Material breach of a treaty: some remarks on the Partial Award of 30 June 2016 in the matter of an arbitration between Croatia and Slovenia

Abstract

The article examines the Partial Award of 30 June 2016 in the matter of an arbitration between Croatia and Slovenia, which presents particular interest with regard to the topic of termination of a treaty— which in this case was an arbitration agreement— on the grounds of its material breach by a party. It focuses on the issues of: i) the jurisdiction of the Tribunal to examine the legality of the purported termination of the arbitration agreement; ii) the possibility of termination of an arbitration agreement because of its material breach; iii) the definition of material breach, examining the notion of repudiation of a treaty and the notion of violation of a provision essential to the accomplishment of the object and purpose of the treaty, as well as the question of whether the material character of the breach depends on the gravity of the latter; and iv) procedural issues with regard to the termination of a treaty on the grounds of its material breach. The article argues that the Tribunal made in this Partial Award some important clarifications with regard to the issue of termination of a treaty on the grounds of its material breach. Moreover, the Tribunal arguably emphasised treaty stability, by adopting a strict interpretation of the definition of material breach according to Art 60 (3)(b) VCLT, which, however, to a certain extent moves away from the letter of this provision.

Keywords: material breach of a treaty; termination of a treaty; repudiation; object and purpose of a treaty; gravity of breach

Word count (including footnotes): 8,910 words

1 Introduction

The Partial Award of 30 June 2016[1] in the matter of an arbitration between Croatia and Slovenia ('Award') concerned the issue of the jurisdiction of the Arbitral Tribunal, which was based on an Arbitration Agreement between the parties. It provides interesting insights on the question of the fate of an arbitration in case of a purported termination by a party of the arbitration agreement on the grounds of its material breach by the other party and, more broadly, on the issue of termination of a treaty on the grounds of its material breach. This article will examine the above-

[1] *In the Matter of an Arbitration Under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009 (Croatia/Slovenia)* Partial Award of 30 June 2016, PCA, available at <https://pcacases.com/web/sendAttach/1787>, accessed 18 February 2019.

mentioned Award focusing on the law of treaties. It does not purport to evaluate other aspects of the Award, particularly with regard to the procedural irregularities which had given rise to it and their effect on the arbitral proceedings.[2]

1.1 Background of the Arbitration[3]

The arbitration between Croatia and Slovenia concerned a territorial and maritime dispute between them. Both Croatia and Slovenia are successor states to the Socialist Federal Republic of Yugoslavia. Between 1992 and 2001, following their declarations of independence, the two states engaged in bilateral negotiations, as well as in a mediation process, in an attempt to determine the land and maritime boundaries between them. Nevertheless, such attempts were fruitless. On 1 May 2004 Slovenia acceded to the European Union, but when Croatia tried to accede to the European Union, Slovenia raised reservations to several of the negotiating chapters at the Intergovernmental Accession Conference of the European Union with Croatia in December 2008, on the grounds that these might prejudice the determination of the boundaries between the two states.

Eventually, on the basis of an initiative of the European Commissioner for Enlargement, the dispute between the two states was submitted to arbitration by the *Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia*, signed by the parties on 4 November 2009 in Stockholm ('Arbitration Agreement' or 'Agreement').[4] Following the entry into force of the Agreement on 29 November 2010, and in accordance with its provisions, Slovenia lifted its reservations to Croatia's accession to the European Union, which took place on 1 July 2013.

In the meantime, the constitution of the Arbitral Tribunal took place in 2012 and the Permanent Court of Arbitration acted as Registry in the arbitration. On 22 July 2015, a few months before the award would have been rendered, Serbian and Croatian newspapers published intercepted telephone conversations between Dr Sekolec, the arbitrator appointed by Slovenia, and Ms Simona Drenik, one of two agents designated by Slovenia. In these conversations, Dr Sekolec reportedly disclosed confidential information about the Tribunal's deliberations to Ms Drenik. Following these reports, Dr Sekolec and Ms Drenik resigned from their functions in the proceedings.

This incident gave rise to a disagreement between the parties with regard to the continuation of the arbitration. Eventually, on 30 July 2015, Croatia notified Slovenia by *note verbale* that, in view of the aforementioned incident, it considered

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[2] For a concise general overview of the Award see Emanuel Castellarin, 'La Sentence Partielle du 30 Juin 2016 dans l' affaire du différend territorial et maritime entre la Croatie et la Slovénie' (2016) LXII Annuaire Français de Droit International 129.

[3] See analytically Award [5]-[86].

[4] Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia (adopted 4 November 2009, entered into force 29 November 2010) (Annex HRLA-75/Annex SI-395), available at <https://pcacases.com/web/sendAttach/2165>, accessed 18 February 2019.

that Slovenia had materially breached the Arbitration Agreement, entitling Croatia to terminate it in accordance with Art 60 (1) of the 1969 Vienna Convention on the Law of Treaties[5] ('VCLT') and that from the date of that note the Republic of Croatia ceased to apply the Arbitration Agreement.[6] On its part, on 13 August 2015, Slovenia informed the Tribunal of its objection to Croatia's notification of its intention to terminate the Arbitration Agreement[7] and stated that the Tribunal had the power and the duty to continue the proceedings.[8]

Following its reconstitution, in letter dated 1 December 2015 the Tribunal provided for further written and oral submissions of the parties 'concerning the legal implications of the matters set out in Croatia's letters of 24 July 2015 and 31 July 2015'. Slovenia participated in these proceedings and in its Written Submission filed on 26 February 2016 it requested the Tribunal to decide that: 1) The Arbitration Agreement remained in force between the parties; and 2) The proceedings pursuant to the Arbitration Agreement would continue until the Tribunal issued a final Award.[9]

By contrast, Croatia did not participate in the proceedings and stated 'that— to assure the sound administration of justice, and for legal and ethical reasons— the Arbitral Tribunal should terminate its work with immediate effect.'[10] According to it, the solution to the border dispute had to be found outside the framework of the arbitration 'in accordance with international law and in the spirit of good neighbourly relations.'[11]

1.2 The Award

The Tribunal continued the proceedings despite the absence of Croatia, having recalled the principle of international procedural law (also incorporated in Art 28 of the PCA Optional Rules)[12] that a unilateral decision of a party to withdraw from dispute settlement proceedings cannot bring such proceedings to an end.[13] It dealt

[5] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 115 UNTS 331.

