

Kluwer Arbitration Blog

The Border of Slovenia and Croatia – Where the CJEU Reached the Frontier of its Jurisdiction

Velislava Hristova · Tuesday, April 28th, 2020

On 11 December 2019, the Advocate General Priit Pikamäe delivered its Opinion recommending the Court of Justice of the European Union (“**CJEU**”) to declare that it does not have jurisdiction to rule in infringement of European Union (“**EU**”) law proceedings concerning the long-running border dispute between Slovenia and Croatia, which the CJEU endorsed in the judgement of 31 January 2020.

The main question raised in the case between the two EU member states is whether the CJEU is competent to decide on an action brought by Slovenia under Art. 259 of the Treaty on the Functioning of the European Union (“**TFEU**”) alleging that Croatia has failed to fulfil its obligations under EU law by refusing to recognise an arbitral award determining the maritime and land boundary between the two states.

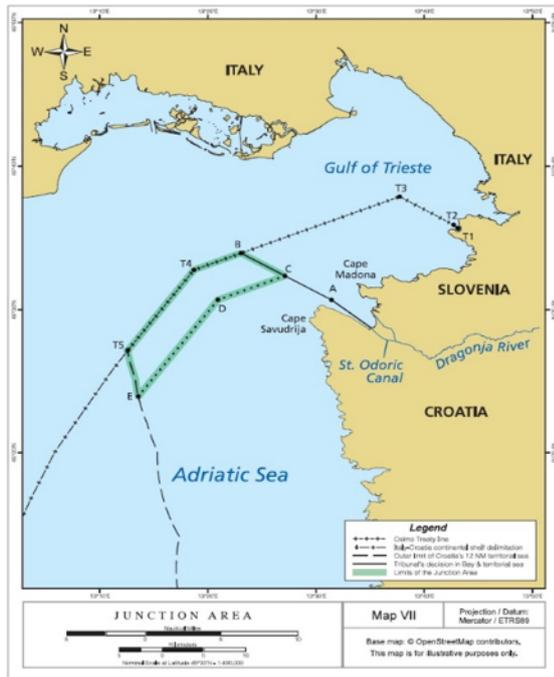
Factual Background and Pre-litigation Procedure

The collapse of the Socialist Federal Republic of Yugoslavia (“**SFRY**”) in the early 1990s uncovered some smouldering issues between its former constituent republics.

Amongst others, the breakup revealed the border dispute between two of the SFRY’s successors –Slovenia and Croatia. After declaring their independence in 1991, between 1992 – 2001 both states unsuccessfully attempted to resolve the dispute regarding the course of their land and maritime boundary.

On 4 November 2009, in the course of Croatia’s accession to the EU, Slovenia and Croatia signed an [arbitration agreement](#) (“**Arbitration Agreement**”) referring their land and maritime border dispute to arbitration. The European Commission and the Swedish EU Council Presidency facilitated the drafting of the Arbitration Agreement, and along with being signed by the parties, the Arbitration Agreement was also signed by the Swedish EU Council Presidency as a witness. During the arbitral proceedings, due to *ex parte* communication between the arbitrator appointed by Slovenia and one of the Slovenian representatives in the proceedings, in July 2015, Croatia informed Slovenia and the arbitral tribunal of its decision to terminate the Arbitration Agreement claiming a material breach of the Arbitration Agreement by Slovenia under Art. 65, para 1 of the Vienna Convention on the Law of Treaties (discussed on the blog [here](#)). After a change in the

composition of the arbitral tribunal, the proceedings continued, and on 29 June 2017, the tribunal rendered its **final award** (“**Arbitral Award**”) determining the boundary between Slovenia and Croatia. However, Croatia contested the validity of the Arbitral Award and its binding effect.



The border as determined by the arbitral tribunal in the Arbitral Award, page 347

Infringement Proceedings Filed by Slovenia

On 16 March 2018, Slovenia initiated infringement proceedings under Art. 259 TFEU referring the dispute to the European Commission. Since the Commission did not issue a reasoned opinion on the matter within the required three month period, on 13 July 2018, Slovenia brought an **action before the CJEU**.

In support of its action, firstly, Slovenia claimed that by breaching its unilateral commitment undertaken during the EU accession process to adhere to the Arbitral Award and the boundary determined by that award, Croatia refused to respect the rule of law and the principles of sincere cooperation and *res judicata*. Secondly, Slovenia maintained that by refusing to comply with the Arbitral Award, Croatia prevents it from exercising its full sovereignty over its land and maritime territory breaching its duty of sincere cooperation and jeopardizing the attainment of the EU's objectives. Lastly, Slovenia argued that Croatia was preventing it from fulfilling its obligation to implement a number of EU secondary law acts related to the common fishery policy, the border control and the maritime spatial planning.

On 21 December 2018, Croatia submitted a motion arguing that the action brought by Slovenia is inadmissible as the CJEU had no jurisdiction to rule on a dispute concerning the Arbitration Agreement and the Arbitral Award which did not require the application or interpretation of EU law.

