



BETWEEN A ROCK AND A HARD PLACE: THE COURT OF JUSTICE'S JUDGMENT IN CASE *SLOVENIA V. CROATIA*

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ABSTRACT: The *Slovenia v. Croatia* case (Court of Justice, judgment of 31 January 2020, case C-457/18) is a complex and politically charged one. Here, the Court of Justice was indirectly called upon to pronounce on the legal effects of an international arbitral award delimiting the territorial and maritime boundary between two Member States – the validity of which remains fiercely contested by one of the parties. This *Insight* analyses the Court of Justice's reasoning in the case at hand and argues that, although the Court was arguably caught between a rock and a hard place, its misconstruction of the subject matter of the action and its failure to engage with the *res judicata* effects of the arbitral award within the EU legal order weaken the persuasive force of its line of argumentation.

KEYWORDS: territory – arbitration agreement – arbitration award – subject matter of the dispute – *res judicata* effects – international law.

I. INTRODUCTION

On 31 January 2020 the Court of Justice rendered its judgment in the *Slovenia v. Croatia* case.¹ The background to the case is almost tabloid-worthy involving a lingering boundary dispute, an arbitration procedure disrupted by *ex parte* communications between a party and an arbitrator resulting in an unenforced final award. The case is one of the handful of cases based on Art. 259 TFEU to have reached the docket of the Court of Justice² and the only one involving questions pertaining to the territorial application of EU law in the context of Art. 259 infringement proceedings. Despite this, the judgment has thus far received scant attention in the literature. The purpose of this *Insight* is to sketch out some general remarks on the Court's reasoning in the case at hand.

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¹ Court of Justice, judgment of 31 January 2020, case C-457/18, *Slovenia v. Croatia*.

² For an overview, see B. SCHIMA, *Article 259*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (eds), *Commentary on the EU Treaties and the Charter of Fundamental Rights*, Oxford: Oxford University Press, 2019, p. 1786.



At this juncture, a brief overview of the factual and legal background to the case is necessary in order to contextualise the discussion unfolding in the following sections. After declaring their independence in the early 1990s, a boundary dispute between the two States arose. In 2009, in the course of Croatia's accession to the EU, Slovenia (already a Member State) and Croatia signed an arbitration agreement³ undertaking to submit their territorial and maritime border dispute to an arbitral tribunal whose award would be final and binding upon both parties.⁴ During the arbitral proceedings, recordings attesting to the existence of secret communications between one of the arbitrators and the Slovenian agent were leaked to the press.⁵ On account of this incident, Croatia informed Slovenia of its decision to terminate the arbitration agreement since, in its view, the incident constituted a material breach of the agreement – within the meaning of Art. 60 Vienna Convention on the Law of Treaties (VCLT).⁶ On 30 June 2016 the arbitral tribunal issued a partial award acknowledging that Slovenia had acted in breach of the arbitration agreement and declaring, at the same time, that the nature and gravity of those violations did not allow Croatia to terminate the arbitration agreement which continued to apply.⁷ On 29 June 2017 the tribunal rendered a final arbitration award delimiting the land and maritime border between the two States. Croatia has fiercely denied the validity and binding effects of both the partial and the final award.⁸

Against this backdrop, Slovenia brought an action under Art. 259 TFEU against Croatia claiming that its failure to recognise the award has resulted in a number of violations of EU primary and secondary law.⁹ The Court, following the AG's opinion,¹⁰ found that it lacked jurisdiction to rule on the alleged violations of EU law since these were ancillary to the broader international law dispute between the two States whose subject matter fell outside the purview of EU law.¹¹ On this basis, the Court dismissed the action as inadmissible.¹²

There is little doubt that the case before the Court was freighted with significant political overtones – to put it mildly. It is no secret that the resolution of the border dispute

³ Arbitration Agreement of 4 November 2009 between the Government of the Republic of Slovenia and the Government of the Republic of Croatia (hereinafter referred to as arbitration agreement).

⁴ Art. 7, para. 2, of the arbitration agreement.

⁵ S. MILEKIC, *Croatia May Quit Arbitration Case over Piran Gulf*, in *Balkan Insight*, 24 July 2015, balkaninsight.com.

⁶ *Slovenia v. Croatia*, cit., para. 32.

⁷ Arbitral Tribunal, *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 04 November 2009*, partial award of 30 June 2016, paras 175 and 225 (hereinafter referred to as partial award).

⁸ Republic of Croatia, Ministry of Foreign and European Affairs, *Termination of the Arbitration Process between Croatia and Slovenia: Causes and Consequences*, www.mvep.hr.

⁹ *Slovenia v. Croatia*, cit., para. 1.

¹⁰ Opinion of AG Pikamäe delivered on 11 December 2019, case C-457/18, *Slovenia v. Croatia*, para. 164.

¹¹ *Slovenia v. Croatia*, cit., paras 104 and 107.

¹² *Ibid.*, para. 108.

was a *quid pro quo* for lifting Slovenia's reservations regarding Croatia's accession negotiations.¹³ On the other hand, concerns relating to the independence and impartiality of international adjudicators cannot (and should not) be easily dismissed since they have a direct impact on the confidence placed by the parties in the dispute resolution mechanism, and thus, ultimately, on its effectiveness.¹⁴ In this light, the Court's ruling in *Slovenia v. Croatia* is hardly surprising. Caught between a rock and a hard place, the Court considered the matter before it as one inexorably linked to the underlying border dispute; a dispute which, in its view, belongs to the realm of public international law and as such, lacks any legal connection to EU law. However, how convincing is the Court's line of argumentation? The rest of this *Insight* will focus on presenting and analysing the Court's reasoning in the case at bar.

