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# CROATIA V. SLOVENIA: THE DEFILED PROCEEDINGS

By  
Matko Ilić\*

## I. INTRODUCTION

Arbitrator impartiality and procedural fairness are expected in international arbitration. However, international arbitration simultaneously serves other goals, including the recognition and enforceability of awards that are more difficult to attain in other types of dispute resolution. When parties sign an arbitration agreement, they undergo a binding dispute resolution process that leads to a binding award. However, *Croatia v. Slovenia*, a unique case, highlighted the conflict between the binding nature of the award and the integrity of arbitral proceedings.<sup>1</sup> When a party engages in ex parte communications with a party-appointed arbitrator, is the arbitral process necessarily threatened? The article will discuss the background of the controversy between Croatia and Slovenia regarding the Bay of Piran/Savudrija, the Partial Award issued by the Permanent Court of Arbitration, the Tribunal's rationale, and the expectation of the parties to settle their disputes in good faith and in accordance with arbitrator impartiality, independence, and procedural fairness.

## II. BACKGROUND OF THE CONTROVERSY: THE BAY OF PIRAN/SAVUDRIJA

The current dispute between Croatia and Slovenia concerns the maritime border controversy along the Bay of Savudrija, as named in Croatia, or the Bay of Piran, as named in Slovenia ("the Bay").<sup>2</sup> Well known for its Sečovlje saltpans and fishing locations, the Bay and the land between the Bay and Istria underwent border changes during and after the Second World War.<sup>3</sup> Following the enactment of the Treaty of Osimo in 1975 and Slovenia's and Croatia's independence from Yugoslavia on June 25, 1991, border controversies between the two nations arose.<sup>4</sup> These controversies centered on both the

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<sup>1</sup> *Croatia v. Slovenia*, PCA Case Repository 2012-04, Partial Award, P 16 (Perm. Ct. Arb. June 30, 2016).

<sup>2</sup> Drago Kladnik & Primož Pipan, *Bay of Piran or Bay of Savudrija? An Example of Problematic Treatment of Geographical Names*, 48 ACTA GEOGRAPHICA SLOVENICA 57, 59 (2008).

<sup>3</sup> See generally Primož Pipan, *Border Dispute Between Croatia and Slovenia Along the Lower Reaches of the Dragonja River*, 48 ACTA GEOGRAPHICA SLOVENICA 331, 336-39 (2008) (describing in detail the border shift between Slovenia and Croatia before and after the formation of the Free Territory of Trieste in 1947); Giuseppe Cataldi, *Prospects for the Judicial Settlement of the Dispute Between Croatia and Slovenia Over Piran Bay*, in INT'L CTS. AND THE DEV. OF INT'L LAW 257, 257 (explaining the effect of the 1975 Treaty of Osimo between Italy and Yugoslavia, which applied the principle of equidistance to alter the 1947 borders surrounding the Bay).

<sup>4</sup> Pipan, *supra* note 3, at 333.

location of several villages near the Dragonja River and the demarcation line of the Bay.<sup>5</sup> In 2001, the Croatian and Slovenian governments tried to resolve the border dispute along the Bay and the villages near the Dragonja River by planning out the Drnovšek-Račan treaty.<sup>6</sup> Under this agreement, both parties would set new territorial and high sea coordinates along their sea surface as well as create joint bodies that would demarcate the lines of the state borders.<sup>7</sup> However, in 2002, Croatia failed to sign the pact, which would have positioned the new border at the bed of the Dragonja River.<sup>8</sup> The following nine years were characterized as times of constant disagreement regarding the proposed borders of the Bay.<sup>9</sup>

On May 1, 2004, Slovenia joined the European Union, which shaped future Bay discussions with its neighbor, Croatia.<sup>10</sup> Namely, Slovenia vetoed Croatia's EU-accession negotiations due to the maritime dispute.<sup>11</sup> To move forward with the European Union accession talks, Croatia agreed to arbitrate the border dispute with Slovenia.<sup>12</sup> The resolution of the maritime issues was a prerequisite for Croatia's admission to the European Union under Article 9 of the Arbitration Agreement.<sup>13</sup> An agreement to arbitrate the

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<sup>5</sup> Pipan, *supra* note 3, at 333 (stating the impact of the border dispute on three villages near the Bay: Mlini-Škrile, Bužini, and Škodelin).

<sup>6</sup> Treaty Between the Republic of Slovenia and the Republic of Croatia on the Common State Border, Croat.-Slovn., July 20, 2001.

<sup>7</sup> *Id.*

<sup>8</sup> Pipan, *supra* note 3, at 343 (describing the Drnovšek-Račan agreement, which was named after the Prime Ministers of Slovenia and Croatia, respectively, where the three villages mentioned in note 3 “were to become Croatian,” should have Croatia accepted the agreement); *see also* Matej Avbelj & Jernej Letnar Čerňič, *The Conundrum of the Piran Bay: Slovenia v. Croatia – The Case of Maritime Delimitation*, 5 U. PA. J. INT’L L. & POL’Y 1, 11 (presenting the planned maritime border, as proposed by the delimitation agreement; Croatia has not ratified the proposal).

<sup>9</sup> Cataldi, *supra* note 3, at 258 (summarizing the Slovenian argument, in which: (a) Slovenia was a “geographically disadvantaged State” as a result of its landlocked status and thus demanded an “Exclusive Economic Zone”; and (b) the Bay was a “historical bay,” which would grant Slovenia a right of direct junction to the waters); *see generally* Damir Arnaut, *Stormy Waters on the Way to the High Seas: The Case of the Territorial Sea Delimitation Between Croatia and Slovenia*, 8 OCEAN & COASTAL L.J. 21, 48-50 (2002).

<sup>10</sup> *Countries: Slovenia*, EUROPEAN STABILITY INITIATIVE (Sept. 16, 2009), <http://www.esiweb.org/index.php?lang=en&id=395>.

<sup>11</sup> *Slovenia Will Veto Croatia's EU Entry*, MINA (Dec. 17, 2008), <http://macedoniaonline.eu/content/view/4801/46>.

<sup>12</sup> Cataldi, *supra* note 3, at 259 (“[I]t is encouraging to note that membership of the Union . . . is a fundamental element in bringing together two nations and encouraging a positive solution to an ongoing dispute.”).

<sup>13</sup> *Arbitration Agreement Between the Government of the Republic of Croatia and the Government of the Republic of Slovenia*, THE EUROPEAN COMMISSION, art. 9 (Nov. 4, 2009), <http://www.mvep.hr/files/file/dokumenti/arbitraza/en/150902-arbitration-agreement-between-the->

border-lines of the Bay would fulfill the requirement, as suggested in draft agreements by the European Commissioner for Enlargement.<sup>14</sup> The negotiations for Croatia’s accession were on standby until a Slovenian referendum on June 5, 2010 ended its reservations on several negotiating matters.<sup>15</sup> Slovenia permitted Croatia’s entry to the EU, provided that Croatia resolved the maritime dispute with Slovenia via state-to-state arbitration.<sup>16</sup> Ultimately, both parties agreed to initiate arbitration, and they signed the Arbitration Agreement in Stockholm on November 4, 2009.<sup>17</sup> Under the Arbitration Agreement, both parties promised to settle their disputes “peace[fully]” and “in the spirit of good neighbourly relations” in accordance with Article 33 of the United Nations Charter.<sup>18</sup>

### *A. The Preparation and Purpose of the Arbitration Agreement*

The arbitral proceedings began on April 13, 2012, and the parties agreed to apply the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States.<sup>19</sup> The seat of the arbitration was Brussels, Belgium.<sup>20</sup> In accordance with the agreement, on January 17, 2012, the counsel for Slovenia and Croatia selected Judge Gilbert Guillaume of France, Prof. Vaughan Lowe QC of England, and Judge Bruno Simma of Germany as arbitrators.<sup>21</sup> Two weeks after the selection of the arbitrators,

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government-of-croatia-and-the-government-of-slovenia-04112009.pdf [hereinafter Arbitration Agreement]; see also Cataldi, *supra* note 3, at 259.

<sup>14</sup> Croatia v. Slovenia, *supra* note 1, at 3.

<sup>15</sup> Phil Cain, *Croatia Poised for EU Membership Following Slovenian Border Dispute Referendum*, THE TELEGRAPH (June 6, 2010, 9:17 PM), <http://www.telegraph.co.uk/news/worldnews/europe/slovenia/7807200/Croatia-poised-for-EU-membership-following-Slovenian-border-dispute-referendum.html>.

<sup>16</sup> *Id.*

<sup>17</sup> Croatia v. Slovenia, *supra* note 1, at 1-2.

<sup>18</sup> Arbitration Agreement, *supra* note 13, at art. 4; see also U.N. Charter art. 33, ¶ 1 (“The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by . . . arbitration . . . or other peaceful means of their own choice.”); Cataldi, *supra* note 3, at 259.

<sup>19</sup> Croatia v. Slovenia, *supra* note 1, at 4; Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States, available at [https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/Optional-Rules-for-Arbitrating-Disputes-between-Two-States\\_1992.pdf](https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/Optional-Rules-for-Arbitrating-Disputes-between-Two-States_1992.pdf) [hereinafter PCA Optional Rules].

<sup>20</sup> Arbitration Agreement, *supra* note 13, at art. 6(7).

<sup>21</sup> *Case View: Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PERMANENT COURT OF ARBITRATION, <https://pcacases.com/web/view/3>.

Slovenia selected Dr. Jernej Sekolec while Croatia chose Prof. Budislav Vukas as party-appointed arbitrators.<sup>22</sup>

After the selection of the arbitrators, both parties saw the arbitral proceedings as important in settling the long-fought border battle.<sup>23</sup> Dr. Vesna Pusić, the Croatian Minister of Foreign Affairs, praised the task before the Arbitral Tribunal and described the upcoming award as “a beacon for international law.”<sup>24</sup> On the Slovenian side, Mr. Karl Erjavec, the Slovenian Minister of Foreign Affairs, stressed the need for access to the High Sea, which the Minister characterized as a “vital interest” for Slovenia.<sup>25</sup> Both parties listed the main disputes in issue under Article 3(1) of the Arbitration Agreement, including “the course of the maritime and land boundary,” “Slovenia’s junction to the High Sea,” and “the regime for the use of relevant maritime areas.”<sup>26</sup>

Citing Article 4(a) of the Arbitration Agreement’s “Applicable Law,” the counsel for Croatia requested the Tribunal to first apply “the rules and principles of international law,” including Article 15 of the United Nations Law of the Sea Convention (UNCLOS), so that the territorial borders would lie in accordance with the boundary at the time of both nations’ independence from Yugoslavia in 1991.<sup>27</sup> However, the Slovenian counsel, interested primarily in the junction to the High Sea, pointed instead to Article 4(b), in which the finalization of the border would be dependent on “international law, equity and the principle of good neighbourly relations *in order to achieve a fair and just result.*”<sup>28</sup>

### *B. The Ex Parte Communications*

Despite the steadfast assurances of Slovenia and Croatia in agreeing to settle their disputes through the good faith application of international law, evidence emerged that Slovenia violated the Arbitration Agreement by engaging in ex parte communications with

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<sup>22</sup> Croatia v. Slovenia, *supra* note 1, at 4 (complying with art. 2, ¶ 2 of the Arbitration Agreement).

<sup>23</sup> See Press Release, Permanent Court of Arbitration, Conclusion of Hearing in the Arbitration Between the Republic of Croatia and the Republic of Slovenia (June 17, 2014), <https://pcacases.com/web/sendAttach/241> [hereinafter Press Release June 2014].

<sup>24</sup> See *id.* (“[Dr. Pusić] emphasized the importance that Croatia and the Croatian people attach to these proceedings.”).

<sup>25</sup> *Id.*

<sup>26</sup> Arbitration Agreement, *supra* note 13, at art. 3(1).

<sup>27</sup> *Id.* at art. 4(a); Press Release June 2014, *supra* note 23, at 1-2.

<sup>28</sup> Arbitration Agreement, *supra* note 13, at art. 4(b) (emphasis added); Press Release June 2014, *supra* note 23, at 3; see also Cataldi, *supra* note 3, at 266 (“Common sense can and must guide the Tribunal. If this is done, . . . it will have provided a successful solution to a controversy . . . *without neglecting political aspects and principles of equity.*”) (emphasis added).

its party-appointed arbitrator on July 22, 2015.<sup>29</sup> First, the Serbian newspaper Newsweek revealed leaked transcripts of conversations between Slovenia's party-appointed arbitrator, Dr. Sekolec, and Ms. Simona Drenik, the Legal Adviser and Agent for Slovenia, which were allegedly recorded on November 15, 2014, and January 11, 2015.<sup>30</sup> In addition, the Croatian newspaper Večernji published evidence of the same ex parte communications, which evidenced that Slovenia violated the arbitral agreement.<sup>31</sup> According to the transcript, the Slovenian agent and arbitrator discussed the proposed delimitation of the Croatian-Slovenian boundary lines.<sup>32</sup> The evidence also showed that Ms. Drenik proposed a strategy on how to influence the arbitrators so that they rule in favor of Slovenia.<sup>33</sup> Next, Dr. Sekolec assigned Ms. Drenik the task of preparing *effectivités* for the arbitration, and the Slovenian arbitrator proposed to create a computer file with Ms. Drenik's cadaster documents, which left an impression that Dr. Sekolec was the original author.<sup>34</sup> In response

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<sup>29</sup> Croatia v. Slovenia, *supra* note 1, at 6, 16 (citing Article 9.1 of the Terms of Appointment, which stated that “[t]he Parties shall not engage in any oral or written communications with any member of the Arbitral Tribunal ex parte in connection with the subject matter of the arbitration or any procedural issues that are related to the proceedings.”).