[6] *Note verbale* from the Ministry of Foreign and European Affairs of the Republic of Croatia to the Ministry of Foreign Affairs of the Republic of Slovenia, No. 3303/2015 (30 July 2015) (Annex SI-1034).

[7] Letter from the Prime Minister of the Republic of Slovenia to the Prime Minister of Croatia, No. 570-3/2015/4 (31 July 2015) (Annex SI-1041).

[8] PCA press release, 'Slovenia demands continuation of arbitration proceedings— Arbitral Tribunal clarifies further procedural steps', 19 August 2015 <https://www.pcacases.com/web/sendAttach/1403>, accessed 18 February 2019.

[9] Written Submission of the Republic of Slovenia ('Written Submission') filed on 26 February 2016, 56.

[10] *Note verbale* from the Permanent Mission of the Republic of Croatia to the United Nations to the Permanent Missions and Permanent Observer Missions, No. 55/2016, 3 (16 March 2016) (Annex SI-1058).

[11] Ibid, 4; Letter from the Croatian Prime Minister to the Slovenian Prime Minister (31 July 2015).

[12] 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>, accessed 18 February 2019.

[13] Award [142].

with three main issues: 1) its jurisdiction to examine the legality of the purported termination of the Arbitration Agreement; 2) its duty and ability to continue the proceedings; and 3) the legality of the termination of the Arbitration Agreement.

Eventually, the Tribunal decided that: 1) It had jurisdiction to examine the legality of the purported termination of the Arbitration Agreement;[14] 2) there was no obstacle to the continuation of the arbitral proceedings in view of the recomposition of the Tribunal and the remedial action taken by it;[15] and 3) although Slovenia had violated provisions of the Arbitration Agreement, the latter remained in force; thus, the arbitral proceedings pursuant to the Arbitration Agreement had to continue.[16]

In this article, from the above mentioned three issues examined by the Tribunal, the first and the third will be critically analysed, since the second is not connected with the material breach of the Arbitration Agreement. The Tribunal decided to separate the issue of the termination of the Arbitration Agreement from the issue of the termination of the arbitral proceedings; as it has been correctly observed, 'whereas the former entails the latter, the latter does not prompt the former.'[17]

2 Jurisdiction of the Tribunal to Examine the Legality of the Purported Termination of the Arbitration Agreement

The first question which arises in a case of purported termination of an arbitration agreement is whether the arbitral tribunal, the jurisdiction of which to decide on the subject matter of the arbitration is based on this agreement, is competent to examine the legality of such a termination.

The Tribunal applied the well-established general international law rule according to which 'an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction'[18] ('*Kompetenz-Kompetenz*', '*la compétence de la compétence*'), citing a number of relevant international instruments, decisions and awards.[19] In particular, the Arbitration Agreement provided in its Art 6 (2) that, unless envisaged otherwise, the Arbitral Tribunal would conduct the proceedings according to the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States and Art 21 (1) of Section III of those Rules stipulates that 'the arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the *existence* or validity of the arbitration clause or of the separate arbitration agreement.'[20] Consequently, the Tribunal had jurisdiction to

[14] Award [167].
[15] Ibid [169]-[196]. See also above section 1.2.
[16] Award [231].
[17] Arman Sarvarian, 'Arbitration between Croatia and Slovenia: Leaks, Wiretaps, Scandal (Part 4)' (*EJIL: Talk!*, 3 May 2016), available at <https://www.ejiltalk.org/arbitration-between-croatia-and-slovenia-leaks-wiretaps-scandal-part-4/>, accessed 18 February 2019.
[18] *Nottebohm Case* (Preliminary Objections) [1953] ICJ Rep 111, 119.
[19] Award [148]-[156].
[20] See n 12 (emphasis added).

determine whether the Arbitration Agreement still existed, namely whether it remained in force or whether it had been terminated.[21]

The Tribunal made clear that the purported termination of the Arbitration Agreement by Croatia on the grounds of its alleged material breach by Slovenia did not deprive it of that jurisdiction[22] and it referred in this regard to the ICJ judgment in the *ICAO Council* case. In this judgment the Court stated that the purported unilateral termination or suspension of a treaty does not affect jurisdictional clauses, as the contrary solution would enable a party purporting to terminate or suspend a treaty to avoid the determination of the legality of its act by a dispute settlement organ.[23]

It must be noted that Croatia had not clearly argued that the Tribunal lacked jurisdiction by reason of its purported termination of the Agreement, namely that the purported termination of the Agreement terminated the jurisdiction of the Tribunal.[24] Nevertheless, the Tribunal considered it pertinent to clarify the issue. Having thus already determined that it had jurisdiction to examine the legality of the purported termination of the Arbitration Agreement and that this jurisdiction is not affected by the purported termination of the Agreement by Croatia, the Tribunal rejected Croatia's claim that the procedure to be followed was that of Arts 65 and 66 VCLT with respect to the termination of a treaty[25] and clarified that its jurisdiction is instead preserved by Art 65 (4) VCLT,[26] according to which 'nothing in the foregoing paragraphs [paragraphs 1-3] shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.'

3 The Possibility of Termination of the Arbitration Agreement on the Grounds of Material Breach

The Tribunal decided that, with the exception of the question of the legality of the purported termination of the Arbitration Agreement by Croatia, there was no obstacle to the continuation of the arbitral proceedings in view of the recomposition of the Tribunal and the remedial action taken by it.[27] Therefore, it went on to examine this question.

