilled[43].

The Drnovšek-Račan agreement was done in two originals in the Slovenian and Croatian languages, both texts being equally authentic.

The Pahor-Kosor agreement is shorter and, in addition to the preamble, includes 11 Articles. It was concluded in English language, which is the only authentic language of the agreement.

As already explained, the main difference between these two agreements is the different purpose for which they were negotiated. The Pahor-Kosor agreement thus in Articles 1 and 3 defines its main *raison d'être,* which lies in the establishment of the Arbitral Tribunal with the task to determine:

(a) the course of the maritime and land boundary between Slovenia and Croatia;
(b) Slovenia's junction to the High Sea;
(c) the regime for the use of the relevant maritime areas.

[38] Article 25.
[39] Article 26.
[40] Article 27.
[41] Article 28.
[42] Article 29.
[43] Article 30.

How the articles of the Arbitration Agreement are to be understood and applied depends on the Arbitral Tribunal which has the sole competence to interpret it.

However, these two Articles should be read together with other articles, in particular Article 9, which requires from Slovenia to lift its reservations as regards opening and closing of negotiation chapters where the obstacle is related to the dispute and that both parties shall refrain from any action or statement which might negatively affect the accession negotiations. These articles thus reveal what were the two determinants guiding the negotiation process and the resulting compromise which was necessary to enable the two States to find a balanced solution.

The composition of the Arbitral Tribunal is regulated by Article 2, which envisages a five-member panel.

Article 4, defining the applicable law, provides that the Arbitral Tribunal shall apply:
(a) the rules and principles of international law for the determinations of the course of the maritime and land boundary between Slovenia and Croatia; and
(b) 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 for the determinations of Slovenia's junction to the High Sea and the regime for the use of the relevant maritime areas.

Critical date, has been set in Article 5 on the 25 June 1991, requiring the Arbitral Tribunal not to accord legal significance to documents or actions undertaken unilaterally after that date, which can not in any way commit either side of the dispute nor prejudge the award.

As regards the procedure, the parties decided in Article 6 to each submit a memorial to the Arbitral Tribunal within twelve months and that unless envisaged otherwise, the Arbitral Tribunal shall conduct the proceedings according to the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States. The place of arbitration shall be Brussels. Even if such solution seems obvious under general customary international law, the special provision was included in paragraph 8 of Article 6, providing that the Arbitral Tribunal may at any stage of the pro-

cedure with the consent of both Parties assist them in reaching a friendly settlement.

The arbitral award shall be, in accordance with Article 7, issued expeditiously after due consideration of all relevant facts pertinent to the case. It shall be adopted by the majority of arbitrators and shall state the reasons on which it is based. No individual or dissenting opinions are allowed.

Article 8 was included to ensure the overcome of the dead-lock in Croatia's pre-accession negotiations for the EU membership and states that no document presented in the EU accession negotiations unilaterally shall prejudice the Arbitral Tribunal when performing its tasks or commit either side on the dispute. This applies to all documents and positions either written or submitted orally, including, inter alia, maps, negotiating positions, legal acts and other documents in whatever form, produced, presented or referred to unilaterally in the framework of the EU accession negotiations. It also applies to all EU documents and positions which refer to or summarize these documents and positions.

In order not to intensify the dispute or jeopardize the work of the Arbitral Tribunal, both parties must, as required by Article 10 (stand-still), refrain from any action or statement that may cause any of the two before mentioned situations. The Arbitral Tribunal has the power to order, if it considers that circumstances so require, any provisional measures it deems necessary to preserve the stand-still.

Despite the fact, that Article 11 envisages the entry into force of this agreement on the first day of the week following the exchange of diplomatic notes with which the parties express their consent to be bound, all procedural timelines will start to apply only from the date of the signature of Croatia's EU Accession Treaty.

The main bone of contention in the Arbitration Agreement, taking into account debates that emerged in both States, seems to be jointly read Articles 3 and 4 of the Arbitration agreement, which Slovenia, contrary to Croatia, understands as requesting from the Arbitral Tribunal to determine, among others, the coordinates of Slovenia's junction - in a physical sense of territorial contact - to the High Sea by taking into account not only international law, but also a number of other factors and circumstances – amounting in the opinion of Slovenia – to a decision similar to a decision adopted *ex*

aequo et bono. Among other particularities of this Arbitration Agreement, it is in particular in these two aspects that it provides unique solutions, not yet witnessed in the case law of territorial disputes[44].