<sup>30</sup> *Id.*; *Poslušajte Audio-Zapis Kako Slovenci Preotimaju Hrvatima Piranski Zaliv* [Listen to the Audio Recording as to How the Slovenes are Seizing the Bay of Piran from the Croats], NEWSWEEK (July 22, 2015, 3:26 PM), <http://www.newsweek.rs/region/53276-njuzvik-ekskluzivno-otkriva-poslusajte-audio-zapis-kako-slovneci-preotimaju-hrvatima-piranski-zaliv-video.html> (Serb.).

<sup>31</sup> Croatia v. Slovenia, *supra* note 1, at 6, 16; Alison Ross, “Poisoned Waters”: Croatia’s Stance on the Sekolec Scandal, 10 GLOBAL ARB. REV. 15 (Aug. 19, 2015), <http://globalarbitrationreview.com/article/1034698/poisoned-waters-croatia-s-stance-on-the-sekolec-scandal>; Sandra Veljković, *Donosimo Audiosnimku Razgovora Arbitra i Slovenske Predstavnice* [We Bring the Audio Recording of the Conversation Between the Arbitrator and the Slovenian Representative], VEČERNJI LIST (July 22, 2015, 3:33 PM), [http://www.vecernji.hr/nagradjeni\\_autori/ekskluzivno-donosimo-razgovor-arbitra-i-slovenske-strane-poslusajte-snimke-1015908](http://www.vecernji.hr/nagradjeni_autori/ekskluzivno-donosimo-razgovor-arbitra-i-slovenske-strane-poslusajte-snimke-1015908) (Croat.).

<sup>32</sup> Croatia v. Slovenia, *supra* note 1, at 14-16; *Excerpts from Recordings of Conversation Between Dr. Jernej Sekolec, Member of the Arbitral Tribunal, and Ms. Simona Drenik, Agent of the Republic of Slovenia*, REPUBLIC OF CROAT.: MINISTRY OF FOREIGN AND EUR. AFF. 1 (2015), <http://www.mvep.hr/files/file/dokumenti/arbitraza/hr/150820-excerpts-from-recordings-between-dr-sekolec-and-mr-drenik-14082015.pdf> (last visited Oct. 2, 2016) [hereinafter Excerpts from Recordings].

<sup>33</sup> Excerpts from Recordings, *supra* note 32, at 2 (providing that Dr. Sekolec said, “When [Guillaume and I] had coffee break, Guillaume came to me and said, between us, in four eyes, ‘you are pushing very hard, but you know, Croatia...’ He said, ‘you got what you needed in the sea.’”), 12 (according to Ms. Drenik, “[Y]ou (Sekolec) give [Simma] one or two (murmur), say, OK, you know ‘I looked at this, so you know, I think...’ Not that you would give him 500 arguments. But you say ‘I think, look at this...’ . . . Maybe he will then present it, but if you present it, he will look at it, Guillaume I mean. But if Simma says ‘Oh, it seems to me, we could look at this again.’”).

<sup>34</sup> *Id.*; *Effectivités*, ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW (3d ed. 2009) (“[E]ffectivités are acts by a State relevant to a claim of title to territory by occupation or prescription; the factual elements that demonstrate the exercise of governmental authority in a territory.”).

to the revealed transcripts, Dr. Sekolec resigned from his position as party-appointed arbitrator on July 23, 2015.<sup>35</sup>

After evidence of Slovenia's ex parte communications was revealed, Croatia highlighted the communication during arbitral proceedings.<sup>36</sup> Describing the event as an "apparent collusion" between the Slovenian parties and Dr. Sekolec, the Croatian counsel cited Article 9.1 of the Terms of Appointment, which forbade ex parte communications.<sup>37</sup> Croatia described the incident as a "fundamental breach of professional ethics and dishonesty that . . . violat[ed] . . . fundamental due process," thus depicting the entire arbitration process as "tainted."<sup>38</sup> By citing Article 60(1) of the Vienna Convention on the Law of Treaties ("Vienna Convention"), which allows parties to rescind "treat[ies]" when a "material breach of a bilateral treaty" has occurred, the Croatian Parliament unanimously and unilaterally revoked the Arbitration Agreement on July 29, 2015.<sup>39</sup> Despite recognizing that Ms. Drenik was engaged in ex parte communications, Slovenia disagreed with Croatia that the violation was a "material breach" of the Arbitration Agreement; namely, a "material breach" had to act as "a gross infringement of an essential provision."<sup>40</sup>

### *C. Reactions to the Ex Parte Communications*

#### *1. Croatia's Reactions*

Collectively, the Croatian counsel expressed disapproval with the close communications between Dr. Sekolec and Ms. Drenik and their effect on the arbitral

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<sup>35</sup> Croatia v. Slovenia, *supra* note 1, at 16; Ross, *supra* note 31, at 9.

<sup>36</sup> Croatia v. Slovenia, *supra* note 1, at 16.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 16-17 ("The communications appear to reveal . . . [the disclosure of] critical elements of the Arbitral Tribunal's deliberations to Slovenia's Agent. . .").

<sup>39</sup> *See id.* at 18; *see also Arbitration Row May Hurt Zagreb More than Ljubljana*, OXFORD ANALYTICA DAILY BRIEF SERVICE (July 30, 2015), <http://search.proquest.com.ezaccess.libraries.psu.edu/docview/1700147308?pq-origsite=summon&accountid=13158>; Vienna Convention on the Law of Treaties art. 60(1), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 ("A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.") [hereinafter Vienna Convention].

<sup>40</sup> Press Release, Permanent Court of Arbitration, Slovenia Demands Continuation of Arbitration Proceedings (Aug. 19, 2015), <https://pcacases.com/web/sendAttach/1403> [hereinafter Press Release August 2015]; *see* Vienna Convention, *supra* note 39, at art. 60(1); Croatia v. Slovenia, *supra* note 1, at 34.

proceedings.<sup>41</sup> However, as Croatia emphasized, the resignations of the breaching parties and the reconstitution of the Tribunal could not “begin to address the gravity of the situation,” which displayed Croatia’s hesitance with any further involvement with the arbitration.<sup>42</sup> Furthermore, Croatia wrote a letter to the arbitrators on July 24, 2015, and elaborated on the “irreparable harm” caused by the ex parte discussions:

The communications appear to reveal that Arbitrator Sekolec *inter alia* disclosed critical elements of the Arbitral Tribunal’s deliberations to Slovenia’s Agent; advised her on the issues on which he believed the Tribunal was inclined to rule in Slovenia’s favour, and on which issues it was not so inclined; requested that Ms. Drenik provide him with arguments and “facts” not already in the record so that he could use them in his discussions with other members of the Arbitral Tribunal as his own; conspired with Ms. Drenik to assure that the other members of the Tribunal would not know their true source; communicated these arguments and “facts” to the other members of the Tribunal on the basis that they were his own.<sup>43</sup>

In Croatia’s view, Dr. Sekolec’s “numerous” discussions with the members of the Tribunal and the PCA in a period of thirteen months led to a great likelihood that previously unadmitted evidence would either end up in possession of the arbitrators or would affect the arbitrators’ decision-making process without Croatia’s knowledge.<sup>44</sup> Dr. Pusić previously echoed these concerns in the beginning of 2015, in which Mr. Erjavec had allegedly received and publicized confidential information regarding the arbitration.<sup>45</sup> Erjavec’s reports to the Slovenian media were released on January 7, 2015, April 22, 2015, and June 26, 2015.<sup>46</sup> Thus, Croatia feared that Slovenia possessed “an additional channel of communications” with the Arbitral Tribunal, and the past conversations with the

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<sup>41</sup> Croatia v. Slovenia, *supra* note 1, at 16 (“[T]he most fundamental principles of procedural fairness, due process, impartiality and integrity of the arbitral process have been systematically and gravely violated. . .”).

<sup>42</sup> *See id.*

<sup>43</sup> *Id.*

<sup>44</sup> *See id.* at 17; Ross, *supra* note 31, at 6, 8 (referring to Croatia’s lack of knowledge regarding the precise extent in which the ex parte discussions had shaped the thought process of the arbitrators and the entire arbitration, as commented by Zoran Milanović, the then-Prime Minister of Croatia).

<sup>45</sup> Croatia v. Slovenia, *supra* note 1, at 5-6; Ross, *supra* note 31, at 7, 10 (according to the Slovenian Parliament on February 2, 2013, Slovenia would have treated the Tribunal’s decision as *ultra vires* if Slovenia did not obtain access to the High Sea).

<sup>46</sup> Croatia v. Slovenia, *supra* note 1, at 5-6.



Slovenian media strengthened Croatia's stance towards rescinding the Arbitration Agreement.<sup>47</sup>

On July 30, 2015, the Croatian Ministry of Foreign Affairs confirmed Croatia's decision to end any further participation in the arbitral proceedings, remarking that Slovenia had materially breached the Arbitration Agreement, according to Article 60(1) and (3) of the Vienna Convention and Articles 6 and 10 of the Arbitration Agreement.<sup>48</sup> In particular, the Ministry regarded the ex parte violations and sharing of unadmitted evidence as "unlawful" and "unethical," such that the damage inflicted upon the arbitration was "irreparable."<sup>49</sup> Quoting the Vienna Convention and the Arbitration Agreement, the Ministry explained that the illegal communications among the Slovenian parties rendered the "object or purpose" of the Arbitration Agreement impossible to fulfill.<sup>50</sup> Since Croatia could not continue the proceedings in good faith, the Ministry felt justified to terminate the Arbitration Agreement.<sup>51</sup>

## 2. Slovenia's Reactions

Although Slovenia conceded that the ex parte communications between Sekolec and Drenik violated Article 9(1) of the Terms of Appointment, the counsel did not agree with Croatia's assertion that the Arbitral Tribunal was obliged to terminate the Arbitration Agreement.<sup>52</sup> First, by citing *Victor Pey Casado v. Chile*, Slovenia downplayed the significance of ex parte violations regarding the continuation of the arbitral proceedings.<sup>53</sup>

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<sup>47</sup> Croatia v. Slovenia, *supra* note 1, at 6; Ross, *supra* note 31, at 7.

<sup>48</sup> Croatia v. Slovenia, *supra* note 1, at 18; Vienna Convention, *supra* note 39, at art. 60(1) ("A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part."), art. 60(3) ("A material breach of a treaty, for the purposes of this article, consists in: (a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty."), art. 65(3) (referring both parties to "a solution" in accordance with Article 33 of the United Nations Charter); Arbitration Agreement, *supra* note 13, at art. 6(2) (referring to the violation of the Optional Rules of the PCA), art. 10 ("Both Parties refrain from any action or statement which might intensify the dispute or jeopardize the work of the Arbitral Tribunal.").

<sup>49</sup> Croatia v. Slovenia, *supra* note 1, at 18.

<sup>50</sup> *Id.*; Ross, *supra* note 31, at 8.

<sup>51</sup> Croatia v. Slovenia, *supra* note 1, at 23 ("[S]uch an award, if rendered, 'could never be implemented, or enforced.'").

<sup>52</sup> See *id.* at 29 (citing *Victor Pey Casado and Foundation "Presidente Allende" v. Republic of Chile*, ICSID Case No. ARB/98/2, Award of 8 May 2008, ¶¶ 34-43); Arbitration Agreement, *supra* note 13, at art. 3(4) (referring to the Arbitral Tribunal's *kompetenz-kompetenz*, in which "[t]he Arbitral Tribunal has the power to interpret the present Agreement"); PCA Optional Rules, *supra* note 19, at art. 21 (explaining the *kompetenz-kompetenz* doctrine).

<sup>53</sup> Ross, *supra* note 31, at 11; see, e.g. V.V. Veeder, *The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator – from Miami to Geneva*, 107 AM. SOC'Y OF INT'L L. 387, 390-401 (2013)

In *Victor Pey Casado*, the Claimant requested that Mr. Rezek, a party-appointed arbitrator, resign due to “improperly admitt[ing]” a draft on the tribunal’s jurisdictional decision, which pointed to a “loss of confidence” in the arbitrator.<sup>54</sup> Significantly, only the party that appointed Rezek gained access to the copy of the decision.<sup>55</sup> The arbitral proceedings continued after the resignation and replacement of Rezek.<sup>56</sup> Therefore, by citing *Victor Pey Casado*, Slovenia attempted to show that its arbitral proceedings with Croatia could continue as planned, despite any arbitrator bias.<sup>57</sup>

After hearing Slovenia’s argument, the Arbitral Tribunal responded.<sup>58</sup> Specifically, to treat the “non-material” breach, as Slovenia described it, the Arbitral Tribunal replaced Sekolec and restarted the arbitral proceedings *de novo*.<sup>59</sup> In addition, the Slovenian counsel replaced Drenik as Agent.<sup>60</sup> After the changes were made, Slovenia argued that the Tribunal could perform its task as mandated by the Arbitration Agreement, and contrary to Croatia’s claim, the arbitral disputes did not become impossible to resolve as a result of the allegedly “irremediable corruption of the record of the proceedings.”<sup>61</sup> Slovenia argued that arbitration could be salvaged under the Tribunal’s authority.<sup>62</sup> In support of its argument, Slovenia cited an I.C.J. Advisory Opinion, *Legal Consequences for States of the Continued Presence of South Africa in Namibia and Military and Paramilitary Activities in and against Nicaragua*.<sup>63</sup> In its opinion, the International Court of Justice (I.C.J.) stated

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(discussing the “Alabama arbitration” in 1872 between American and British parties, in which the arbitrators were involved in lengthy, yet open discussions with the members of counsel).