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[21] Award [160],[162].

[22] Ibid [161].

[23] *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)* [1972] ICJ Rep 46 ('*ICAO Council* case') [16]. See also [32] of the same judgment.

[24] Letter from the Minister of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal (31 July 2015) (Annex SI-1040).

[25] According to Croatia, given the objection of Slovenia to the notification of termination of the Agreement by the former, the procedure to be followed was determined by Art 65 (3) VCLT, according to which the parties had to 'seek a solution through the means indicated in article 33 of the Charter of the United Nations' (ibid).

[26] Award [163]-[168].

[27] Ibid [169]-[196]. See also above section 1.2.

It noted that both Croatia and Slovenia are parties to the VCLT[28] and made clear that Art 60 (1) VCLT, which stipulates that '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 … in whole or in part', applies to arbitration agreements. Art 60 VCLT is drafted in general terms and therefore applies to any treaty provisions not covered by paragraphs 4 and 5 of the same article.[29] Indeed, nothing seems to preclude the possibility of the termination of a treaty providing for compulsory dispute settlement in case of material breach of its provisions.

The Tribunal observed that the Arbitration Agreement did not contain provisions with regard to the action which could be taken by one party in case of breach of the Arbitration Agreement by the other party. In other words, there were no rules in the Arbitration Agreement which could be considered as *lex specialis* to Art 60 VCLT in the sense of Art 60 (4) VCLT (which stipulates that paragraphs 1-3 of Art 60 'are without prejudice to any provision in the treaty applicable in the event of a breach') and, therefore, contrary to the submission by Slovenia,[30] Art 60 (4) VCLT did not prevent the application of Art 60 (1).[31]

Thus, the central question was whether the breaches committed were material so that Art 60 (1) VCLT could apply.

4 The Definition of Material Breach

The Tribunal noted that a 'material breach' as required by Art 60 (1) VCLT could consist according to Art 60 (3) VCLT either in a repudiation of the treaty (Art 60 (3)(a) VCLT) or in the violation of a provision essential to the accomplishment of the object and purpose of the treaty (Art 60 (3)(b) VCLT).[32] It went on to examine both definitions of the notion of material breach.

4.1 Repudiation

First, the Tribunal had to examine the existence of a repudiation of the Arbitration Agreement. Croatia stated in a *note verbale*, which was issued on the eve of the hearing before the Tribunal, that Slovenia's conduct amounted to a repudiation of the Arbitration Agreement, without elaborating on this argument.[33] The Tribunal treated this *note verbale* as constituting a distinct ground on which Croatia based its purported termination of the Arbitration Agreement.[34] Slovenia on its part claimed that even if it were accepted by the Tribunal that Slovenia's conduct constituted a

[28] Award [202].

[29] Ibid [204]. These paragraphs refer to special provisions in the treaty applicable in the event of a breach (Art 60 (4)) and to provisions relating to the protection of the human person contained in treaties of a humanitarian character (Art 60 (5)).

[30] Written Submission [5.05]-[5.06].

[31] Ibid [206].

[32] Award [212].

[33] *Note verbale* (n 10), 3.

[34] Award [100].

repudiation of the Arbitration Agreement, in the sense of Art 60 (3)(a) VCLT, it would still be possible for the Tribunal to achieve the object and purpose of the Agreement and, therefore, that the conduct complained of would not be so fundamental as to amount to a repudiation of the Agreement by Slovenia.[35]

Both positions evidenced some misunderstanding with regard to the two versions of the definition of material breach according to Art 60 (3) VCLT. The two forms that the material breach can take according to this provision are included alternatively ('or'), which means that, contrary to what Croatia seems to have argued, Slovenia's conduct could not constitute at the same time repudiation *and* a violation of a provision essential to the accomplishment of the object and purpose of the treaty. Croatia did not clearly advance its argument with regard to repudiation as an alternative to its argument based on Art 60 (3)(b) VCLT. At the same time, Slovenia attempted to refute the argument based on repudiation by arguing that, in spite of the breach, the accomplishment of the object and purpose of the Arbitration Agreement was still possible; namely, it confused the two definitions of the notion of material breach by essentially arguing that since there was no material breach in the sense of Art 60 (3)(b) there was also no material breach in the sense of a repudiation of the Agreement according to Art 60 (3)(a) VCLT.

The Tribunal offered some important clarifications of the notion of repudiation, thus supplementing the ILC commentary to Art 60 VCLT, which merely requires that the repudiation is 'unjustified', i.e. it is not sanctioned by any of the provisions of the VCLT.[36] More specifically, the Tribunal noted that repudiation of an agreement means a 'refusal to fulfil or discharge it', involving 'the rejection of a treaty *as a whole* by the defaulting party'[37] and indeed 'clearly and definitively'.[38] It went on to explain:

> Against this yardstick, *it cannot be said that Slovenia refused to apply the Arbitration Agreement or rejected that treaty as a whole*. Quite to the contrary, Slovenia has argued that the Agreement continues to apply and has invited the Tribunal to assume its jurisdiction pursuant to the Agreement … A repudiation of the Agreement as a whole must be distinguished from a purported breach of any of its provisions, which may constitute a material breach under Article 60, paragraph 3, subparagraph (b) of the Vienna Convention.[39]

The explanation of the notion of repudiation by the Tribunal, referring to refusal to apply the treaty or rejection of the treaty 'as a whole', is in accordance with the letter of Art 60 (3)(a) VCLT, which refers to repudiation of *the treaty*. If the drafters of the VCLT wanted to also include the possibility of partial repudiation of a treaty, they could have added the expression 'in whole or in part', which can be found in other

[35] Transcript of the Oral Hearing of 17 March 2016, 56:10-21 (Statement by Sir Michael Wood).

[36] ILC, 'Report of the International Law Commission on the Work of its 18th session' (4 May-19 July 1966), Supplement No 9, UN Doc A/CN.4/191, 255 [9].

