

CJEU Lacks Jurisdiction to Rule on Slovenia/Croatia Border Arbitration Dispute



On 31 January 2020, the Grand Chamber of the Court of Justice of the European Union (the **CJEU**) handed down its judgment in *Slovenia v. Croatia* (C-457/18), declaring that the CJEU lacked jurisdiction to rule on the interpretation of an arbitral award settling the border dispute between the two countries.

Background of the case

The case involved a complex territorial and maritime border dispute between Slovenia and Croatia that has long troubled the two countries since they both declared independence from the Socialist Federal Republic of Yugoslavia in 1991. Having had unsuccessful bilateral negotiations between 1992 and 2001, and pressure to settle the issue as a condition of accession for Croatia's accession into the European Union, the two countries entered into an arbitral agreement to settle the dispute through an independent adjudicatory body. This agreement paved the way for Croatia to become an EU Member State on 1 July 2013, as Slovenia had already acceded to the EU on 1 May 2004. Pursuant to that arbitration agreement, the dispute was then submitted to an arbitral tribunal so that

both countries would be legally bound by its award.

However, due to a procedural incident that occurred in the course of the proceedings before the arbitral tribunal, in which unofficial communications transpired between the arbitrator appointed by Slovenia and Slovenia's State Agent, Croatia considered that the tribunal's ability to make an impartial and independent award had been compromised. It consequently notified Slovenia and the tribunal of its termination of the arbitral agreement on 30 July 2015 pursuant to Article 60, paragraph 1 of the Vienna Convention on the Law of Treaties.

Ultimately, while the tribunal, which had in the interim been partly replaced, considered that Slovenia had violated the arbitral agreement, it nonetheless concluded that Croatia had unlawfully annulled it and that the arbitral agreement should thus remain in force. On 29 June 2017, the new tribunal handed down its award, which defined the land and sea borders between the two countries.

Since this award was still not being executed by Croatia, Slovenia brought an infringement action pursuant to Article 259 of the Treaty on the Functioning of the European Union (*TFEU*) against Croatia, claiming that EU law was being violated. In particular, Slovenia argued that, by refusing to execute the arbitral award, Croatia violated Articles 2 and 4 of the Treaty on the European Union (*TEU*), which relate to the respect of law, territorial integrity and the principle of sincere cooperation. In addition, Slovenia argued that Croatia failed to fulfil its obligations under a number of EU regulations and directives, such as the common fisheries policy, maritime special planning and border control.

Reasoning of the CJEU

From the outset, the CJEU recalled its former case-law in *Commission v. Belgium* (C-132/09) according to which it lacked

jurisdiction to rule on the interpretation of an international agreement concluded by EU Member States when the subject matter as well as the obligations of that international agreement fall outside the scope of the EU's competence. The CJEU also recalled that it had no jurisdiction to rule on an action for infringement made pursuant to Article 259 TFEU when the alleged infringement is ancillary to the obligation under international law.

On that basis, the CJEU found that the dispute between Slovenia and Croatia fell outside the scope of competences of the EU because (i) the arbitral award was handed down by an international tribunal, which had been set up from an arbitral agreement (governed by international law) and whose subject matter did not fall within the areas of the EU's competences; and (ii) the EU was not a party to the arbitral agreement or award. Consequently, the CJEU concluded that the arbitral agreement could by no means be interpreted as being part of EU law (para. 102).

In particular, the CJEU reasoned that the pleaded infringements of EU law, both under EU primary and secondary law, were *"ancillary to the alleged failure by Croatia to comply with the obligations arising from a bilateral international agreement to which the European Union is not a party and whose subject matter falls outside the areas of EU competence"* (para. 104). In accordance with the case law, outlined above, the Court concluded that *"since the subject matter of an action for failure to fulfil obligations brought under Article 259 can only be non-compliance with obligations arising from EU law"*, it lacked the jurisdiction to rule on the present action (para. 104).

In its conclusion, the CJEU opined that while it lacked jurisdiction to rule on whether Croatia failed to abide by its obligations under the arbitral dispute with Slovenia, this ruling was without prejudice to all obligations, arising for each of the two countries concerned and with respect to

Article 4, paragraph 3 TEU, to implement a definitive solution that conforms to international law, and assures the effective application of EU law and the end of the border dispute. In this regard, the CJEU perhaps suggested that the parties could submit an action under Article 273 TFEU, provided there is a special agreement between the two countries.

Significance

The present judgment is noteworthy to understand the CJEU's stance on the overlap of jurisdiction between infringements of international law and European Law. Indeed, by framing the crux of the issue on the question of whether the CJEU has competence to interpret public international law, namely with respect to the arbitral award, and not whether EU primary and secondary law are being violated, the CJEU keeps itself distant from blurring the judicial distinction between international and European law.

From a broader political perspective, staying out of the border dispute might also have implications for Croatia's accession to the Schengen Area. In October 2019, the EU Commission gave its support to the accession of Croatia stating that it had *"taken the measures needed to ensure that the necessary conditions for the full application of the Schengen rules and standards are met"*. However, it cannot accede to the Schengen Area without the unanimous decision from all states party to the *acquis*. Without the endorsement from Slovenia, Croatia could face difficulties acceding to the Schengen, as Slovenian MPs have already expressed [in an open letter to the Commission](#), their reservation towards Croatia's compliance with EU legal standards, *"notably regarding respect for and implementation of international agreements and judgments"*.

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