<sup>54</sup> *Victor Pey Casado*, ¶¶ 34-43.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Croatia v. Slovenia*, *supra* note 1, at 36.

<sup>59</sup> *Id.* at 46.

<sup>60</sup> *Id.* at 7-8, 30 (applying Article 37 of the ILC Draft Articles on Responsibility of States for Intentionally Wrongful Acts, which accepted “a declaration of wrongfulness” for non-material breaches, an act that Slovenia performed, selecting H.E. Mr. Ronny Abraham, the former I.C.J. president, as Slovenia’s new party-appointed arbitrator on July 28, 2015, and selecting, as per Slovenia’s request, new party-appointed arbitrators, such as H.E. Mr. Rolf Einar Fife of Norway and Prof. Nicolas Michel of Switzerland, who replaced Prof. Vukas of Croatia).

<sup>61</sup> *See id.* at 29 (“This arbitration can and should continue to its conclusion, and can do so.”); *see Ross*, *supra* note 31, at 13 (remarking that “the scandal would be more serious if [the arbitration] involved one of the three members of the tribunal not appointed by the two states”).

<sup>62</sup> *Croatia v. Slovenia*, *supra* note 1, at 29.

<sup>63</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, Advisory Opinion, 1971 I.C.J. Rep. 16, 47, ¶¶ 94-95 (June

that ex parte communications only make an arbitral dispute impossible to resolve when such communications render the “object and purpose of the treaty” impossible to complete.<sup>64</sup> Here, Slovenia argued, Croatia did not fulfill its burden of proof that the ex parte communications were a material breach of the Arbitration Agreement.<sup>65</sup>

Next, despite Croatia’s intended absence from future arbitral meetings, Slovenia claimed that the Arbitral Tribunal could continue the proceedings in accordance with Article 28(2) of the PCA Optional Rules.<sup>66</sup> If Croatia were to successfully “delay” the proceedings by abstaining from future gatherings, arbitration would then lose its expeditious character.<sup>67</sup> According to Slovenia, the losing side of arbitral proceedings would often attempt to “frustrate an arbitration agreement” by unilaterally withdrawing from arbitration.<sup>68</sup>

Third, Slovenia contended that Croatia’s accession to the European Union was a “*quid pro quo* of the Parties’ agreement,” which permitted the Slovenian party to resolve all disputes revolving around the Bay and the territorial borders through state-to-state arbitration.<sup>69</sup> Thus, Slovenia argued that Croatia could not terminate the Arbitration Agreement, especially since the nation “has irrevocably benefitted” as a new European Union member.<sup>70</sup> In support of its argument, Slovenia cited the *Fisheries Jurisdiction* case to show that once a party vested the decision-making powers in an arbitrator, as Croatia did by joining the European Union, the party could not behave as if the agreement to arbitrate did not exist.<sup>71</sup> Since the Arbitration Agreement sought to settle the border dispute between the two nations, Slovenia claimed that Croatia could not obstruct the direction of the arbitral proceedings.<sup>72</sup>

Fourth, to counter Croatia’s reliance on the Vienna Convention, Slovenia considered Articles 60(4) and 42(2) of the Convention, which permit the nullification of a

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21); *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, 125, 138, ¶¶ 270, 275-76 (June 27) [hereinafter *Nicar. v. U.S.*].

<sup>64</sup> *Croatia v. Slovenia*, *supra* note 1, at 33; *Nicar. v. U.S.*, 1986 I.C.J. at 138, ¶ 275-76.

<sup>65</sup> *Croatia v. Slovenia*, *supra* note 1, at 33.

<sup>66</sup> *See id.* at 32; PCA Optional Rules, *supra* note 19, at art. 28(2).

<sup>67</sup> *Croatia v. Slovenia*, *supra* note 1, at 20.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 28.

<sup>70</sup> *Id.*

<sup>71</sup> *Fisheries Jurisdiction (U.K. v. Ice.)*, Jurisdiction of the Court, Judgment, 1973 I.C.J. Rep. 3, 21, ¶ 45 (Feb. 2) [hereinafter *U.K. v. Ice.*].

<sup>72</sup> *Croatia v. Slovenia*, *supra* note 1, at 28.

treaty only through “the provisions of the treaty.”<sup>73</sup> The Vienna Convention could render the Arbitration Agreement null and void if no “prejudice” to the Arbitration Agreement would result from the action.<sup>74</sup> Articles 60(4) and 65(4), in conjunction with rulings from the I.C.J., support the position that the Vienna Convention cannot alter any existing obligations between two arbitrating parties. Thus, Slovenia contended that the Vienna Convention does not justify the unilateral rescission of the agreement to arbitrate.<sup>75</sup>

Lastly, in reaction to Croatia’s past concerns that the Slovenian government had access to confidential information of the arbitral proceedings and illicitly persuaded the other members of the Tribunal, Slovenia claimed that Croatia misinterpreted Erjavec’s comments to the Slovenian media.<sup>76</sup> In addition, Slovenia contended that Sekolec and Drenik shared only two documents, which were already disclosed to Croatia.<sup>77</sup> Members of the Tribunal, Slovenia claimed, may discuss the case with each other without any violation of ex parte communications, and such practice is “common and appropriate as part of a tribunal’s deliberations.”<sup>78</sup> Thus, Slovenia claimed that the ex parte communications did not render the arbitral proceedings impossible to fulfill, and Croatia could not end its participation in the arbitration, according to Slovenia.<sup>79</sup>

### 3. *Partial Award and Rationale*

After the reconstituted Arbitral Tribunal held a hearing on March 17, 2016, the Tribunal issued the Partial Award on June 30, 2016 to explain the ex parte issue.<sup>80</sup> The Tribunal decided that: (1) the Slovenian ex parte communications violated the Arbitration

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<sup>73</sup> Croatia v. Slovenia, *supra* note 1, at 26.

<sup>74</sup> *See id.* at 26; Vienna Convention, *supra* note 39, at art. 60(4), 42(2).

<sup>75</sup> Croatia v. Slovenia, *supra* note 1, at 26; Vienna Convention, *supra* note 39, at art. 60(4), 65(4) (“Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.”); U.K. v. Ice., 1973 I.C.J. at 21, ¶ 45; Fisheries Jurisdiction (Fed. Rep. of Ger. v. Ice.), Jurisdiction of the Court, Judgment, 1973 I.C.J. Rep. 49, 66, ¶ 45 (Feb. 2); Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), Provisional Measures, 2002 I.C.J. Rep. 219, 246, ¶ 75 (July 19).

<sup>76</sup> Croatia v. Slovenia, *supra* note 1, at 6, 13.

<sup>77</sup> *See id.* at 31.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 33-34.

<sup>80</sup> Press Release, Permanent Court of Arbitration, Conclusion of Hearing in the Arbitration between the Republic of Croatia and the Republic of Slovenia (Mar. 18, 2016), <https://pcacases.com/web/sendAttach/1604> (following Croatia’s *note verbale* from July 30, 2015, the Croatian Ministry of Foreign and European Affairs concluded that the Arbitration Agreement was terminated and that Croatia would not be taking further part in the proceedings); Croatia v. Slovenia, *supra* note 1, at 8-9.

Agreement; (2) contrary to Croatia's contention, the Tribunal disagreed that the Arbitration Agreement was rendered null and void; (3) "the arbitral proceedings pursuant to the Arbitration Agreement [would] continue," (4) the Tribunal "[would] determine the further procedural steps" of the proceedings; and (5) the Tribunal would decide on questions of cost after the issuance of the Final Award.<sup>81</sup> Although Slovenia violated the Arbitration Agreement, the Tribunal declared that the breach would not "affect the Tribunal's ability, in its current composition, to render a final award independently and impartially."<sup>82</sup> Despite the Partial Award, Croatia continues to deny the applicability of the Arbitration Agreement.<sup>83</sup>

The Tribunal explained the rationale for the Partial Award in detail.<sup>84</sup> First, citing Article 28 of the PCA Optional Rules, the Tribunal held that Croatia was not permitted to unilaterally end the arbitral proceedings; instead, the arbitrators possessed *kompetenz-kompetenz* to decide whether an agreement to arbitrate existed and whether the matter in dispute was arbitrable, not Croatia.<sup>85</sup> Next, the Tribunal held that the reconstruction of the Tribunal had no effect on the Final Award, emphasizing that Sekolec did not share

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<sup>81</sup> Croatia v. Slovenia, *supra* note 1, at 57.

<sup>82</sup> Press Release, Permanent Court of Arbitration, Tribunal Issues Partial Award: Arbitration Between Croatia and Slovenia to Continue (June 30, 2016), <https://pcacases.com/web/sendAttach/1785>.

<sup>83</sup> *Termination of the Arbitration Process Between Croatia and Slovenia: Causes and Consequences*, THE REPUBLIC OF CROATIA: MINISTRY OF FOREIGN AND EUROPEAN AFFAIRS (June 30, 2016), <http://www.mvep.hr/hr/ostalo/prestanak-arbitraznog-postupka/> (stating that the Partial Award had incorrectly decided that the neutrality and independence of the arbitrators were not in question and emphasizing that Croatia is no longer a party to the arbitral proceedings); Caroline Simson, *Croatia-Slovenia Territorial Row Survives Arbitrator Contract*, LAW360 (June 30, 2016, 5:34 PM), <https://www.law360.com/articles/812802/croatia-slovenia-territorial-row-survives-arbitrator-contact> (according to Croatia's Ministry of Foreign and European Affairs, the Partial Award was "a missed opportunity for the arbitral tribunal to restore confidence in independence and impartiality of its own work, as well as confidence in international arbitration as such"); *HAAG Odlučio, Arbitraža iz koje se Hrvatska povukla, ipak se nastavlja* [The Hague Has Decided: The Arbitration from which Croatia Has Withdrawn is Nevertheless Ongoing], DNEVNIK (June 30, 2016, 6:06 PM), <http://dnevnik.hr/vijesti/hrvatska/nastavlja-se-arbitraza-za-granicu-izmedju-hrvatske-i-slovenije---441934.html> (Croat.) (commenting that the arbitration process has been "irrevocably compromised," while the then-Prime Minister Zoran Milanović criticized the decision of the Tribunal, remarking that "someone in the tribunal did something he should not have done. The Croatian Parliament has carried out an unanimous decision to terminate the proceedings, and that is how it is going to be").

<sup>84</sup> Croatia v. Slovenia, *supra* note 1, at 36.

<sup>85</sup> *See id.* at 37-41 (citing *The Walfish Bay Boundary Case* (Ger./ Gr. Brit.), Award of May 23, 1911, R.I.A.A. Vol. XI, 263, 307; *Rio Grande Irrigation and Land Company* (Gr. Brit. v. U.S.), Award of Nov. 28, 1923, R.I.A.A. Vol. VI, 131, 135-36; *Appeal Relating to the Jurisdiction of the ICAO Council* (India v. Pak.), Judgment, 1972 I.C.J. Rep. 46, 53-54, ¶ 16 (Aug. 18) ("If a *mere allegation*, as *yet unestablished*, that a treaty was no longer operative could be used to defeat its jurisdictional clauses, all such clauses would become potentially a dead letter. . . .") (emphasis added) [hereinafter ICAO Council]; *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 288 (3d Cir. 2003) ("In its simplest form, competence-competence simply means that the arbitrators can examine their own jurisdiction without waiting for a court to do so. . . .") (citing William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 8 AM. REV. INT'L ARB. 133, 140 (1997)).

previously unadmitted information with the arbitrators and that the procedural disadvantage to Croatia from the ex parte communications was minor, if not nonexistent.<sup>86</sup> Thus, the Tribunal believed that there remained no “obstacle to the continuation of the proceedings,” and the hearings resumed on April 26, 2017.<sup>87</sup>

Although the Tribunal found that the arbitration could continue without prejudice to Croatia, the panel noted that if “any hesitation” as to the ability of the arbitrators to resolve the parties’ dispute surrounded the atmosphere of the proceedings, “[the Tribunal] would conclude that the proceedings must be terminated.”<sup>88</sup> No such hesitation existed in the Tribunal’s eyes.<sup>89</sup> Namely, the Tribunal would focus on “remedial action[s]” such as “reopening” the submission of evidence and other facts, which would stabilize the “procedural balance between the Parties” and eliminate further hesitation.<sup>90</sup>

### III. IMPARTIALITY AND PROCEDURAL FAIRNESS IN ARBITRATION

Although the Tribunal held that Croatia could not unilaterally rescind the Arbitration Agreement, the Partial Award afforded minimal consideration to the importance of impartiality, independence, procedural fairness, and good faith in an arbitral setting.<sup>91</sup> This is evidenced through examining the fundamental principles of arbitration and how the tribunal considered arbitral impartiality and procedural fairness in rendering its award. When parties choose to settle their disputes through arbitration, each party surrenders its own ability to litigate all relevant matters in court.<sup>92</sup> Despite the trade-off, arbitration remains an “adjudicatory” action, where a tribunal, just like a court, makes decisions on an “impartial” and “independent” basis.<sup>93</sup> The tribunal’s informed adjudicatory decisions are determined primarily by the parties’ legal arguments and the evidence they put forth in support of their arguments; however, ex parte communications without the other party’s presence counteracts the principles of impartiality and procedural

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<sup>86</sup> Croatia v. Slovenia, *supra* note 1, at 48.