[37] Award [213] (emphasis added), referring also to Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill 2009) 742 [14].

[38] Award [213].

[39] Ibid [214] (emphasis added).

provisions of Art 60. With regard to the Tribunal's remark that the repudiation must be clear, it is suggested that it should be understood as encompassing not only the case in which the repudiation is done expressly, but also the case in which repudiation is inferred by the conduct of the state.[40] In any case, the remark by the Tribunal that the repudiation must also be 'definitive' offers an additional element.

It is notable that this award is the first time that a clear distinction between the two versions of the definition of material breach is made by an international dispute settlement organ; the ICJ in its Advisory Opinion on the *Legal consequences for States of the continued presence of South Africa in Namibia* and its judgment in the *Appeal relating to the jurisdiction of the ICAO Council* case did not do so. In the *Namibia* case, the Court had noted that the General Assembly, in its Resolution 2145 (XXI), had determined that South Africa had both repudiated ('disavowed') the Mandate and had committed a 'deliberate and persistent' violation which destroyed the object and purpose of the Mandate.[41] Similarly, in the *ICAO Council* judgment the Court considered that even if India had repudiated the relevant Treaties, it would still be necessary to examine their provisions as a whole, and in particular those relating to the 'safety of air travel', in order to see whether Pakistan's conduct amounted to such repudiation;[42] namely, it also referred to the object and purpose of those Treaties, without making a distinction between Art 60 (3)(a) and (3)(b) VCLT.

4.2 Violation of a Provision Essential to the Accomplishment of the Object or Purpose of the Treaty

Having rejected the ground based on the repudiation of the Arbitration Agreement, the Tribunal had to examine the second version of the definition of material breach. The sequence of examination by the Tribunal evidences that if a repudiation (the most obvious form of material breach)[43] is accepted, there is no need to examine the definition of material breach according to Art 60 (3)(b) VCLT.

4.2.1 The Object and Purpose of the Treaty

An important component of the definition of Art 60 (3)(b) VCLT is 'the object or purpose of the treaty', the identification of which often presents serious difficulties.

First of all, an interesting point in this regard is the following: the Tribunal in the Award referred to the 'object *and* purpose' of the Agreement, while the letter of Art 60 (3)(b) VCLT refers to the 'object *or* purpose' of the treaty. However, it cannot be

[40] See in this regard Special Rapporteur Fitzmaurice, *Second report on the Law of Treaties*, *ILCYB* 1957-II, 36 Draft Art 30 (2); ibid, 69 [216], according to whom repudiation is 'an act of outright rejection, whereby a party to a treaty declares *or evidences* an intention no longer to be bound by it …' (emphasis added).

[41] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16 ('*Namibia* case') [95].

[42] *ICAO Council* case (n 23) [38].

[43] Special Rapporteur Waldock, *Second report on the Law of Treaties*, *ILCYB* 1963-II, 76 [13].

inferred from the ILC works or the Vienna Conferences that the use of the expression 'object or purpose' in Art 60 (3)(b) was intended to reveal a difference from the other provisions of the VCLT, in which there is reference to the 'object and purpose' of the treaty.[44] Thus, it seems to be accepted that no distinction should be made between a treaty's object on the one hand and purpose on the other,[45] otherwise the concept is undermined. Presumably for this reason the Tribunal consistently uses the expression 'object and purpose'.

Thus, the Tribunal had to examine the object and purpose of the treaty. It referred in this regard to the application of Art 60 (3)(b) VCLT in the ICJ judgments in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*[46] and to the *Military and Paramilitary Activities in and against Nicaragua* case[47] in which the ICJ had examined this criterion for the material character of the breach. It examined the preamble of the Arbitration Agreement between Croatia and Slovenia and concluded that the object and purpose of the Arbitration Agreement was 'the peaceful and definitive settlement of a dispute that had theretofore been incapable of amicable resolution.'[48]

Indeed, the preamble of a treaty is a starting point for the identification of the object and purpose of a treaty;[49] however, it is not the only one. According to the Guide to Practice on Reservations to Treaties adopted by the ILC, '[t]he object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context, in particular the title and the preamble of the treaty. Recourse may also be made to the preparatory works of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice of the parties.'[50] This becomes obvious later in the Award, where the Tribunal identifies a second object and purpose of the Arbitration Agreement, based on two

[44] See analytically Jan Klabbers, 'Some Problems Regarding the Object and Purpose of Treaties' (1997) VIII The Finnish Yearbook of International Law 138, 145-8. Reuter, during the works of the ILC, supported a distinction between the two notions (ILC, Summary Record of the 726th meeting, *ILCYB* 1964-I [77]) and expressed the view that Art 60 (3)(b) used the expression 'object or purpose' in order not to restrict the notion of material breach (Paul Reuter, 'Solidarité et divisibilité des engagements conventionnels' in Yoram Dinstein (ed), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989) 623, 628 note 9). See in the same vein Dissenting Opinion of Judge *ad hoc* Roucounas, *Application of the Interim Accord of 13 September 1995 (FYROM v Greece)* [2011] ICJ Rep 644 [67]. Nevertheless, Reuter did not consider that there is complete separation between the two notions (Reuter, ibid, 628).

[45] See also Jan Klabbers, 'Treaties, Object and Purpose', MPEPIL online [8], last updated December 2006, accessed 18 February 2019; Richard Gardiner, *Treaty Interpretation* (2nd edn OUP 2015) 212-5.

[46] *Namibia* case (n 41) [95].

[47] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 ('*Nicaragua* case') [270]-[276].

[48] Award [219]. In this regard, it referred also to *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* [1991] ICJ Rep 53 [49].

[49] Gardiner (n 45) 213, 217, who, however, warns that 'preambles are not always drafted with care and a preamble itself may need interpreting' (ibid).

