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Slovenia To Sue Croatia Over Disputed Border Ruling

By **Caroline Simson**

Law360 (June 20, 2018, 9:26 PM EDT) -- Slovenia will bring Croatia to Europe's highest court for refusing to implement an arbitral award issued last year to resolve a territorial and maritime dispute that arose after the two Balkan nations declared independence from the former Yugoslavia in 1991.

Slovenian Prime Minister Miro Cerar made the announcement on Monday after the European Commission said it would remain neutral in the dispute and would not address Slovenia's complaint that Croatia is infringing EU law by refusing to implement **the award**, which gave Slovenia the larger part of a contested bay and direct access to the sea.

Croatia had boycotted the proceeding since 2015 following an incident in which a Slovenian representative had out-of-court contact with an arbitrator who later resigned. Croatia now claims that the award is nonbinding. The two countries have sparred over its implementation since the award was issued last June, at one point even threatening to fine the other country's fishermen for entering contested waters.

Cerar said Monday that he "deplore[d]" the Commission's inaction on the dispute, adding that the lawsuit is expected to be filed with the European Court of Justice in Luxembourg by mid-July following an expected approval from the Slovenian government on Thursday.

"The Commission is not doing its duty," he said in a statement posted on the Slovenian government's website. "For political reasons, it has not listened to the legal arguments. This is a dangerous precedent for the future of the EU."

He noted that in the days following the ruling, the Commission said it expected both countries to respect and implement it.

Representatives for Croatia could not immediately be reached for comment outside normal business hours there.

The incident that prompted Croatia to bow out of the underlying arbitral proceedings began in mid-2015, when Serbian and Croatian newspapers reported that certain telephone conversations between one of Slovenia's representatives and its appointed arbitrator, Jernej Sekolec, were intercepted. During those conversations, confidential information about the tribunal's deliberations was disclosed, the papers reported.

Both the representative, Simona Drenik, and Sekolec later resigned, and shortly afterward the arbitrator originally appointed by Croatia, Budislav Vukas, also resigned, according to The Hague-based Permanent Court of Arbitration, which administered the proceeding. Thereafter, Croatia demanded that the tribunal discontinue the proceedings, arguing that the official record of the entire arbitration had been "contaminated" and that there was no way to repair the damage, the PCA said.

But the tribunal was reconstituted in September 2015 and it invited the parties to comment on the legal implications of Slovenia's ex parte communications. Croatia did not file any written submissions on the matter or participate in a March 2016 hearing, though it made its position known in various letters and diplomatic notes.

Slovenia, meanwhile, argued that the proceedings could continue because the tribunal had the tools

to remedy the effects of any wrongdoing that may have occurred.

The tribunal held in **June 2016** that while Slovenia had violated provisions of the countries' arbitration agreement by engaging in ex parte contact with the appointed arbitrator, the violation was not so egregious as to affect the tribunal's ability to issue an independent and impartial award. That meant it was able, and indeed required, to continue the proceeding without Croatia.

A year later, the five-member tribunal issued its final award in the arbitration that determined the maritime and land boundaries of disputed areas between the two Balkan states. The decision gave Slovenia the larger portion of a bay and a "junction area" connecting its waters to the high seas.

The tribunal was composed of Judge Gilbert Guillaume, Professor Vaughan Lowe QC, Judge Bruno Simma, Ambassador Rolf Einar Fife and Professor Nicolas Michel.

Slovenia was represented in the proceeding by Rodman R. Bundy of Eversheds LLP, Michael Wood of 20 Essex Street, and Daniel Muller and Alain Pellet. They are assisted by Natasha Harrington of Eversheds LLP, Maja Menard, Alina Miron and Eran Sthoeger.

Croatia did not participate in the arbitration.

The case is *The Arbitration Between the Republic of Croatia and the Republic of Slovenia*, case number 2012-04, in the Permanent Court of Arbitration.

--Editing by Catherine Sum.