<sup>87</sup> *Id.*; see Press Release, Permanent Court of Arbitration, Tribunal Declares Hearings Closed and Plans to Render Award in the Coming Months (Apr. 26, 2017), <https://pcacases.com/web/sendAttach/2122>.

<sup>88</sup> Croatia v. Slovenia, *supra* note 1, at 56 (“[T]he Tribunal recalls that it is its duty to protect the procedural rights of both Parties.”) (“As long as an *impartial and independent decision-making process* can be guaranteed, procedural fairness requires that the process be continued. . . .”) (emphasis added).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 48.

<sup>91</sup> *Id.* at 49-55.

<sup>92</sup> L. Ali Khan, *Arbitral Autonomy*, 74 LA. L. REV. 1, 8 (2013).

<sup>93</sup> GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 215-16 (2d ed. 2014).

fairness.<sup>94</sup> As the article describes in detail, arbitrator impartiality and procedural fairness play important roles in arbitration.

### *1. Impartiality in the Arbitration Agreement and the Croatian-Slovenian National Arbitration Laws*

First, the Arbitration Agreement between and the national arbitration laws of Slovenia and Croatia identify arbitrator impartiality and independence as integral qualities of a proper arbitral proceeding.<sup>95</sup> According to Article Four of the Arbitration Agreement, the Arbitral Tribunal was given the task to delineate the bounds of the Bay in accordance with “international law, equity, and the principle of good neighborly relations *in order to achieve a fair and just result.*”<sup>96</sup> In the spirit of the Agreement, the Tribunal described the interests of both parties as “vital,” and if the arbitral proceedings could not reach the goal of a “fair and just result,” the Tribunal could rescind the Arbitration Agreement.<sup>97</sup> Consequently, arbitral impartiality, an integral part of “procedural fairness,” falls under the purpose of Article Four and plays a major role in the structure of the arbitral proceedings.<sup>98</sup> Both Laws on Arbitration for Slovenia and Croatia highlight the provisions on arbitral impartiality, the requirement of disclosure, and equal treatment of the parties.<sup>99</sup> Lastly, the nearly verbatim provisions of both nations’ arbitration acts allow the arbitral tribunal to terminate the arbitration agreement if the proceedings become “impossible.”<sup>100</sup> For

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<sup>94</sup> RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 1.1 (AM. LAW. INST. 2011); *see also* Lon L. Fuller & Kenneth I. Winston, *The Forms and Limits of Adjudication*, 92 HARVARD L. REV. 353, 381 (1978) (regarding arbitration as a “special . . . form of adjudication”).

<sup>95</sup> Arbitration Agreement, *supra* note 13, at art. 4(b).

<sup>96</sup> *Id.* (applying “the rules and principles of international law” in art. 4(a)) (emphasis added).

<sup>97</sup> Croatia v. Slovenia, *supra* note 1, at 56 (“If the Tribunal had *any hesitation* that the present process can achieve these noble goals, it would conclude that the proceedings must be terminated.”) (emphasis added).

<sup>98</sup> *Id.*

<sup>99</sup> Law on Arbitration of Slovenia, Apr. 25, 2008, Official Gazette of Slovenia, May 9, 2008, art. 15(1), 21 (Slovn.) (recognizing “the principle of good faith” in the interpretation of the national arbitration law); Croatian Law on Arbitration, Official Gazette of Croatia 88/2001, art. 12(1), 17(1) (Croat.); *see generally* Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(1)(d), Sept. 30, 1970, 330 U.N.T.S. 38 (preventing the enforcement of an award if the “arbitral procedure was not in accordance with the agreement of the parties”).

<sup>100</sup> Law on Arbitration of Slovenia, *supra* note 99, at art. 36(2)(3); Croatian Law on Arbitration, *supra* note 99, at art. 32(1)(3).

instance, impossibility could occur when the object or purpose of the arbitration agreement is defeated.<sup>101</sup>

## 2. *Impartiality in the Permanent Court of Arbitration Optional Rules*

Second, Article Ten of the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States, which is very similar to the national arbitration laws of Slovenia and Croatia, requires arbitrator impartiality and independence.<sup>102</sup> A reason for impartiality is that the arbitrators must “provide fair and effective procedures for peaceful resolution of disputes.”<sup>103</sup> Thus, if the conduct of arbitration leans prejudicially towards one side during ex parte communications, the fair and effective procedures in the Optional Rules would become compromised.<sup>104</sup> Similarly, the arbitral tribunal must provide each party an equal chance to present its arguments.<sup>105</sup> In conjunction with Article 34(2), if the continuation of the arbitral proceedings would become “unnecessary” or “impossible,” the tribunal could rescind the arbitration agreement.<sup>106</sup> Thus, impartial and independent arbitrators and procedural fairness are important aspects of the arbitration agreement, which are reflected in the Optional Rules of the PCA and the national arbitration laws.<sup>107</sup>

## 3. *Authors’ Perspectives on Impartiality and Fairness*

Third, many scholars note the importance of arbitral impartiality and procedural fairness, which are threatened during ex parte communications.<sup>108</sup> Echoing the principles

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<sup>101</sup> See also *Guinea-Bissau v. Senegal*, Judgment, 1991 I.C.J. Rep. 53, 70, ¶ 49 (Nov. 12).

<sup>102</sup> PCA Optional Rules, *supra* note 19, at art. 10(1).

<sup>103</sup> See *id.* at 43.

<sup>104</sup> *Id.*

<sup>105</sup> See *id.* at art. 15(1).

<sup>106</sup> See *id.* at art. 34(2); see also Law on Arbitration of Slovenia, *supra* note 99, at art. 36(2)(3); Croatian Law on Arbitration, *supra* note 99, at art. 32(1)(3).

<sup>107</sup> PCA Optional Rules, *supra* note 19, at art. 10(1), 13(3), 15(1), 17(1), 34(2); Law on Arbitration of Slovenia, *supra* note 99, at art. 2(1), 15(1), 21, 36(2)(3); Croatian Law on Arbitration, *supra* note 99, at art. 12(1), 17(1), 32(1)(3).

<sup>108</sup> Bazil Oglinda, *Key Criteria in Appointment of Arbitrators in International Arbitration*, 5 TRIBUNA JURIDICA 124, 127 (2015); CHRISTOPH SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 498 (2d ed. 2009); Mitchell L. Lathrop, *Arbitrator Bias in the United States: A Patchwork of Decisions*, 80 DEF. COUNS. J. 146, 146 (2013); Carita Wallgren-Lindholm, *Uneven Representation and Imbalanced Resources Between Parties to an International Arbitration or in Relation to the Arbitral Tribunal: Restoring Reasonable Balance*



of the PCA Optional Rules, Bazil Oglinda, an arbitrator for the International Chamber of Commerce and the Romanian Chamber of Commerce, described impartiality as “the watchword of all tribunals, including arbitrators.”<sup>109</sup> Even though parties appoint arbitrators that would serve the selector’s interests, the barrier between counsel and impartial arbitrators should remain standing.<sup>110</sup> Once the barrier is torn down, many arbitration rules would permit vacatur of the arbitral award; therefore, the maintenance of arbitrator impartiality and independence, as well as procedural fairness to the parties, hold a high position of importance in arbitration.<sup>111</sup> Analyzing multiple arbitration laws, scholars commented on the behavior of the arbitrators and its impacts on the equal treatment of the parties, such as in the United States, where the courts apply the Federal Arbitration Act’s “evident partiality” standard if the arbitrators have shown “corrupt” behavior or where the courts analyze whether the challenged arbitrator acted “in bad faith” to “deprive [a] party of a fundamentally fair proceeding.”<sup>112</sup> Thus, arbitrator impartiality and procedural fairness are inextricably linked with dispute resolution.

In particular, Ms. Carita Wallgren-Lindholm, a member of the ICC International Court of Arbitration, and Mr. James Carter, a U.S. arbitrator with a great understanding of the ICC, LCIA, AAA, and ICSID, considered the role of an arbitrator and the impermissibility of *ex parte* communications, which damage procedural fairness.<sup>113</sup>

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*and Symmetry in the Hearing Room (or Not)*, in *STORIES FROM THE HEARING ROOM: EXPERIENCE FROM ARBITRAL PRACTICE* 195 (Domitille Baizeau & Bernd Ehle eds., 2015); James Carter, *The Rights and Duties of the Arbitrator: Six Aspects of the Rule of Reasonableness*, in *THE STATUS OF THE ARBITRATOR* 24 (ICC Pub. No. 564, 1995); Alfonso Gomez-Acebo, *The Standard of Impartiality and Independence*, in *34 PARTY-APPOINTED ARBITRATORS IN INTERNATIONAL COMMERCIAL ARBITRATION*, INTERNATIONAL ARBITRATION LAW LIBRARY 69, 79 (2016).

<sup>109</sup> Oglinda, *supra* note 108, at 127 (citing *Amec Civil Eng’g Ltd. v. Sec’y of St. for Transp.* [2004] EWHC 2339 (TCC)).

<sup>110</sup> *See id.* at 129; *see generally* Schreuer, *supra* note 108, at 498 (describing that tribunals made up of party-appointed arbitrators of the same nationality as the appointing party foster better understanding of the parties’ perspectives and arguments); ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 221 (2d ed. 1991) (“The presiding arbitrator must be, and be seen to be, neutral as well as impartial.”).

<sup>111</sup> Lathrop, *supra* note 108, at 146 (citing FRANCES A. KELLOR, *AMERICAN ARBITRATION*, 236-37 [1st ed. 1948] [“Arbitration laws consider impartiality so important that they quite universally provide that, upon proof of bias, the award shall be set aside.”]).

<sup>112</sup> Federal Arbitration Act, 9 U.S.C. § 10(a)(2) (2017) (permitting the vacatur of an award if the arbitrators displayed “evident partiality”); *Pochat v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 12-22397-CIV-ROSENBAUM, 2013 U.S. Dist. LEXIS 119447, at \*3 (S.D. Fla. Aug. 22, 2013); Louis Russo and Matthew Richardson, *Your Arbitral Awards are Safe: U.S. Courts are Deferential to Arbitral Disclosure Rulings*, *MEALEY’S INTL. ARB. REP.* 21 (2015); *Silicon Power Corp. v. GE Zenith Controls, Inc.*, 661 F. Supp. 2d 524, 538 (E.D. Pa. 2009) (“[Congress] barred federal courts from confirming awards *tainted* by partiality, *a lack of elementary procedural fairness*, corruption, or similar misconduct. This balance would be eviscerated, and the integrity of the arbitration process could be compromised, if parties could require that awards, flawed for any of these reasons, must nevertheless be blessed by federal courts.”) (emphasis added).

<sup>113</sup> Wallgren-Lindholm, *supra* note 108, at 195; Carter, *supra* note 108, at 24.

Commenting from the perspective of a modern arbitrator, Wallgren-Lindholm wrote that arbitrators should prevent any party attempts at ex parte communications.<sup>114</sup> She reasoned that ex parte communications with the arbitrator could lead to an “inappropriate flow of information or misdirected intentions.”<sup>115</sup> Next, referring to the American Code of Ethics, Carter enumerated the six canons of arbitrator ethics.<sup>116</sup> For instance, the arbitrator must “avoid [the] appearance of impropriety” and “be faithful to the relationship of trust and confidentiality *inherent in that office*.”<sup>117</sup> Clarifying the latter canon, Carter explained that the arbitrator cannot make use of discovered information “to affect adversely the interest of others,” which could likely include information gained in ex parte discussions.<sup>118</sup> Wallgren-Lindholm’s and Carter’s analyses reflect the international opinion against ex parte communications; since parties agree to arbitration on the basis of trust for the process, arbitrators are obliged to maintain the parties’ trust in a fair and impartial manner.<sup>119</sup>

In addition, the impartiality and procedural fairness of arbitrators are often compared to that of judges.<sup>120</sup> Alfonso Gomez-Acebo, the co-head of the International Arbitration Group at Baker McKenzie, described three requirements of an impartial and independent arbitrator.<sup>121</sup> Namely, the arbitrator must: (1) have an “unbiased mind,” which is “not different” from a judge; (2) have an “unbiased behavior”; and (3) keep “a minimum distance” from the parties.<sup>122</sup> Other scholars equate an arbitrator to a judge where practicing impartiality and procedural fairness is essential.<sup>123</sup> Thus, the arbitrator has the obligation

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<sup>114</sup> Wallgren-Lindholm, *supra* note 108, at 198 (clarifying that if the contracting parties attempt to communicate with an arbitrator outside of the arbitral proceedings and without the permission of the opposing party, the arbitrator must deny the party’s outside contact, adding that “such ex parte contact is not allowed in international arbitral proceedings and should not occur anew”).