[50] ILC, *Guide to Practice on Reservations to Treaties*, adopted by the ILC at its sixty-third session and submitted to the General Assembly as part of the Commission's report covering the work on that session (A/66/10/Add.1) *ILCYB* 2011-II [3.1.5.1]. See also Arts 31-3 VCLT.

substantive provisions of the Agreement and on the circumstances of its conclusion.[51]

At this point some further remarks on the object and purpose of a treaty are necessary. The reason why the expression 'object or purpose of the treaty' is in singular seems to be that the drafters of the VCLT considered that one 'object or purpose' needs to be identified.[52] Although the ILC initially defined material breach as 'the violation of a provision which is essential to the effective execution *of any of the objects or purposes of the treaty*',[53] implying that there could be more than one object and purpose in a treaty, it subsequently chose the formulation which was included in Art 60 (3)(b).[54] Nevertheless, the task of identifying a single object and purpose of a treaty will in some cases present great difficulty, since the treaty may be considered as pursuing various objects and purposes.[55]

In fact, the Tribunal considered that the Arbitration Agreement was an example of a treaty encompassing more than one object and purpose. It pointed out that the definitive settlement of the dispute regarding the land and maritime boundary between the two states was not the only object and purpose of the Arbitration Agreement, but that the Agreement also had as an object and purpose the lifting of the reservations of Slovenia to the accession of Croatia to the European Union and that from various elements of the Agreement[56] 'a nexus was established between the settlement of the territorial and maritime dispute and the accession of Croatia to the European Union.'[57] Therefore, since Croatia had already become member of the European Union, the Tribunal noted that if Croatia could unilaterally terminate the Agreement only one of the 'objects and purposes' of the Arbitration Agreement would be achieved.[58]

This remark was made by the Tribunal in response to the relevant argument put forward by Slovenia that Croatia's position frustrated 'the essential *quid pro quo*' of the Agreement. In this regard, Slovenia referred to the judgments of the ICJ in the *Fisheries Jurisdiction* and the *Gabčíkovo-Nagymaros Project* cases to argue that Croatia could not be released from its commitments under the Arbitration Agreement after it had already irrevocably benefited from the latter.[59] Nevertheless, this remark

[51] Award [220]. See below in this section.

[52] See Klabbers (n 45) [6]-[7].

[53] ILC, 'Report of the International Law Commission on the Work of its 15th session' (6 May-12 July 1963) UN Doc A/CN.4/163, 204, Draft Art 42 (3)(b) (emphasis added).

[54] ILC, 'Report of the International Law Commission on the Work of its 18th session' (4 May-19 July 1966), Supplement No 9, UN Doc A/CN.4/191, 253, Draft Art 57 (3)(b).

[55] See WTO, *United States—Import Prohibition of Certain Shrimp and Shrimp Products- Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R [17]; Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984), 130; DW Greig, 'Reciprocity, Proportionality, and the Law of Treaties' (1994) 34 Virginia Journal of International Law 295, 351-2. Such examples constitute the Charter of the United Nations (1 UNTS xvi), the 1982 Law of the Sea Convention (1833 UNTS 3) or the Treaty on the Functioning of the European Union (OJEU C 115).

[56] The Tribunal specifically referred to Arts 9 and 11 (3) of the Arbitration Agreement.

[57] Award [220].

[58] Ibid [221].

[59] Written Submission [2.06], [2.10]-[2.11], [4.15]-[4.17], referring to *Fisheries Jurisdiction (United Kingdom v Iceland)* (Jurisdiction of the Court) [1973] ICJ Rep 3 [34]. Cf Transcript of the Oral Hearing of 17 March 2016, 7:21-8:2 (Statement by Mr Karl Erjavec), 41:13-24 (Statement by Sir

was in fact made as an *obiter dictum*, since, as it will be seen, the Tribunal took the view that there had not been material breach of the Arbitration Agreement by Slovenia and, therefore, Croatia was not entitled to terminate the Agreement.[60] The Tribunal, presumably because it was not necessary in order to decide the case before it, did not clearly answer the question whether a party is entitled to terminate a treaty on the grounds of its material breach by the other party, when the former has already irrevocably benefited from the treaty. However, it seems to have implied that this question should be answered in the negative. Indeed, it is arguable that, as McNair has noted in this regard, where under a treaty certain obligations have been executed while certain others remain executory, a purported termination by the party which has received the benefit of the executed obligations on the grounds of a violation by the other party of an executory obligation will be difficult to justify.[61]

Consequently, the Tribunal focused on whether there had been a violation of the provision essential to the accomplishment of the one of the two identified objects and purposes of the Agreement, namely the settlement of the dispute between the parties.[62]

4.2.2 '…Essential to the Accomplishment…'

The Tribunal found that Ms Drenik, in her capacity as agent of Slovenia, had acted in breach 'of various provisions governing the arbitration'.[63] It must be noted that the Tribunal did not clearly determine the provisions of the Agreement which had been breached specifically by the agent of Slovenia.[64] It had already found that Dr Sekolec and Ms Drenik had acted in breach of, *inter alia*, Art 6 (2) of the Arbitration Agreement,[65] according to which '[u]nless envisaged otherwise, the Arbitral Tribunal shall conduct the proceedings according to the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States', which pose a high standard of 'impartiality or independence' to all arbitrators.[66]

In any case, the Tribunal decided that in view of the remedial action taken, particularly the resignations of Dr Sekolec and Ms Drenik from their functions in the proceedings and the recomposition of the Tribunal, the breach of the Arbitration

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Michael Wood), 76:8-77:6 (Statement by Mr Rodman Bundy) (also referring to *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7 ('*Gabčíkovo-Nagymaros Project* case'), [114]). Nevertheless, in the latter case the Court referred to the non-implementation of the 1977 Treaty by both parties.

[60] Award [225].

[61] Arnold McNair, *The Law of Treaties* (Oxford, Clarendon Press 1961) 571. Castellarin (n 2) 137, considers this *obiter dictum* of the Tribunal as suggesting an application of the principle of proportionality: '*l' extinction de la convention d' arbitrage est un moyen disproportionné par rapport à l' atteinte à l' objet et au but de la convention*.'