Findings of the Advocate General

In his [opinion](#), The Advocate General began his analysis by examining the relationship of the Arbitration Agreement and the Arbitral Award with EU law and determining whether they bound the EU. He found that:

1. The cases where the EU is bound by international law are well-established. Namely, the EU is bound by international conventions concluded by the EU itself or where the EU assumes powers previously exercised by the member states, and by rules of customary international law. Therefore, international agreements which do not fall within the situations listed above, are not EU acts and, therefore, do not bind the EU (§ 104).
2. The territorial scope of the Treaties is an objective fact determined by the member states. As a consequence, the delimitation of national territory does not fall within the jurisdiction of the CJEU (§§ 110-112).
3. The Arbitration Agreement and the Arbitral Award did not fall within any of the hypothesis in which the EU is bound by international law (§ 122).
4. The issues concerning the alleged infringements of the rule of law and the principle of sincere cooperation are ancillary to the issue of determination of the land and maritime boundary between the two member states and therefore, the CJEU does not have jurisdiction to decide on those matters (§ 130, 134, 135).
5. Slovenia's claims in relation to non-compliance with the EU secondary legislation were based on the assumption that the border between the two member states had been determined by the Arbitral Award. However, the Arbitral Award has not been implemented, and the boundary between the two member states remained undetermined (§ 149).

The Advocate General expressed his view that Slovenia was seeking implementation of the Arbitral Award, which fell outside the competence of the EU and the CJEU's jurisdiction. He then concluded that the infringements of EU law alleged by Slovenia are ancillary to the issue of the determination of its border with Croatia which is a matter of public international law and therefore falls outside of the jurisdiction of the CJEU (§ 164).

The Judgment of the CJEU

In the [judgment of 31 January 2020](#), examining the issue of whether it has jurisdiction to hear the case, the CJEU noted that it is not within its sphere of competence to interpret an international agreement concluded by member states whose subject is not a matter of EU law. Relying on previous case-law, the CJEU further explained that it lacks jurisdiction to decide on an action under Art. 259 TFEU for failure to fulfil obligations, when the infringement of EU law pleaded in support of the action is ancillary to the obligations stemming from the international agreement at issue (§§ 91-92).

In light of the above, the CJEU found that the infringements of EU law claimed by Slovenia resulted from the alleged failure by Croatia to comply with the obligations under the Arbitration Agreement and the Arbitral Award rendered on its basis or from the false premise that the border between the two member states has been determined by the Arbitral Award (§ 101).

The CJEU clarified that the Arbitral Award was rendered by an international tribunal established under a bilateral arbitration agreement governed by international law the subject matter of which

did not fall within the sphere of competence of the EU and the EU was not a party to the Arbitration Agreement, notwithstanding its facilitating role. It further stated that despite the links between the conclusion of the arbitration agreement and the arbitral proceedings conducted on its basis on the one hand and the accession of Croatia to the EU on the other, the Arbitration Agreement and the Arbitral Award could not be considered an integral part of EU law. In this context, the CJEU clarified that the neutral reference made to the Arbitral Award in the Act of Accession of Croatia to the EU did not mean that the commitments made by Slovenia and Croatia under the arbitration agreement were incorporated into EU law (§§ 102-103).

In that regard, the CJEU concluded that the infringements pleaded by Slovenia were ancillary to the alleged failure by Croatia to comply with its obligations under the Arbitration Agreement. As the action for failure to fulfil obligations under Art. 259 TFEU can only apply in case of non-compliance with obligations arising out of EU law, the CJEU found that it lacked jurisdiction to decide on the alleged failure to comply with the obligations stemming from the Arbitration Agreement and the Arbitral Award (§ 104).

The CJEU noted that it is within the competence of each member state to determine its borders in accordance with international law. Therefore, it was beyond its jurisdiction to examine the extent and the limits of the respective territories of Slovenia and Croatia by applying directly the boundary as determined by the Arbitral Award in order to verify the existence of the pleaded infringements of EU law. The CJEU nevertheless reminded Slovenia and Croatia of their obligation to “strive sincerely to bring about a definitive legal solution consistent with international law, as suggested in the Act of Accession” of Croatia to the EU which ensures the application of EU law. One such option could be a submission “to the Court under a special agreement pursuant to Article 273 TFEU” (§§ 107, 109).

The Way Ahead

The Judgment in the case between Slovenia and Croatia is one of the very few where the CJEU had to decide on a dispute between two member states.

Indeed, it is the first case under Art. 259 TFEU where the territorial application of EU law was at stake, and the CJEU had to decide on whether an arbitral award rendered on the basis of an arbitration agreement concluded between two member states has a connection with EU law and thus falls within the sphere of competence of the CJEU.

While the CJEU said its last word and its Judgement is final and cannot be appealed, the boundary between Slovenia and Croatia remained undetermined.

Looking ahead, it is likely that Croatia will call for a mutually acceptable agreement. Slovenia, on the other hand, will more likely demand the implementation of the Arbitral Award. Although the CJEU decided that it had no jurisdiction to rule on the border dispute between the two member states, Slovenia can count on the fact that the Arbitral Award is a binding settlement instrument under public international law.

An important factor which will likely play a key role in finding a definitive solution of the border dispute between the two member states is Croatia’s attempt to join the Euro and the Schengen Area. To become a member, Croatia needs the unanimous consent of all Euro and Schengen Area

member states, among which is Slovenia. It is probable that Slovenia will seek a favourable solution of the dispute using its power to cease Croatia's accession, as it did during the negotiations for Croatia's accession to the EU.

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