<sup>115</sup> *Id.*

<sup>116</sup> Carter, *supra* note 108, at 24.

<sup>117</sup> *See id.* at 25 (emphasis added).

<sup>118</sup> *Id.*

<sup>119</sup> Wallgren-Lindholm, *supra* note 108, at 198; Carter, *supra* note 108, at 25.

<sup>120</sup> Gomez-Acebo, *supra* note 108, at 79.

<sup>121</sup> *Id.*

<sup>122</sup> *See id.* at 80-87 (regarding unbiased behavior as “the tribunal’s obligation to conduct the procedure impartially, allowing all of the parties to have a reasonable opportunity to present their case” and describing “minimum distance” as lack of “favouritism”).

<sup>123</sup> Mohammed Bedjaoui, *The Arbitrator: One Man-Three Roles – Some Independent Comments on the Ethical and Legal Obligations of an Arbitrator*, 5 J. INT’L ARB. 7, 8 (1988) (separating the arbitrator in three categories: (1) an arbitrator as a common law judge; (2) an arbitrator as a judge selected by the parties; and (3) an arbitrator as a catalyzer to the negotiated rules between the parties).

to act in a way that would grant the parties “a fair and public hearing.”<sup>124</sup> The comparison of arbitrators with judges explains the arbitrator’s “quasi-judicial” role, in which the arbitrator must deliver a “faithful, honest and disinterested” analysis of the proceedings.<sup>125</sup> Therefore, just like a judge, the arbitrator acts as a counterbalance of fairness between the arbitrating parties.<sup>126</sup> Because the arbitrator as adjudicator adopts the role of the judge, the arbitrator supports the framework of arbitration, which includes the enforcement of the parties’ agreement to resolve all disputes fairly and impartially via the arbitral process.<sup>127</sup>

#### 4. *Impartiality and Procedural Fairness in National Arbitration Laws and Arbitration Rules*

Fourth, in addition to the arbitral laws of Slovenia and Croatia, other national arbitration laws and rules emphasize the importance of impartiality and procedural fairness.<sup>128</sup> For example, the arbitration law of Austria regards the principles of “fair treatment of the parties” and due process as “general principles,” which are essential to the character of the arbitral proceedings; therefore, the parties cannot waive these protections.<sup>129</sup> The Austrian arbitral laws are thus comparable to principles of a judge’s impartiality and equal treatment of the parties in litigation.<sup>130</sup> The English Arbitration Act of 1996 lists impartiality of the tribunal as both an “object of arbitration” and a general principle; in addition, the tribunal must “act *fairly and impartially* as between the

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<sup>124</sup> Ahmed S. El-Kosheri & Karim Y. Youssef, *The Independence of International Arbitrators: An Arbitrator’s Perspective*, in SPECIAL SUPPLEMENT 2007: INDEPENDENCE OF ARBITRATORS, ICC INTL. CT. OF ARB. BULL. 43 (ICC Pub. 690, 2008) (citing a Paris Court of Appeal case, which stated that an “arbitration finds its jurisdictional value in the independence of arbitrators and the respect of fundamental guarantees”).

<sup>125</sup> David J. Branson, *American Party-Appointed Arbitrators—Not the Three Monkeys*, 30 DAYTON L. REV. 1, 49 (2004) (citing *Barcon Assoc. Inc. v. Tri-County Asphalt Corp.*, 86 N.J. 179, 188 (1981)).

<sup>126</sup> See also Peter M. Friedman, *Don’t I Know You From Somewhere? Why Due Process Should Bar Judges from Presiding Over Cases When They Have Previously Prosecuted the Defendant*, 88 J. CRIM. L. & CRIMINOLOGY 683, 684 (1998); see also *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

<sup>127</sup> Gregory C. Pingree, *Where Lies the Emperor’s Robe? An Inquiry Into the Problem of Judicial Legitimacy*, 86 OR. L. REV. 1095, 1106 (2007).

<sup>128</sup> See generally Law on Arbitration of Slovenia, *supra* note 99, at art. 21; Croatian Law on Arbitration, *supra* note 99, at art. 17.

<sup>129</sup> Christoph Liebscher & Dorit Ungar, *The New Austrian Arbitration Law and the Federal Arbitration Law in the United States – A Comparison*, 21-5 MEALEY’S INTL. ARB. REP. 15 (2006).

<sup>130</sup> *Id.*

parties.”<sup>131</sup> Therefore, the arbitral laws of Slovenia and Croatia are not unique in describing the standards for arbitrator impartiality.

Arbitration rules, including those from London Court of International Arbitration (LCIA), the American Arbitration Association (AAA), and the UNCITRAL Arbitration Rules, require that the arbitrators be “strictly impartial,” and, as a corollary, the rules forbid any *ex parte* communications between party members and arbitrators.<sup>132</sup> In addition, institutional rules from other parts of the globe contain provisions similar to the PCA, such as the Hong Kong International Arbitration Centre, Singapore International Arbitration Centre, Judicial Arbitration and Mediation Services, Vienna International Arbitration Centre, and International Institute for Conflict Prevention and Resolution.<sup>133</sup> As a result, virtually all national arbitration laws and institutional rules value impartiality of the arbitral tribunal and procedural fairness toward the parties; if arbitrators favor one of the parties in a partial manner, the arbitral proceedings could become tainted.<sup>134</sup>

### 5. Codes of Ethics

Fifth, arbitral codes of ethics have increasingly won acceptance in international arbitration, and they reinforce the necessity of impartiality in arbitration.<sup>135</sup> In international practice, arbitrators hold a high regard for the implementation of the IBA Guidelines on Conflicts of Interest in International Arbitration.<sup>136</sup> According to General Standard 1 of the IBA Guidelines, the arbitrator must act in an impartial and independent way, which is

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<sup>131</sup> Arbitration Act 1996, c. 23 (Eng.), art. 1, 33, [http://www.legislation.gov.uk/ukpga/1996/23/pdfs/ukpga\\_19960023\\_en.pdf](http://www.legislation.gov.uk/ukpga/1996/23/pdfs/ukpga_19960023_en.pdf) (“The tribunal *shall* comply with that general duty in conducting the arbitral proceedings.”) (emphasis added).

<sup>132</sup> Rita Davis & Allan B. Moore, *An American Abroad: The Divergent Worlds of U.S. and U.K. Insurance Arbitrations*, 29-1 MEALEY’S INTL. ARB. REP. 26 (2014); *see also* London Court of International Arbitration, Arbitration Rules, art. 14.4(i) (2014) (requiring the members of the Tribunal “to act fairly and impartially . . . giving [each party] a reasonable opportunity of putting its case and dealing with that of its opponent(s)”); American Arbitration Association, Arbitration Rules, art. 20 (2014); UNCITRAL Arbitration Rules art. 17(1) (2010) (requiring the Tribunal to resolve the parties’ disputes in a “fair and efficient” manner).

<sup>133</sup> Hong Kong International Arbitration Centre, Arbitration Rules, art. 11.1 (2013); Singapore International Arbitration Centre, Arbitration Rules, art. 13.1, 13.6 (2016); Judicial Arbitration and Mediation Services, Arbitration Rules, art. 9.1, 13.3 (2014); Vienna International Arbitration Centre, Arbitration Rules, art. 16.2 (2013); International Institute for Conflict Prevention and Resolution, Arbitration Rules, art. 5.4, 7.1 (2014).

<sup>134</sup> Davis, *supra* note 132.

<sup>135</sup> *See generally* IBA Council, *IBA Guidelines on Conflicts of Interest in International Arbitration*, at 2 (Oct. 23, 2014), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=e2fe5e72-eb14-4bba-b10d-d33dafee8918> (representing “best international practice” regarding the impartiality of the arbitrators).

<sup>136</sup> *Id.*

described as a “fundamental principle.”<sup>137</sup> Lawrence Newman and David Zaslowsky described Articles 5.3 and 5.4 of the IBA Rules of Ethics for International Arbitrators, which forbid “unilateral communications” and require arbitrators to inform the other party or arbitrators of any “improper communication[s].”<sup>138</sup> The Guidelines reflect the “more commonly expressed European claim that international arbitration practices are that party appointed arbitrators are completely neutral,” even though party appointed arbitrators may provide better clarification of the selecting party’s arguments to the rest of the Tribunal.<sup>139</sup> Therefore, the IBA Guidelines and Rules of Ethics discourage the arbitrators from engaging in *ex parte* proceedings, and they echo the growing international consensus on arbitrator impartiality and independence.<sup>140</sup>

## 6. *Impartiality and Procedural Fairness in Arbitral Decisions*

Furthermore, arbitral decisions show the importance of impartiality of the arbitrators and procedural fairness. In particular, one unpublished ICC decision focused on the behavior of an arbitrator, who was “an acting judge” and had access to information that other members of the tribunal did not possess.<sup>141</sup> Because personal and unequal access to information led to questions about the arbitrator’s impartiality, the ICC Court did not “confirm [the arbitrator] on ‘grounds of [his] past.’”<sup>142</sup> Thus, arbitrators must base their decisions on the arguments and evidence presented by both parties, instead of relying on *ex parte* sources.

In the unpublished case, *ICC Case 12171*, a maritime arbitral proceeding between the claimant, a Croatian shipyard, and the respondent, a German company, the ICC Court held that the award was “non-binding upon the parties” since the German respondent engaged in *ex parte* communications with the expert arbitrator.<sup>143</sup> In its decision, the ICC Court first commented on the lack of impartiality and independence of the expert

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<sup>137</sup> IBA Council, *supra* note 135, at 4.

<sup>138</sup> Lawrence Newman & David Zaslowsky, *When Arbitrators Stray: Ex Parte Communications*, NEW YORK L. J. (Sept. 25, 2015), <http://nysbar.com/blogs/ResolutionRoundtable/When%20Arbitrators%20Stray.pdf>.

<sup>139</sup> *Id.*; *cf.* Schreuer, *supra* note 108, at 498.

<sup>140</sup> Schreuer, *supra* note 108, at 498.

<sup>141</sup> KAREL DAELE, CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION 285 (2012) (citing Anne Marie Whitesell, *Independence in ICC Arbitration: ICC Court Practice Concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators*, ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN, SPECIAL SUPPLEMENT 22, Case 5 (2007)).

<sup>142</sup> *Id.*

<sup>143</sup> Case No. 12171 of 2011, Award on Preliminary Issues, Vol. 22, No. 1 (ICC Int’l Ct. Arb.) [hereinafter ICC Case No. 12171].

arbitrator.<sup>144</sup> Namely, the arbitrator “had discussions with [Respondent] about the [arbitral] procedure” and believed that he was “very close to Respondent”; the arbitrator was not in contact with the claimant, and the claimant was unaware of the ex parte communications between the arbitrator and the respondent.<sup>145</sup> However, unlike the current conflict between Croatia and Slovenia, the Court was unsure if the expert arbitrator’s affinity for the German respondent affected the expert arbitrator’s impartiality and independence.<sup>146</sup> Nevertheless, the Court analyzed whether the arbitrator violated the Croatian claimant’s right of equal treatment and procedural fairness.<sup>147</sup> Similar to the current dispute regarding the Bay of Piran/Savudrija, the arbitrator was twice engaged in secret ex parte communications with the German respondent, and as a result, the claimant was not able to provide the arbitrator with its own documents to support the Croatian argument and counter the German position.<sup>148</sup> The ICC case was significant because the Court heavily considered various factors in annulling an award, including the impartiality and independence of the arbitrator, as well as the right of the parties to be heard.<sup>149</sup> Although a sole arbitrator settled the Croatian-German dispute, the ICC Court did not make a distinction between a sole arbitrator and a party-appointed arbitrator; thus, the ICC followed the increasing international emphasis on discouraging any behavior that would compromise the impartiality of the arbitrator, which would have otherwise led to an unfair decision.<sup>150</sup>

Moreover, the *Buraimi Oasis* case of 1955 between the United Kingdom and Saudi Arabia illustrated that the violation of ex parte proceedings, if extensive, could lead not only to an annulled award but also to abandoned arbitral proceedings.<sup>151</sup> In *Buraimi Oasis*, the Saudi party-appointed arbitrator, Sheikh Yusuf Yasin, was often in contact with the Saudi Arabian counsel.<sup>152</sup> The Saudi government bribed multiple arbitrators to decide in Saudi Arabia’s favor; in response, the arbitrators resigned from both sides until the process was abandoned.<sup>153</sup> Global Arbitration Review described that the ex parte proceedings and

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<sup>144</sup> ICC Case No. 12171.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*; Croatia v. Slovenia, *supra* note 1, at 31.