[62] Award [222].

[63] Ibid [208].

[64] Similarly Castellarin (n 2), 136.

[65] Award [175]. The text of the Award mistakenly cites Art 6 (1) of the Agreement. The Tribunal did not clearly state that Ms Drenik had acted in breach of Art 6 (2) of the Arbitration Agreement. For a criticism of the Award with regard to the identification of the breached provisions of the Agreement by the Tribunal see Castellarin (n 2), 135.

[66] Award [175].

Agreement by Slovenia did 'not render the continuation of the proceedings *impossible*' and, therefore, did not defeat the object and purpose of the Agreement,[67] namely the settlement of the 'dispute between the Parties *in accordance with the applicable rules*.'[68] Thus, the Tribunal concluded that Croatia was not entitled to terminate the Agreement under Art 60 (1) VCLT and the Agreement remained in force.[69]

It is noteworthy that the Tribunal moves away from the formulation of Art 60 (3)(b) VCLT since instead of determining whether the breached provisions of the Agreement were essential for the accomplishment of its object and purpose, it requires that the breach defeats the object and purpose of the Agreement.[70] More specifically, with regard to the latter criterion, it seems that the Tribunal adopted a strict interpretation of Art 60 (3)(b) VCLT, focused on the impossibility of accomplishment of the object and purpose of the Agreement, essentially arguing that if the breach of the treaty can be remedied and such remedial action is taken — thereby permitting the accomplishment of the object and purpose of the treaty—then the breach is not material. It has been argued, however, that Art 60 (3)(b) VCLT does not require that the breach of the provision makes the realisation of the object and purpose of the treaty impossible, but that the realisation of the object and purpose is at least seriously threatened.[71] In any case, the letter of Art 60 (3)(b) VCLT requires the element of the violation of a provision essential to the accomplishment of the object and purpose of the treaty; it does not seem to require impossibility of the accomplishment of this object and purpose. It might be argued that the breach of Art 6 (2) of the Arbitration Agreement was indeed a breach of a provision essential to the accomplishment of the object and purpose of the Agreement (if it is accepted that the object and purpose of the Agreement was the settlement of the 'dispute between the Parties in accordance with the applicable rules'), even if the accomplishment of this object and purpose did not become impossible as a result of the breach in view of the remedial action taken.

Of course, it is true that the Tribunal's interpretation of Art 60 (3)(b) VCLT offers more guarantees for treaty stability, as it poses a higher standard for meeting the

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[67] Ibid [224]-[225] (emphasis added). It referred in this regard to the *Namibia* case (n 41 [95]) and to the *Nicaragua* case (n 47 [270]-[276])

[68] Award [222] (emphasis added).

[69] Ibid. Castellarin also interestingly notes (n 2, 137) that the Tribunal seems to have implied that the purported termination of the Agreement by Croatia was in contradiction with the request of the latter to the Tribunal right after the intercepted conversations were reported 'to review the totality of the materials presented, and reflect on the grave damage that has been done to the integrity of the entire proceedings…' (Award [223]-[224]). A similar argument had been advanced by Slovenia (ibid, [116]). However, the Tribunal did not clarify whether the conduct of Croatia would fall within the notion of estoppel or would be against good faith (Castellarin, ibid). In any case, it is doubtful that Croatia's conduct would fall within Art 45 (b) VCLT, namely that Croatia could have lost the right to invoke the alleged material breach as a ground for terminating the Agreement, as it must by reason of its conduct have been considered as having acquiesced in the maintenance in force of the Agreement: it would be difficult to argue that the above-mentioned request amounts to acquiescence, given also the fact that Croatia made the notification required by Art 65 (1) VCLT quite promptly. The application of Art 45 VCLT should be made with great caution.

[70] See also Castellarin (n 2) 136.

[71] Paul Reuter, *Introduction au droit des traités* (3ème edn, Geneva 1995), 173.

condition of material breach for the termination of a treaty according to Art 60 VCLT. Nevertheless, attention should be paid so that such an interpretation does not become too restrictive for the non-defaulting party or parties to a treaty. Although it could be accepted that a treaty should not be terminated in case of breach of one or more of its provisions which are essential for the accomplishment of its object and purpose if the breach can be remedied and the object and purpose of the treaty can still be achieved, such remedial action must not upset the balance of interests of the parties to the treaty in the performance of the obligations arising therefrom. It should be taken into account that the material breach of the Arbitration Agreement could arguably be remedied without considerable difficulty and without prejudicing the position of Croatia with regard to its interests in the performance of the Agreement; this might not be possible in case of material breach of other treaties.

4.2.3 The Gravity of the Breach

Croatia had argued that, as a result of Slovenia's actions, essential procedural rules had been 'systematically and *gravely* violated'.[72] By contrast Slovenia disputed the gravity of the breach and it argued also on this basis against the application of Art 60 (1) VCLT. It claimed that in case law as well as in the majority of the doctrine it is accepted that Art 60 (3)(b) VCLT applies only in case of 'a *gross* infringement of an essential provision', otherwise the termination of a treaty would be a 'disproportionate remedy'.[73] However, in analysing Art 60 (3)(b) VCLT, the Tribunal noted that it 'does not refer to the intensity or the gravity of the breach, but instead requires that the provision breached be essential for the accomplishment of the treaty's object and purpose.'[74] Thus the Tribunal made clear that the gravity of the breach is not an element of the definition of material breach according to the letter of Art 60 (3)(b) VCLT.