Despite many differences between the two described agreements, deriving from their different nature and purpose, and different procedural solutions envisaged in them (e.g. appointment of arbitrators, the rules used for the conduct of proceedings), there is at least one striking similarity between them: both envisage Slovenia's junction to the High Sea. It would be a bit credulous to believe this to be a pure coincidence and we shall see whether the final award of the Arbitral Tribunal will in this respect provide for a solution that will much diverge from the one included in Article 4 of the Drnovšek-Račan agreement.

Concluding remarks

The period in bilateral relations between Slovenia and Croatia, marked by the search for resolution of their border dispute, could be described also as a transitional phase between leaving the old family (the former republics of the SFRY) and joining the new one, within the EU, whose assistance proved to be instrumental in the process leading to the conclusion of the Pahor-Kosor Agreement. However, the importance of resolving the border dispute confirms the continuing relevance of state borders which remain a quintessential matter of State sovereignty even in situation of co-existence in the international organization of a supranational nature, such as the EU, which is trying to diminish the importance of borders among its Member States for the benefit of its citizens and other individuals travelling within it.

However, there are still two tasks for Slovenia and Croatia where bilateral cooperation between them is called for, before the third party irrevocably takes the border dispute in its own hands. First, Slovenia and Croatia should select and appoint the five arbitrators that will be responsible for rendering the arbitral award, and second, they should specify the details of the subject-matter of the dispute submitted to the Arbitral Tribunal. Nevertheless, the two issues can be resolved even despite any possible disagreements between

[44] For the analysis of the judicial and arbitral decisions in relation to granting territorial contact to the High Sea see: Šebenik, Nataša (2009): Teritorialni dostop do odprtega morja v mednarodni sodni in arbitražni praksi. Pravna praksa 49-50: II-VII.

the two parties. In case of the appointment of arbitrators, it is the President of the International Court of Justice, who is under the Arbitration Agreement envisaged as an appointing authority and shall, if Slovenia and Croatia fail to appoint the three 'neutral' members of the Arbitral Tribunal within fifteen days, appoint the President and the two members of the Arbitral Tribunal[45]. After this task is accomplished, it is the President of the Arbitral Tribunal who shall act and appoint any or both of the 'national' members of the Arbitral Tribunal if the parties fail to do so in fifteen days after the appointment of the three 'neutral' members[46].[47] If Slovenia and Croatia are not able to bilaterally agree on the joint determination of the subject-matter of the dispute within one month, and thus fail to fulfill the third task, it will be left to the Arbitral Tribunal to use the submissions of the Parties for the determination of the exact scope of the dispute and claims between them[48].

Regardless of the level of satisfaction in each of the two States with the solution to be presented by the Arbitral Tribunal in the final award on determination of the land border and maritime delimitation between Slovenia and Croatia, this will constitute a binding and definitive settlement of the dispute. The two States will then need to prove their commitment to international law and respect for its fundamental principles of good faith and *pacta sunt servanda* and take all necessary steps to implement the arbitral award, including by revising national legislation, as necessary, within six months after the adoption of the award, as required by Article 7, paragraph (3) of the Arbitration Agreement. Only then will we be able to confirm that Slovenia and Croatia by concluding the Pahor-Kosor Agreement set a posi-

[45] Article 2, paragraph (1) of the Arbitration Agreement reads: 'Both Parties shall appoint by common agreement the President of the Arbitral Tribunal and two members recognized for their competence in international law within fifteen days drawn from a list of candidates established by he President of the European Commission and the Member responsible for the enlargement of the European Commission. In case that they cannot agree within this delay, the President and the two members of the Arbitral Tribunal shall be appointed by the President of he International Court of Justice from the list.'

[46] Article 2, paragraph (2) of the Arbitration Agreement envisages: 'Each Party shall appoint a further member of the Arbitral Tribunal within fifteen days after the appointments referred to in paragraph 1 have been finalised. In case that no appointment has been made within this delay, the respective member shall be appointed by the President of the Arbitral Tribunal.'

[47] On the appointment of arbitrators in inter-State disputes see: Sancin, Vasilka (2010): Izbor arbitrov v meddržavnih sporih. Pravna praksa 29-30: 19-20.