<sup>147</sup> Croatia v. Slovenia, *supra* note 1, at 31.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Ross, *supra* note 31, at 13.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*; John Barrett Kelly, ‘*The Buraimi Oasis Dispute*’ in INTERNATIONAL AFFAIRS, 32 ROYAL INSTIT. OF INT’L AFF. 318, 320 (1956).

the replacement of biased arbitrators caused an “instigation of the tribunal.”<sup>154</sup> The violation of the *ex parte* rule in *Buraimi Oasis* countered Slovenia’s emphasis on the *Alabama Arbitration* case of 1872, where U.S. agents and arbitrators were in constant, extensive, yet acceptable contact with one another; however, the *Alabama Arbitration*’s role was to show the value of parties selecting their own arbitrators.<sup>155</sup> *Alabama Arbitration* does not explicitly support the violation of *ex parte* restrictions, and the trend in today’s institutional rules and national arbitration statutes supports the movement towards greater arbitrator impartiality.<sup>156</sup>

Some arbitral decisions likewise implied the necessity of arbitrator impartiality in carrying out the arbitration agreement. For example, in *Guinea-Bissau v. Senegal*, the International Court of Justice described two major goals of state-to-state arbitration: (1) to “entrust an arbitral tribunal with the task of settling a dispute in accordance with the terms agreed by the parties”; and (2) to settle all disputes “peaceful[ly] and [definitely] . . . that had theretofore been incapable of amicable resolution.”<sup>157</sup> Arbitration, therefore, requires trust in the arbitrators to deliver an award in compliance with the arbitration agreement, and the proceedings must be carried out fairly and amicably; without fair and amicable proceedings, the parties would have very likely not opted to settle their disputes via arbitration.<sup>158</sup>

## 7. Procedural Fairness in Case Law

Case law likewise stresses the need for procedural fairness in arbitration. The court in *Pochat*, a U.S. decision, held that an arbitrator’s misconduct in the admission of evidence could lead to annulment of the award; in particular, the court analyzed as a factor whether the arbitrator’s decision to admit particular evidence was “so gross as to deprive the party of a fundamentally fair proceeding. . . .”<sup>159</sup> The court’s emphasis on procedural fairness corresponds to the important attributes of arbitration.<sup>160</sup> Taking procedural fairness one step further in the area of *ex parte* communications, Gary Born stated that “undisclosed *ex parte* contacts concerning the merits of the parties’ dispute are presumptively regarded as

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<sup>154</sup> Ross, *supra* note 31, at 13.

<sup>155</sup> *Id.* at 11 (showing that party-appointed arbitrators reflect the parties’ “trust in the proceeding[s]”).

<sup>156</sup> *Id.*

<sup>157</sup> *Guinea-Bissau v. Senegal*, 1991 I.C.J. at 70, ¶ 49.

<sup>158</sup> *Id.*

<sup>159</sup> *Pochat*, 2013 U.S. Dist. LEXIS 119447, at \*3.

<sup>160</sup> *Id.*

*improper.*<sup>161</sup> To support this claim, Born cited *United Food*, where an arbitral award was challenged due to an arbitrator's involvement in ex parte communications; namely, the arbitrator made use of the information gained in these discussions.<sup>162</sup> Various cases such as *United Food*, however, illustrate that the complainant must show more than the mere existence of ex parte communications to annul an award or the proceedings, such as presenting evidence of the communications' effect on procedural fairness or proving the breach of the object and purpose of the arbitration agreement.<sup>163</sup>

### 8. Parties' Obligations

Lastly, the arbitrating parties likewise hold specific obligations, including the requirement to act in good faith.<sup>164</sup> Applicable to arbitration agreements, Article 26 of the Vienna Convention on the Law of Treaties holds that arbitration agreements are "binding upon the parties," and such agreements "must be performed [by the parties] in good faith."<sup>165</sup> The concept of good faith is central in international relations, as stated by the commentary to the Vienna Convention.<sup>166</sup> The commentary cited several arbitral decisions which required the parties to act in good faith, such as in the *North Atlantic Coast Fisheries* proceedings.<sup>167</sup> The good faith-spirit of Article 26 of the Vienna Convention is present in Article 10(1) of the Arbitration Agreement between Slovenia and Croatia, which forbids either party from "intensify[ing] the dispute or jeopardiz[ing] the work of the Arbitral

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<sup>161</sup> GARY B. BORN, *INTERNATIONAL ARBITRATION: CASES AND MATERIALS*, 745 (2d ed. 2015) (emphasis added).

<sup>162</sup> *United Food & Commercial Workers Int'l Union v. SIPCO*, No. 4-90-CV-70250, 1992 U.S. Dist. LEXIS 21332, at \*29-30 (D. Iowa Dec. 30, 1992).

<sup>163</sup> *See Glass, Molders, Pottery v. Excelsior Foundry*, 56 F.3d 844, 846 (7th Cir. 1995) ("An ex parte contact is not an automatic ground for invalidating such an award."); *Spector v. Torenberg*, 852 F. Supp. 201, 209 (S.D.N.Y. 1994) ("[A] party must show that [the ex parte] conversation deprived [the party] of a fair hearing and influenced the outcome of the arbitration."); *United States Life Ins. Co. v. Superior Nat'l Ins. Co.*, 591 F.3d 1167, 1176 (9th Cir. 2010) (requiring the party to show both the existence of ex parte communications and the effect of the communications on the "rights of a party" to challenge an award).

<sup>164</sup> *See also Tobey v. County of Bristol*, 23 F. Cas. 1313, 1321-22 (C.C.D. Mass. 1845) (describing the arbitration agreement as one "which must rest in the good faith and honor of the parties"); Vienna Convention, *supra* note 39, at art. 26.

<sup>165</sup> Vienna Convention, *supra* note 39, at art. 26.

<sup>166</sup> Draft Articles on the Law of Treaties with Commentaries, Rep. of the Comm. to the G.A. 211 (1966), [http://legal.un.org/ilc/texts/instruments/english/commentaries/1\\_1\\_1966.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf) [hereinafter Draft Articles on the Law of Treaties].

<sup>167</sup> *Id.* (citing Reports of International Arbitral Awards, vol. XI, 188 [1910], which held that the Treaty of Ghent limited Great Britain's regulation of fisheries rights by the principle of good faith).



Tribunal.”<sup>168</sup> In sum, the requirement of good faith among the parties plays a key role in settling the Bay dispute under the “principles of international law” and “good neighbourly relations.”<sup>169</sup> Articles 4 and 10(1) of the Arbitration Agreement, taken together, emphasize good faith by all actors in the arbitral process; therefore, the acts of individual parties cannot purposely undermine the goals of arbitration, an adjudicative process.<sup>170</sup> If only arbitrators were required to act in good faith and to carry out the arbitration agreement, parties could likely be encouraged to adopt underhanded tactics to receive an unfair advantage in the arbitral proceedings; it thus follows that the parties have similar obligations to act in good faith.<sup>171</sup>

If the arbitral proceedings do not follow the principles of impartiality, independence, and procedural fairness, the arbitral institution would likewise feel the negative impacts of the ethical violations.<sup>172</sup> When the arbitrator’s sense of independence and impartiality is not trusted, then the parties’ faith in the arbitral proceedings could be jeopardized “in an ir[r]eparable way.”<sup>173</sup> Thus, the behavior of the arbitrators and the parties can have a significant impact on the arbitral proceedings and ultimately, the result.<sup>174</sup> With a tainted arbitral proceeding, arbitration ceases to function as an acceptable method of amicably settling the parties’ disputes in particular institutions, thus increasing the risk of an annulled award or of rescinded arbitration agreements.<sup>175</sup> Therefore, tainted *ex parte* communications clash with the integrity of arbitral institutions, as well as with

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<sup>168</sup> Vienna Convention, *supra* note 39, at art. 26; Arbitration Agreement, *supra* note 13, at art. 10(1); *see also* Draft Articles on the Law of Treaties, *supra* note 166, at 211 (stating that provisions similar to Article 10(1) of the Arbitration Agreement were “clearly implicit in the obligation to perform the treaty in good faith”).

<sup>169</sup> Arbitration Agreement, *supra* note 13, at art. 4.

<sup>170</sup> *See id.* at art. 4, 10(1).

<sup>171</sup> Bernardo M. Cremades, *Good Faith in International Arbitration*, 27 AM. U. INT’LL. REV. 761, 768 (2011) (interpreting good faith to prevent any “abuse of law through an antisocial exercise of a right”); Papillon Group Corporation (Pan.) v. Arab Republic of Syria, Final Award, ICC Case No. 12923, 118 (Oct. 11, 2007) (“[I]nternational arbitration is based on the good faith of the parties.”).

<sup>172</sup> Daele, *supra* note 141, at 218.

<sup>173</sup> Crenguta Leaua, *Factors Taken into Consideration by the Parties When Appointing an Arbitrator*, 33 PROCEDIA - SOCIAL AND BEHAVIORAL SCIENCES 925, 928 (2012).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*; *see also* Croatia v. Slovenia, *supra* note 1, at 56 (“As long as an impartial and independent decision-making process can be guaranteed, *procedural fairness* requires that the process be continued. . . .”); Hrvoje Sikirić, *Arbitration and Public Policy*, 7 CROAT. ARBIT. YEARB. 85, 95 (2000) (quoting Article 20 of the Zagreb Arbitration Rules, which held the same); *cf.* ALAN SCOTT RAU, “Consent” to Arbitral Jurisdiction: Disputes with Non-Signatories, in MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION: CONSENT, PROCEDURE, AND ENFORCEMENT 69 (Perm. Ct. Arb., 2009).

arbitrator impartiality and procedural fairness, two vital elements of state-to-state arbitration.<sup>176</sup>

#### IV. THE ARBITRAL TRIBUNAL'S PARTIAL AWARD AS MUDDIED BY THE DEFILED PROCEEDINGS

The Arbitral Tribunal in *Croatia v. Slovenia* erred in continuing the arbitral proceedings, notwithstanding Croatia's unilateral rescission of the Arbitration Agreement. Four issues in the case muddied the Tribunal's decision. First, the Tribunal did not place much emphasis on the purpose of the Arbitration Agreement to settle the Bay dispute in regard to the "principles of international law" and "good neighbourly relations."<sup>177</sup> Second, the Tribunal understated the impact of the ex parte communications on the fairness of the arbitral proceedings.<sup>178</sup> Third, the replacement of the party-appointed arbitrators could not have remedied the issue regarding Slovenia's access to information on the arbitral proceedings and the Tribunal's new knowledge of the case information.<sup>179</sup> Finally, Slovenia's behavior during the proceedings violated the good-faith requirement of both the Vienna Convention and the Arbitration Agreement.<sup>180</sup>

##### *1. The Purpose of the Arbitration Agreement*

First, the Arbitral Tribunal incorrectly claimed that the purpose and main goal of the arbitral proceedings between Slovenia and Croatia were not "defeated" and that the arbitral proceedings could continue in the absence of Croatian counsel.<sup>181</sup> Although Article 65 of the Vienna Convention on the Law of Treaties invokes a presumption of validity of treaties (including arbitration agreements), Article 60 of the Vienna Convention permits a party to revoke the arbitration agreement if the breach of the agreement was "material."<sup>182</sup>

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<sup>176</sup> Arbitration Agreement, *supra* note 13, at art. 4(b) (requiring the Tribunal to reach a "fair and just result" in the Bay dispute).

<sup>177</sup> *Id.* at art. 4.

<sup>178</sup> *Croatia v. Slovenia*, *supra* note 1, at 48.

<sup>179</sup> Arbitration Agreement, *supra* note 13, at art. 10(1).

<sup>180</sup> *Id.*; Vienna Convention, *supra* note 39, at art. 26.

<sup>181</sup> *Croatia v. Slovenia*, *supra* note 1, at 55.

<sup>182</sup> Vienna Convention, *supra* note 39, at art. 65(4) ("Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes."), art. 60(1) ("A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.").

For a breach to be “material,” the act must be a “violation of a provision *essential to the accomplishment of the object or purpose* of the [arbitration agreement].”<sup>183</sup> For instance, the *Nicaragua* case in the I.C.J. held that an act that “undermines the whole spirit of the agreement” is likewise a material violation of the arbitration agreement.<sup>184</sup> The Convention reflects the spirit and the intent of the parties to arbitrate.<sup>185</sup>

According to the purpose of the Arbitration Agreement, which is explained in Article 4(b), the Arbitral Tribunal must apply “international law, equity, and the principle of good neighbourly relations” in fairly resolving the Bay dispute between the parties.<sup>186</sup> The PCA Optional Rules’ provisions on arbitrator impartiality and case law also shape the purpose of an arbitration agreement.<sup>187</sup> The Tribunal correctly stated that in *Guinea-Bissau v. Senegal*, an I.C.J. case, the purpose of an arbitration agreement is “to entrust an arbitration tribunal with the task of settling a dispute in accordance with the terms agreed by the parties, who define in the agreement the jurisdiction of the tribunal and determine its limits” and to reach a “peaceful and definitive settlement of a dispute that had theretofore been incapable of amicable resolution.”<sup>188</sup> However, the current Tribunal placed too much weight on finality as the main goal of arbitration, for there was virtually no consideration of arbitrator impartiality and procedural fairness in framing the goals.<sup>189</sup> As explained by the Reporters to the U.S. Restatement (Third) and other scholars, arbitration serves an adjudicatory function, which includes the impartiality and independence of arbitrators, as well as procedural fairness.<sup>190</sup> The adjudicatory decisions

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<sup>183</sup> Vienna Convention, *supra* note 39, at art. 60(3)(b) (emphasis added); *see also* Croatia v. Slovenia, *supra* note 1, at 33-34 (Slovenia cited the *Namibia* I.C.J. case, in which a material breach must “make the accomplishment of the object and purpose of the treaty *impossible*”) (emphasis added); *see also* Born, *supra* note 161, at 428-29 (citing Partial Decision of 2 April 1992, Kassel Landgericht, 1993 RIW 239) (“[I]f it appears that such an agreement is practically unfeasible – for whatever reason – each party is entitled to release itself from the contract on the ground of a concrete reason,” which introduces the concept of good faith when the fulfillment of an arbitration agreement becomes impracticable or impossible).