At this point the following remarks might be made. The definition of Art 60 (3)(b) VCLT is premised on the character of the breached provision, namely that it must have been essential for the accomplishment of the treaty's object and purpose, and does not take into account the gravity of the breach. Therefore, according to the letter of Art 60 (3)(b) VCLT, even a minor breach of an essential provision constitutes a material breach.[75] Nevertheless, in the doctrine the view has been supported—which is shared also by the author of this article— that the element of gravity of the breach

[72] Letter from the Minister of Foreign and European Affairs of the Republic of Croatia to the Registrar of the Tribunal, 2 (24 July 2015) (Annex SI-1021) (emphasis added).

[73] Transcript of the Oral Hearing of 17 March 2016, 45:17-48:15 (Statement by Sir Michael Wood) (emphasis added), referring to Bruno Simma, 'Reflections on Article 60 of the Vienna Convention on the Law of Treaties and Its Background in General International Law' (1970) 20 ÖZöR 5, 31. However, Slovenia connected this argument to its claim that the breaches of the Arbitration Agreement were not material since they could 'be remedied'; namely, that the breaches did not 'make the accomplishment of the object and purpose of the treaty impossible' (see above section 4.2.2).

[74] Award [215].

[75] Cf however Waldock (n 43), 76 [13], as well as the amendments which were proposed by the Finnish (UN Doc A/CONF.39/C.1/L.309) and US (UN Doc A/CONF.39/C.1/L.325) delegations in the Vienna Conference.

should be part of the definition of material breach according to Art 60 (3)(b) VCLT.[76] There is some support for this view in international case law[77] and in state practice;[78] moreover, such an interpretation is more consistent with the purpose of VCLT in general, which is to ensure the stability of treaty relations according to the principle *pacta sunt servanda*. This purpose is achieved if states can release themselves of their treaty obligations only in case of a serious breach of the treaty.

The Tribunal did not take a position on whether the gravity of the breach should be an element of the definition of material breach according to Art 60 (3)(b) VCLT *de lege ferenda*. Besides, since the Tribunal took the view that there had not been material breach of the Arbitration Agreement by Slovenia according to Art 60 (3)(b) VCLT, there was no reason for it to examine the additional element of gravity of the breach. However, the notion of gravity should arguably be considered as part of the definition of material breach: in such a case, if the breach of a treaty provision which is essential for the accomplishment of the object and purpose of the treaty can be remedied, such a breach is perhaps not sufficiently serious so as to justify the termination of that treaty.

5 Procedural Issues with Regard to the Purported Termination of the Arbitration Agreement

Croatia's position regarding the procedure of its purported termination was unclear. The Minister of Foreign and European Affairs of Croatia gave, by *note verbale* addressed to his Slovenian opposite number, the notification required by Art 65 (1) VCLT; nevertheless, in this notification it was stated that Croatia '*proposes* to terminate *forthwith* the Arbitration Agreement.'[79] Therefore, in spite of the use of the word 'propose' Croatia essentially seemed to claim a right of unilateral termination of the Arbitration Agreement on the grounds of its alleged material breach by Slovenia. Nevertheless, Arts 60 and 65-8 and Annex VCLT do not provide for a right of unilateral termination of a treaty by a party on the grounds of its material

[76] See indicatively Egon Schwelb, 'Termination or Suspension of the Operation of a Treaty as a Consequence of its Breach' (1967) 7 Indian Journal of International Law 309, 315; Simma (n 73); Taslim O Elias, *The Modern Law of Treaties* (Kluwer 1974), 114; Jan Klabbers, 'Side-stepping Article 60: material breach of a treaty and responses thereto' (1998) 7 Publications of the Finnish Branch of the International Law Association 20, 21; Bruno Simma and Christian J Tams, '1969 Vienna Convention: Article 60' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties, A Commentary* (2011) 1351, 1361; Thomas Giegerich 'Article 60' in Olivier Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties, A Commentary* (2012) 1021, 1032.

[77] See for instance in the *Namibia* judgment (n 41) [97] ('gross violation of the mandate'); similarly Separate Opinion of Judge Ammoun, *Namibia* (ibid [80]). The ICJ in the *Gabčíkovo-Nagymaros* judgment (n 59) [73] used the term 'fundamental breach', thereby implying the seriousness of the breach.

[78] See for instance that in the *Air Services Agreement* award (1978) RIAA XVIII 417[18] the US used the terms 'material' or 'serious' breach as synonymous. This is often the case in state practice when there is a claim of material breach: states refer to it as 'serious' or 'grave'.

[79] *Note verbale* (n 10).

breach. Art 60 (1) VCLT stipulates that the non-defaulting party is merely entitled to invoke the breach as a ground for terminating the treaty. In order for the treaty to be terminated, the procedure of Arts 65-8 and Annex VCLT must be followed.

In the same *note verbale* it was stated that 'from the date of this note the Republic of Croatia *ceases to apply* the Arbitration Agreement.'[80] Thus, while Croatia did not claim that the Arbitration Agreement had been terminated, but stated its intention to terminate it (presumably because there is no right of unilateral termination according to the VCLT), it claimed a right to cease to apply the Arbitration Agreement, which is another issue: it may refer to the performance of the Agreement and not necessarily to the issue whether the Agreement is in force.[81] Croatia did not, however, clarify on which legal basis it could cease the application of the Agreement. In a subsequent press release, Croatia has claimed that, following its initiation of the procedure for the termination of the Agreement, the operation of the Agreement has been suspended.[82] However, such a claim finds no basis in the VCLT: according to Arts 60 and 65-8 of the latter, the suspension of the operation of a treaty is brought about through the same procedure as the termination of a treaty.

Slovenia pointed out the inconsistency in the Croatian position in that the latter was essentially claiming a right of unilateral termination which was contrary to the regulation of the VCLT, while at the same time it invoked the procedure of Arts 60 and 65 VCLT.[83]

The Tribunal, in examining Croatia's position, used somewhat inconsistent terminology: on the one hand it referred to 'purported termination'[84] by Croatia, or that Croatia 'proposed to terminate'[85] the Agreement (and thus seemed to accept the Croatian argument that it was following the procedure of Arts 60 and 65 VCLT), and on the other hand it noted that Croatia was *unilaterally* terminating the Agreement,[86] without commenting on whether such 'unilateral' termination was in accordance with the VCLT. In any event, it did not answer the question whether Croatia had 'validly terminated' the Agreement[87] from a procedural point of view. However, as already noted, from the combination of Arts 60 and 65-8 and Annex VCLT it can be inferred that there can be no unilateral termination of a treaty on the grounds of its material breach according to the VCLT.