[48] Article 3, paragraph (2) of the Arbitration Agreement states: 'The Parties shall specify the details of the subject matter of the dispute within one month. If they fail to do so, the Arbitral Tribunal shall use the submissions of the Parties for the determination of the exact scope of the maritime and territorial disputes and claims between the Parties.'

tive example of finding a peaceful solution to resolve open issues of greatest national importance. Such achievement is to be particularly appreciated in the region that has in the past witnessed the most serious violations of international law, including the commitment of mass atrocities, constituting breaches of *ius cogens* norms of international law.

While recognizing, that the described Slovenian-Croatian example is neither the first[49] nor probably the last among the new States that emerged from the former SFRY and resorted to third party to resolve their border issues in a peaceful manner, the special contribution of this case is to be viewed from the perspective of the innovative and unique solutions that have been found and included in the Arbitration Agreement to accommodate interest of both parties. These could in the future be beneficial and referred to by other States, in similar geographic, historical, political or economic circumstances, in the region or broader.

REFERENCES

Arah, Metka (2010): Arbitraža – da ali ne?. Pravna praksa 22 (Priloga): II-VII.

Arnaut, Damir (2002): Stormy Waters on the Way to the High Seas. The Case of the Territorial Sea delimitation Between Croatia and Slovenia. Ocean and Coastal Law Journal 8: 21-61.

Avbelj, Matej and Letnar Černič, Jernej (2007): The Conundrum of the Piran Bay. Slovenia v. Croatia—The Case of Maritime Delimitation. Journal of International Law & Policy V (6): 1-19.

Bučar, France (2009): Arbitražni postopek – kaj tvegamo in kaj smemo tvegati. Pravna praksa (Priloga) 45: VI-VII.

Celar, Branko (2004): Mednarodnopravne možnosti rešitve mejnega spora med Republiko Slovenijo in Republiko Hrvaško. X. dnevi javnega prava, Portorož, 14.-16. junij 2004. Inštitut za javno upravo: 539-557.

Degan, Vladimir-Đuro (2007): Consolidation of Legal Principles on Maritime Delimitation: Implications for the Dispute between Slovenia and Croatia in the North Adriatic. Chinese Journal of International Law 6: 601-628.

Drenik, Simona (2009): Arbitražni sporazum: potek pogajanj in dosežene rešitve. Pravna praksa (Priloga) 45: II-V.

Krivic, Matevž (2010): Zavajanje s pobožnimi željami po kopenski meji do Savudrije. Pravna praksa 21: 8-9.

[49] E. g. The protocol signed by the Government of Croatia and the Government of the Federal Republic of Yugoslavia on 10 December 2002, establishing a provisional cross-border regime on the Prevlaka peninsula.

Krivic, Matevž (2010): Kritika odločitve Ustavnega sodišča o arbitražnem sporazumu s Hrvaško. Pravna praksa 19: II-VI.

Letnar Černič, Jernej (2009): Premislek o 3. členu Arbitražnega sporazuma med RS in RH. Pravna praksa 47: 16-17.

Sancin, Vasilka (2010): Priprava memoranduma je dolgotrajen in zahteven proces. Pravna praksa 37: 15-16.

Sancin, Vasilka (2010): Izbor arbitrov v meddržavnih sporih. Pravna praksa 29-30: 19-20.

Sancin, Vasilka (2010): Začetek veljavnosti Arbitražnega sporazuma. Pravna praksa 24-25: 18-20.

Sancin, Vasilka (2009): Enostranske izjave k dvostranskim mednarodnim pogodbam. Pravna praksa 46: 16-17.

Sancin, Vasilka (2009): Kompromis med Slovenijo in Hrvaško. Pravna praksa 45 (Priloga): VII-X.

Sancin, Vasilka (2009): Sosedstvo je vzajemna reč. Pravna praksa 39: 3.

Šebenik, Nataša (2009): Teritorialni dostop do odprtega morja v mednarodni sodni in arbitražni praksi. Pravna praksa 49-50: II-VII.

Škrk, Mirjam (2009): Al' prav se piše pravizhnost ali pravičnost?. Pravna praksa 26: 6-7.

Vidmar, Srecko ''Lucky'' (2002): Compulsory Inter-State Arbitration of Territorial Disputes. Denver Journal of International Law and Policy 31: 87-111.

Zgonec-Rožej, Miša (2003): Reševanje mejnega spora med republiko Slovenijo in Republiko Hrvaško. Pravnik 58 (9/12): 593-620.