<sup>184</sup> *Nicar. v. U.S.*, 1986 I.C.J. at 135-38, ¶¶ 270-76.

<sup>185</sup> *Greenspan v. LADT*, 185 Cal. App. 4th 1413, 1460 (Cal. App. 2d Dist. 2010) (noting that arbitration is “a creature of contract” and that parties could “bargain for terms and provisions contained in the arbitration clause”).

<sup>186</sup> Arbitration Agreement, *supra* note 13, at art. 4(b).

<sup>187</sup> PCA Optional Rules, *supra* note 19, at art. 9-12 (providing for challenges to arbitrators if there are “justifiable doubts” regarding the arbitrators’ impartiality or independence), art. 15(1) (requiring procedural fairness, in which “each party is given a full opportunity” in presenting arguments to the tribunal).

<sup>188</sup> *See* *Guinea-Bissau v. Senegal*, 1991 I.C.J. at 70, ¶ 49; *Croatia v. Slovenia*, *supra* note 1, at 54.

<sup>189</sup> *See* *Croatia v. Slovenia*, *supra* note 1, at 54.

<sup>190</sup> RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 1.1 (AM. LAW. INST. 2011); *see also* Fuller, *supra* note 94, at 381; *see also* European Human Rights Convention, Convention for the Protection of Human Rights and Fundamental Freedoms art. 6 (2010) (“[E]veryone is

of arbitrators are based on the evidence and legal arguments of the parties during the arbitral proceedings, not on ex parte communications, which take place outside of the arbitral proceedings.<sup>191</sup> Since ex parte communications conflict with the purpose of the current Arbitration Agreement, which includes resolving disputes in accordance with arbitrator impartiality and procedural fairness, Slovenia's act did constitute a material breach of the Arbitration Agreement. Because there was "hesitation" that the current arbitral process could solve the Bay dispute in an impartial and fair manner, the Arbitration Agreement could have been rendered null and void.<sup>192</sup> Taken together, the Arbitration Agreement should have been rescinded under Article 60(1) of the Vienna Convention, contrary to the Tribunal's contention.<sup>193</sup>

Furthermore, the Tribunal correctly recognized Croatia's admission to the European Union as the *quid pro quo* of the Arbitration Agreement.<sup>194</sup> However, this EU-"nexus" could not justify Slovenia's unhampered use of ex parte communications to distort the arbitral proceedings and violate the constituent goals of arbitration.<sup>195</sup> In the Partial Award, the Tribunal held that "the [Arbitration] Agreement was negotiated with the full support of the European Union. . . ."<sup>196</sup> The support from the European Union did not mean that arbitration was to be sole method of resolving the Bay dispute.<sup>197</sup> In a September 2015 article, the European Commission (EC) supported the negotiations to arbitrate, "which [was] in the interest of the legal security for both parties. . . ."<sup>198</sup> However, the EC left open the possibility of non-arbitral cooperation; therefore, the European Union's nexus to the Arbitration Agreement is not as strong as the Tribunal described it.<sup>199</sup> Slovenia's contention that Croatia's rescission of the Arbitration Agreement would jeopardize "the essential *quid pro quo* of the Parties' agreement, [such as Croatia's accession to the European Union]" is

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entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.").

<sup>191</sup> Fuller, *supra* note 94, at 381; European Human Rights Convention, *supra* note 190, at art. 6.

<sup>192</sup> Croatia v. Slovenia, *supra* note 1, at 56.

<sup>193</sup> *See id.* at 52, 55.

<sup>194</sup> *Id.* at 54-55.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> Croatia v. Slovenia, *supra* note 1, at 54-55.

<sup>198</sup> HINA, *EC Supports Croatia-Slovenia Arbitration but is Open to Other Solutions*, DALJE.COM (Sept. 2, 2015), <http://en.dalje.com/2015/09/ec-supports-croatia-slovenia-arbitration-but-is-open-to-other-solutions/>.

<sup>199</sup> *Id.* ("The Commission is also willing to support another sustainable bilateral solution, if the two parties agree on it, which would lead to a definitive solution to the border dispute. . . .").

therefore inaccurate.<sup>200</sup> In addition, the Tribunal has not shown that the goal of EU membership was a better reflection of the “whole spirit of the Agreement” than arbitrator impartiality and procedural fairness; rather, the Tribunal has only shown that there was a supposed “nexus” between EU membership and binding dispute resolution, which does not erase the adjudicative function of arbitration.<sup>201</sup> The *quid pro quo* of arbitration, Croatia’s admission to the EU, cannot contradict the purpose of the Arbitration Agreement, which is to settle all disputes in an impartial and procedurally fair manner.<sup>202</sup> As a result, Slovenia’s ex parte communications were a material breach under Article 60 of the Vienna Convention.

## 2. *Ex Parte Communications’ Impact on the Arbitral Proceedings*

Second, the Tribunal understated the impact of Slovenia’s ex parte communications on the arbitral proceedings.<sup>203</sup> According to the Tribunal, Arbitrator Sekolec only presented two documents to the Tribunal and subsequently to the parties.<sup>204</sup> As common arbitral practice, Sekolec wrote “personal and confidential notes regarding the border on or around Dragonja,” which “summarise[d] his point of view.”<sup>205</sup> Next, Sekolec presented a collection of documents to the Registry of the Tribunal; however, the Registry created its own official index of documents without the assistance of Sekolec’s submissions.<sup>206</sup> Because the two official documents supposedly contained no new information about the Bay dispute, the Tribunal incorrectly held that the ex parte communications did not affect the “procedural balance” of the arbitral proceedings, contrary to Croatia’s objections.<sup>207</sup> Even if the documents introduced by Sekolec did not contribute new information, the ex parte communications did not solely impact the type of documents that were admitted in the proceedings.<sup>208</sup>

Although the Tribunal recognized that Sekolec only submitted two documents, Croatia reasonably feared that Slovenia’s ex parte communications affected the course of

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<sup>200</sup> Croatia v. Slovenia, *supra* note 1, at 28.

<sup>201</sup> *Id.* at 53-54 (citing *Nicar. v. U.S.*).

<sup>202</sup> *See id.* at 54-55.

<sup>203</sup> *Id.* at 48.

<sup>204</sup> *See id.* at 47.

<sup>205</sup> Croatia v. Slovenia, *supra* note 1, at 47.

<sup>206</sup> *See id.* at 47-48.

<sup>207</sup> *See id.* at 48-49.

<sup>208</sup> *See id.* at 49.

arbitration beyond the submission of two documents. Further, Croatia feared that the mere substitution of Sekolec and Vukas as party-appointed arbitrators would not alleviate the issue.<sup>209</sup> Due to the potential widespread effect of the discussions between Sekolec and Drenik, Croatia “could no longer determine” the exact, negative contributions of the ex parte communications to the arbitral proceeding.<sup>210</sup> The discovered transcripts from 2014-2015 show that Drenik discussed with Sekolec: (a) possible strategies on ways to persuade the arbitrators both during and outside of arbitral proceedings; and (b) the exchange of Slovenian documents under Sekolec’s name.<sup>211</sup> In particular, Drenik suggested that Sekolec introduce new documents as if he were the author of the documents, and Drenik likewise suggested multiple arguments and scenarios that Sekolec could make while dining with the arbitrators, such as with Bruno Simma.<sup>212</sup>

Although arbitrators may discuss arbitral issues with one another outside of the proceedings, the conflict lies in the fact that the Slovenian counsel was attempting to unfairly influence the non-party appointed arbitrators by introducing new arguments, perspectives, and evidence without the presence of Croatian counsel.<sup>213</sup> The role of a party-appointed arbitrator is to help the Tribunal better understand the position of the party who selected that arbitrator, not to act as a secret mouthpiece to sway the Tribunal.<sup>214</sup> Thus, ex parte communications do not exclusively affect the validity of documents presented by a party-appointed arbitrator, as the Tribunal seemed to suggest, but they could also substantively and prejudicially affect the Tribunal’s understanding of the dispute through a Slovenian lens without the presence of opposing counsel, Croatia.<sup>215</sup> The altered understanding of the dispute could subsequently have an impact on the official record of the arbitration.<sup>216</sup> Even without Sekolec’s and Vukas’ involvement in the Tribunal, the rest of the Tribunal would still retain knowledge of Sekolec’s – and ultimately the Slovenian

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<sup>209</sup> Croatia v. Slovenia, *supra* note 1, at 16 (according to a letter to the Tribunal, written by Croatia on July 24, 2015, “the two resignations [of Sekolec and Vukas] do not begin to address the gravity of the situation”).

<sup>210</sup> Luka Mišetić, *Croatia*, GLOBAL ARB. REV. (Oct. 19, 2015), <http://globalarbitrationreview.com/benchmarking/the-european-middle-eastern-and-african-arbitration-review-2016/1036943/croatia>; *see also* Croatia v. Slovenia, *supra* note 1, at 17.

<sup>211</sup> Croatia v. Slovenia, *supra* note 1, at 14.

<sup>212</sup> *See id.* at 15; *see also* Ross, *supra* note 31, at 6 (describing Sekolec’s discussions with Guillaume, in which Guillaume recommended the Slovenian counsel to not “push” its position any further and implied that Simma and Lowe “could be swayed”).

<sup>213</sup> Croatia v. Slovenia, *supra* note 1, at 15.

<sup>214</sup> John Uff, *UK: Party-Appointed Arbitrators: What is their Proper Role?*, MONDAQ (Oct. 7, 2013), <http://www.mondaq.com/x/267544/Arbitration+Dispute+Resolution/PartyAppointed+Arbitrators+What+Is+Their+Proper+Role>.

<sup>215</sup> Croatia v. Slovenia, *supra* note 1, at 17.

<sup>216</sup> *Id.*

counsel's – ex parte arguments, thus compromising the impartiality of the arbitrators and placing Croatia at a procedural disadvantage.

### 3. *The Replacement of the Party-Appointed Arbitrators*

Furthermore, Croatia reasonably feared that the Slovenian counsel had “informal” access to information discussed by the Tribunal, which weakens the Tribunal’s position that “an impartial and independent decision-making process can be guaranteed.”<sup>217</sup> In January and April 2015, coinciding with the time when the ex parte communications between Sekolec and Slovenian counsel began, Mr. Erjavec, the Foreign Minister of Slovenia, claimed that he possessed “an informal channel of communication with the tribunal.”<sup>218</sup> In addition, Erjavec described in an interview that the Tribunal would rule in favor of Slovenia’s interpretation of the Bay ownership.<sup>219</sup> The comments reflect the possible exchange of information between the Slovenian counsel and Sekolec, which is a violation of Article 10(1) of the Arbitration Agreement.<sup>220</sup> Therefore, Erjavec’s interview showed the extent to which Slovenia was capable of influencing the results of the arbitration via Sekolec’s ex parte involvement.<sup>221</sup> Therefore, even if Sekolec and Vukas were replaced as arbitrators, as the Tribunal ordered, the Slovenian counsel would have still retained access to the information gained by the “informal channel of communication,” such as the arbitrators’ viewpoints on certain facts or arguments.<sup>222</sup> The “channel” works both ways; namely, the remaining members of the Tribunal would nevertheless mentally retain any form of ex parte information or strategies conveyed by Sekolec’s meetings with the individual arbitrators.<sup>223</sup> Such access to the Tribunal weakens the purpose of arbitration, which is to settle all disputes in an adjudicative and impartial manner.<sup>224</sup>

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<sup>217</sup> Ross, *supra* note 31, at 7; *see also* Croatia v. Slovenia, *supra* note 1, at 56.

<sup>218</sup> Croatia v. Slovenia, *supra* note 1, at 12; Ross, *supra* note 31, at 7.

<sup>219</sup> Croatia v. Slovenia, *supra* note 1, at 12.

<sup>220</sup> *Id.*; Arbitration Agreement, *supra* note 13, at art. 10(1) (“Both Parties refrain from any action or statement which might intensify the dispute or jeopardize the work of the Arbitral Tribunal.”).

<sup>221</sup> Croatia v. Slovenia, *supra* note 1, at 12.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> Born, *supra* note 93, at 215-16.

#### 4. Violation of the Good-Faith Requirement under the Vienna Convention

Fourth, contrary to the Tribunal's reasoning that Slovenia's *ex parte* communications did not "render the continuation of the proceedings impossible" under Article 60(1) of the Vienna Convention, Slovenia's behavior violated the good-faith requirement under the Arbitration Agreement and resultantly devalued the purpose of arbitration.<sup>225</sup> Parties must conduct themselves in good faith during arbitral proceedings and negotiations.<sup>226</sup> Following the principle of "pacta sunt servanda," Article 26 of the Vienna Convention requires the parties to comply with arbitration agreements in good faith.<sup>227</sup> Article 26 of the Vienna Convention played an important role in the *Gabčikovo-Nagymaros Project* case, in which the I.C.J. requested the Hungarian and Slovakian parties "to find an agreed solution that takes into account the objectives of the Treaty, which must be pursued in a joint and integrated way. . . ."<sup>228</sup> The Court in *Gabčikovo* also held that the purpose of a treaty and the requirement of good faith are one and the same; the concept of good faith implies that the parties would implement the arbitration agreement "in a reasonable way and in such a manner that its purpose can be realized."<sup>229</sup> The rationale in *Gabčikovo* is reflected in the current Arbitration Agreement, where the parties were expected to maintain "good neighbourly relations" by not interfering with the Tribunal's mandate.<sup>230</sup> Thus, the behavior of the parties was tightly knit with the purpose of the Arbitration Agreement.<sup>231</sup>

Here, Slovenia failed to act in good faith, which frustrated the Arbitration Agreement's purpose. Thus, Croatia reasonably lost faith in the current arbitral process to such an extent as to rescind the Arbitration Agreement.<sup>232</sup> Although Slovenia agreed that the Arbitral Tribunal would apply the "principle of good neighbourly relations" to the

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<sup>225</sup> Croatia v. Slovenia, *supra* note 1, at 55; Vienna Convention, *supra* note 39, at art. 60(1).