It is also noteworthy that while the Tribunal had also considered that it had jurisdiction not only to decide whether Croatia had legally proposed to terminate the

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[80] Ibid.

[81] For a distinction between the two notions see Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries, Report of the ILC to the General Assembly on the work of its 53rd session, *ILCYB* 2001-II, 71 [2]-[3].

[82] Ministry of Foreign and European Affairs of the Republic of Croatia 'Press release on Arbitral Tribunal's decision' 30 June 2016, available at < http://www.mvep.hr/en/info-servis/press-releases/,25852.html>, accessed 18 February 2019.

[83] Written Submission [3.16].

[84] Award [160].

[85] Ibid [163], [167].

[86] Ibid [221].

[87] Ibid [160], [162].

Agreement, but also whether it had 'validly ceased to apply it',[88] in the end it restricted itself to deciding that the Arbitration Agreement remained in force and it did not answer the second question.[89]

6 Conclusion

The Tribunal made interesting contributions to the issue of termination of a treaty, and more specifically of an arbitration agreement, on the grounds of its material breach. It confirmed that Art 60 VCLT applies to any treaty, including arbitration agreements, and it made clear that a purported termination of an arbitration agreement on the grounds of material breach by the other party does not deprive the tribunal of its jurisdiction, which is preserved by Art 65 (4) VCLT and prevails over the procedure of Arts 65-8 and Annex VCLT. Moreover, it offered significant clarifications of the notion of repudiation of a treaty according to Art 60 (3)(a), distinguishing it from Art 60 (3)(b) VCLT. With regard to the second version of the definition of material breach included in Art 60 (3)(b) ('violation of a provision essential to the accomplishment of the object or purpose of the treaty'), the Tribunal consistently used the phrase 'object *and* purpose' of the treaty and accepted that a treaty can have more than one object and purpose. It also made clear that the gravity of the breach is not an element of the definition of material breach according to the letter of Art 60 (3)(b) VCLT.

Perhaps the most notable point of the Award with regard to the notion of material breach is that the Tribunal moved away from the formulation of Art 60 (3)(b) VCLT, since instead of examining whether the breached provisions of the Agreement were essential for the accomplishment of its object and purpose, it required that the breach defeated the object and purpose of the Agreement. With regard to the latter criterion, the Tribunal in fact adopted a strict interpretation of Art 60 (3)(b) VCLT, requiring impossibility of accomplishment of the object and purpose of the treaty as a result of its breach. Although such a strict interpretation offers more guarantees for treaty stability, questions arise with regard to whether it is in accordance with the letter of Art 60 (3)(b).

In any event, the Award highlights the weaknesses of Art 60 (3)(b) VCLT. It is questionable whether the second version of the definition of material breach, namely 'the violation of a provision essential to the accomplishment of the object or purpose of the treaty' is adequate. Although this condition offers guarantees for treaty stability, it could be argued that the breach of such a provision should lead to the termination of the treaty only if that breach is sufficiently serious. The possibility of accomplishing the object and purpose of the treaty through remedying the breach, which was pointed out by the Tribunal, is a consideration which should be taken into account in this regard, provided that such remedial action does not upset the balance

[88] Ibid [167], [199].
[89] Ibid [225].

of interests of the parties to the treaty in the performance of the obligations arising therefrom.

Nevertheless, the Tribunal did not clearly address other questions arising from Croatia's purported termination of the Agreement, presumably because it considered that it was not necessary in order to decide the case before it, since it had decided there had not been a material breach of the Agreement. More specifically, firstly, it did not clarify whether a party is entitled to terminate a treaty on the grounds of its material breach by the other party, when the former has already irrevocably benefited from the treaty. Secondly, it did not take a clear position with regard to whether a purported unilateral termination of a treaty on the grounds of its material breach is in accordance with Arts 60, 65-8 and Annex VCLT and thirdly, it did not examine whether Croatia could cease to apply the Agreement following its notification of an intention to terminate that Agreement. According to the author of the present article, the first of these questions should rather be answered in the negative and the second clearly in the negative. With regard to Croatia's claim that it could cease to apply the Agreement, it is true that Croatia had not clarified on which legal ground it based this claim. However, its subsequent argument in support of this claim (namely that following its initiation of the procedure for the termination of the Agreement the operation of the Agreement had been suspended) finds no basis in the VCLT.

In any event, having accepted that the Arbitration Agreement is in force, on 29 June 2017 the Tribunal went on to issue its Final Award on the case[90] and gave the parties six months to implement it, a period which ended on 29th December 2017. Croatia has refused so far to implement the Final Award on the grounds that the Tribunal should have terminated the arbitration since Croatia had initiated the procedure to terminate the Arbitration Agreement on the grounds of its material breach.[91]

Regardless of possible challenges in the implementation of the Final Award, it might be argued that the Tribunal in its Partial Award correctly decided to emphasise treaty stability as well as certainty in the conduct of arbitral proceedings, which would be prejudiced if a party to an arbitration agreement could bring about its termination on the grounds of an untenable invocation of material breach.

[90] *In the Matter of an Arbitration Under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009 (Croatia/Slovenia)*, Final Award of 29 June 2017, PCA, available at https://pcacases.com/web/sendAttach/2172, accessed 18 February 2019.

[91] Ministry of Foreign and European Affairs of the Republic of Croatia 'Press release on Arbitral Tribunal's decision' 30 June 2016, available at < http://www.mvep.hr/en/info-servis/press-releases/,25852.html>, accessed 18 February 2019.