<sup>226</sup> See also Kuwait v. The American Independent Oil Company (AMINOIL), 21 I.L.M. 976 (1982); see generally Macedonia v. Greece, Judgment, 2011 I.C.J. Rep. 644, 685, ¶ 134 (Dec. 5) ("[T]he Court must consider whether the parties conducted themselves in such a way that negotiations may be meaningful.").

<sup>227</sup> Vienna Convention, *supra* note 39, at art. 26.

<sup>228</sup> Gabčikovo-Nagymaros Project (Hung.v. Slov.), Judgment, 1997 I.C.J. Rep. 7, 78, ¶ 141 (Sept. 25) [hereinafter *Gabčikovo*].

<sup>229</sup> *Id.* at 78-79, ¶ 142.

<sup>230</sup> Arbitration Agreement, *supra* note 13, at art. 4(b), 10(1).

<sup>231</sup> *Gabčikovo*, 1997 I.C.J. at 78-79, ¶¶ 141-42.

<sup>232</sup> Croatia v. Slovenia, *supra* note 1, at 19; see also Nuclear Tests Case (N.Z. v. Fr.), Judgment, 1974 I.C.J. Rep. 457, 473, ¶ 49 (Dec. 20) ("Just as the very rule of pacta sunt servanda in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.").



dispute, Slovenia engaged in extended ex parte communications with Sekolec without Croatia's knowledge, and the ex parte communications likely affected the impartiality of the whole Tribunal and procedural fairness negatively.<sup>233</sup> In addition, Erjavec possessed an "informal channel of communication" with the Tribunal, which strengthened the suspicion of unfair dealings.<sup>234</sup> Although Croatia uncovered the transcripts between Sekolec and Drenik, Slovenia continued to claim that Croatia, as a new EU member, was bound to the Arbitration Agreement.<sup>235</sup> Despite the EU's recognition of other methods to decide the Bay dispute, Slovenia continues to demand that Croatia be subject to the decisions of the Tribunal, whose judgment was tampered with in favor of Slovenia.<sup>236</sup> Slovenia's ex parte discussions did not symbolize good faith or "good neighbourly relations."<sup>237</sup> Contrary to the Tribunal's holding, Slovenia's actions undermined the goal of the Arbitration Agreement, and since there was "hesitation" of fulfilling the good-faith goals of arbitration, the Tribunal should have annulled the arbitral proceedings.<sup>238</sup>

## V. FEAR OF EXPANDED GROUNDS FOR THE RESCISSION OF AN ARBITRATION AGREEMENT

Despite Slovenia's contention that the purpose of the arbitral proceedings was "to settle the dispute submitted to it" and to issue a final award, the ex parte communications "contaminated" the proceedings, as Croatia argued.<sup>239</sup> Thus, Croatia's loss of faith in the arbitral proceedings and the defiling of the arbitral proceedings should have led to the unilateral rescission of the Arbitration Agreement.<sup>240</sup> However, one of the sought-after benefits of arbitration is its binding and expeditious character.<sup>241</sup> Normally, parties may

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<sup>233</sup> Croatia v. Slovenia, *supra* note 1, at 43-44 (citing Section 9.1 of the Terms of Appointment, where "[t]he Parties shall not engage in any oral or written communications with any member of the Arbitral Tribunal ex parte in connection with the subject matter of the arbitration or any procedural issues that are related to the proceedings").

<sup>234</sup> Ross, *supra* note 31, at 7.

<sup>235</sup> Croatia v. Slovenia, *supra* note 1, at 28.

<sup>236</sup> *Id.*

<sup>237</sup> Arbitration Agreement, *supra* note 13, at art. 4(b).

<sup>238</sup> Croatia v. Slovenia, *supra* note 1, at 55.

<sup>239</sup> *See id.* at 42, 48.

<sup>240</sup> *See id.* at 19.

<sup>241</sup> GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 4 (2d ed. 2015) (defining arbitration as "a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording each party an opportunity to present its case").

not unilaterally declare arbitration agreements void, except in very rare circumstances.<sup>242</sup> In most situations, the arbitral tribunal would decide on its jurisdiction through the doctrine of *kompetenz-kompetenz*, where the tribunal would determine whether an agreement to arbitrate exists or is valid.<sup>243</sup>

Slovenia's contention that the purpose of the arbitral proceedings was "to settle the dispute submitted to it" would seem to contradict with Croatia's demand to end the arbitral proceedings.<sup>244</sup> One might fear that if all arbitrating parties were to challenge the existence of the arbitration agreement due to arbitrator partiality, procedural unfairness, or ex parte communications, the binding characteristics of arbitration would gradually fade away.<sup>245</sup> According to *ICAO Council*, "all such [arbitration] clauses would become potentially a dead letter" if parties would continue to challenge the arbitration agreement's existence.<sup>246</sup> Likewise, the expeditiousness of arbitration would fall under attack, for challenges to the arbitration agreement would slow down the arbitral process.<sup>247</sup>

However, if Croatia successfully rescinded the Arbitration Agreement, the decision would not set a dangerous precedent. Rather, the decision to terminate the arbitration agreement would be based on material violations of the agreement's purpose, which the transcripts of the ex parte communications extensively revealed. If the rescinding party cannot prove such material violations, the courts should not recognize the unilateral termination of the arbitration agreement. The idea echoed here is not new; it is already reflected in both Articles 60(1) and 31(1) the Vienna Convention, which requires the interpretation of and compliance with a treaty (in this case, an arbitration agreement) with regard to "its object and purpose."<sup>248</sup>

The heavy burden of proof of rescinding an arbitration agreement under Article 60(1) of the Vienna Convention, therefore, would fall on rescinding parties, such as Croatia.<sup>249</sup> A claim that the opposing party was engaged in ex parte communications with its appointed arbitrator would not be sufficient in itself to render the arbitration agreement

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<sup>242</sup> ICAO Council, 1972 I.C.J. at 53, ¶ 16 ("[A] merely unilateral suspension *per se* [cannot] render jurisdictional clauses inoperative. . .").

<sup>243</sup> Rio Grande Irrigation and Land Company, Ltd. (Gr. Brit. v. U.S.), R.I.A.A. Vol. VI, 131, 135-36 (1923).

<sup>244</sup> Croatia v. Slovenia, *supra* note 1, at 42, 48.

<sup>245</sup> See generally *Hall St. Assocs.*, 552 U.S. at 587 (limiting the U.S. Federal Arbitration Act's grounds for annulment to those explicit in the statute, thus enhancing the strong presumption of enforceability).

<sup>246</sup> ICAO Council, 1972 I.C.J. at 54, ¶ 16.

<sup>247</sup> See generally Daele, *supra* note 141, at 450 (commenting on the "additional circumstances" that are required to challenge partial arbitrators due to said challenges having an impact on the expeditiousness of arbitration).

<sup>248</sup> Vienna Convention, *supra* note 39, at art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."), art. 60(1).

<sup>249</sup> *Id.* at art. 60(1).

void.<sup>250</sup> On the other hand, if the ex parte communications would lead to a “defect[ed]” arbitral system, the arbitration agreement’s purpose to settle all disputes in a fair and impartial manner would fail.<sup>251</sup> The cases the Tribunal cited support this rationale, such as in *Victor Pey Casado*, where the arbitral tribunal replaced a party-appointed arbitrator upon discovering the exchange of a drafted tribunal decision with its appointing party; here, the exchange of a single document was not enough to defile the arbitral system.<sup>252</sup> However, if the rescinding party could extensively show that the ex parte discussions both: (1) violated the main purpose of the arbitration agreement; and (2) tainted the process of arbitration, the party could likely rescind the arbitration agreement.

Even though ex parte communications contravene both the adjudicative nature of arbitration and the requirement that parties settle their disputes on the basis of “international law, equity, and the principle of good neighbourly relations,” which are the main purposes of the arbitration between Slovenia and Croatia, the rescinding party must additionally show that the ex parte transgression had a negative impact on the arbitral process.<sup>253</sup> Without demonstrating this, the defect could be cured by simply replacing the party-appointed arbitrators and counsel members engaged in ex parte communications and restarting the proceedings, as the current Tribunal decided.<sup>254</sup> The current arbitral dispute, however, is *sui generis*; rarely would the rescinding party discover the transcripts and contents of the ex parte communications, as well as multiple statements from the Slovenian government regarding its opinions of and involvement with the arbitral proceedings.<sup>255</sup> Unlike in *Victor Pey Casado*, Croatia was not concerned with one document that summarized the Tribunal’s rationale of the proceedings after careful consideration of all facts and arguments presented by both parties.<sup>256</sup> Instead, through the transcripts and Erjavec’s public comments, the Croatian counsel saw that ex parte communications provided a means for the Slovenian counsel to gain access to and extensively affect the

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<sup>250</sup> Joshua S. Wirth, *United States: Ex Parte Communications Between Reinsurer’s Attorney and Party-Appointed Arbitrator Lead to Vacatur of Award*, MONDAQ (Sept. 9, 2016), <http://www.mondaq.com/unitedstates/x/525602/Reinsurance/EX+PARTE+COMMUNICATIONS+BETWEEN+REINSURERS+ATTORNEY+AND+PARTYAPPOINTED+ARBITRATOR+LEAD+TO+VACATUR+OF+AWARD>.

<sup>251</sup> Rau, *supra* note 175, at 143-44 (“[I]f the process is not itself tainted, such defects say absolutely nothing about the unsuitability of the particular arbitral scheme.”); *see also* Croatia v. Slovenia, *supra* note 1, at 56 (“If the Tribunal had any hesitation that the present process can achieve these noble goals, it would conclude that the proceedings must be terminated.”).

<sup>252</sup> *Victor Pey Casado*, ¶¶ 34-43.

<sup>253</sup> Arbitration Agreement, *supra* note 13, at art. 4(b).

<sup>254</sup> *See* *Victor Pey Casado*, ¶¶ 34-43 (revealing the drafted ICSID decision to the non-contravening party “to maintain equality between the parties”); Croatia v. Slovenia, *supra* note 1, at 55.

<sup>255</sup> Croatia v. Slovenia, *supra* note 1, at 6; Ross, *supra* note 31, at 7, 10 (referring to Erjavec’s statements of “pressure” to the Arbitral Tribunal to decide in favor of Slovenia).

<sup>256</sup> *Victor Pey Casado*, ¶¶ 34-43.

thought process of the Tribunal in a thirteen-month period without Croatia's knowledge, such as by considering new oral or written evidence, attaching different weights to particular arguments in ways that might not be reflected in the Tribunal's official report, and granting strategic insight to the Slovenian counsel as to how the Tribunal might in the future react to particular arguments.<sup>257</sup>

Thus, the evidence that Croatia provided must have also shown that the arbitral process had been comprehensively affected unfairly in favor of Slovenia to stipulate that the task of the Tribunal had been rendered impossible to fulfill.<sup>258</sup> Since in very few situations could parties successfully prove that the ex parte discussions both violated the purpose of the arbitration agreement and defiled the arbitral proceedings, the editor's disagreement with the Tribunal's decision would not lead to more frivolous challenges to the agreements to arbitrate.

## VI. CONCLUSION

The *Croatia v. Slovenia* dispute brought to light the conflict between major tenets of state-to-state arbitration, including finality over a border dispute that arose after the fall of Yugoslavia and procedural fairness in the arbitral proceedings. The Arbitral Tribunal's analysis raised an important question regarding arbitration's ability to resolve long-standing disputes in an adjudicative manner: at what point must the binding character of arbitration give way to the integrity of the proceedings? In most cases, rules of arbitral institutions assume that both finality and impartiality can be achieved. However, in conflicts where both parties have much at stake, parties may turn to strategies that could compromise the integrity of the arbitral proceedings, such as through ex parte communications. If arbitrator impartiality and procedural fairness in reaching a binding decision were cast out as the main goals of arbitration, arbitration would be seen as a repressive tool to reach a particular result by any means necessary. The punishment for ex parte communications or any other attempt to influence the Tribunal, such as by replacing the arbitrators, would be relatively slight when one looks at the sought-after award: access to the Bay. *Croatia v. Slovenia* will serve as a landmark case for future disputes dealing with ex parte communications and arbitrator impartiality. Arbitral tribunals will need to avoid any actions by the parties that could potentially defile the arbitral proceedings.

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<sup>257</sup> *Croatia v. Slovenia*, *supra* note 1, at 22 (according to Croatia, "no reasonable person would conclude that the actions that have occurred may not have influenced other actors in the arbitration process").

<sup>258</sup> Arbitration Agreement, *supra* note 13, at art. 3-4.