II. JUDGMENT OF THE COURT

The Court began its enquiry into the action's admissibility by recalling its pronouncement in the *European Schools* case¹⁵ to the effect that it lacks jurisdiction in cases involving the interpretation of an international agreement concluded between Member States whose subject matter does not fall within the areas of EU competence as well as on the obligations arising thereunder for them.¹⁶ In this light, the Court proceeded to examine the nature and scope of Croatia's putative infringements of EU law and found that these result from its alleged failure to comply with the arbitration agreement and with the award made pursuant to that agreement.¹⁷ The Court clarified that the "award was made by an international tribunal established under a bilateral arbitration agreement governed by international law, the subject matter of which does not fall within the areas of EU competence [...] and to which the European Union is not a party".¹⁸ While the Court acknowledged that there were some links between the conclusion of the agreement and Croatia's accession to the Union, these were too tenuous for the agreement to be considered part of EU law.¹⁹ On this basis, the Court concluded that the infringements of EU law pleaded in the case at hand were ancillary to the broader international

¹³ Opinion of AG Pikamäe, *Slovenia v. Croatia*, cit., para. 126. See also Art. 9 of the arbitration agreement.

¹⁴ A. VON BOGDANY, I. VENZKE, *In Whose Name? An Investigation on International Courts' Public Authority and Its Democratic Justification*, in *European Journal of International Law*, 2012, pp. 32-34.

¹⁵ Court of Justice, judgment of 30 September 2010, case C-132/09, *European Commission v. Kingdom of Belgium*, para. 44 (hereinafter referred to as *European Schools*).

¹⁶ *Slovenia v. Croatia*, cit., para. 91.

¹⁷ *Ibid.*, paras 93-101.

¹⁸ *Ibid.*, para. 102.

¹⁹ *Ibid.*, paras 102-103.

law dispute arising from Croatia's alleged failure to comply with the arbitration agreement – thereby preventing it from exercising its jurisdiction.²⁰

The Court further buttressed this conclusion by noting that it is within the competence of Member States to delimit their territory in accordance with international law.²¹ Thus, it was beyond its jurisdiction to examine, in the context of the action, the extent and limits of the territories of Croatia and Slovenia by directly applying the final award in order to verify the existence of EU law infringements.²² The Court reminded the parties of their obligation stemming from the duty of sincere co-operation to resolve their dispute in accordance with international law for the purpose of ensuring the application of EU law in the areas concerned.²³ One of the options for settling the dispute could be by submitting it to the Court of Justice by means of a special agreement under Art. 273 TFEU.²⁴

III. ANALYSIS AND COMMENT

The rest of this *Insight* will focus on two main points that arguably play a major role in assessing the persuasive force of the Court's reasoning in the case at hand. The first pertains to the Court's framing of the subject matter of the action, while the second pertains to its failure to engage with the *res judicata* effects of the arbitral award within the EU legal order.

III.1. THE SUBJECT MATTER OF THE ACTION AND THE (IR)RELEVANCE OF *EUROPEAN SCHOOLS*

From the outset, it needs to be pointed out that the framing of the subject matter of the action is of utmost importance in assessing the soundness of the Court's findings. There are two lenses through which the dispute can be seen and each one of them brings to the fore different legal considerations. Slovenia argued that the subject matter of the action concerned infringements of EU law; the final award should only be taken into account as a matter of fact in establishing its territorial boundaries for the purpose of verifying the alleged breaches of EU law.²⁵ The Court, largely espousing Croatia's views on the matter,²⁶ considered that the dispute fell within the purview of international law since its examination would require the Court to rule on Croatia's obligations under public international law. In reaching this conclusion as to the subject matter of the action, the Court relied on two main points: a) the relevance of its previous pronounce-

²⁰ *Ibid.*, para. 104.

²¹ *Ibid.*, para. 105.

²² *Ibid.*, para. 107.

²³ *Ibid.*, para. 109.

²⁴ *Ibid.*

²⁵ *Ibid.*, paras 86-87.

²⁶ *Ibid.*, paras 74-78.

ment in the *European Schools* case; and b) its interpretation of the nature of the alleged infringements of EU law as necessarily involving a prior ruling on Croatia's alleged failure to comply with its obligations arising from the arbitral agreement and award.²⁷ Each of these points will be examined in turn.

First, one should be careful in drawing parallels and making analogies between the case at hand and the *European Schools* case. In *European Schools*, the Commission initiated infringement proceedings against Belgium on the grounds that Belgium (allegedly) breached its obligations under an international agreement concluded between it and the Board of the Governors of the European School in conjunction with (then) Art. 10 TEC.²⁸ The Court of Justice, having established that the Union was not a party to the agreement, ruled that the alleged infringement of Art. 10 EC was merely ancillary to any possible violation of the agreement and, thus, it concluded that it lacked jurisdiction to rule on the action.²⁹ Importantly, in *European Schools*, even the Commission itself had expressly acknowledged that it had "never relied on Article 10 TEC per se in this case, that is, independently of the [...] Agreement".³⁰ Thus, in *European Schools*, both parties had accepted that the subject matter of the action concerned an instrument extraneous to the EU legal order.

The situation in the case at hand is radically different. Here, the action brought by Slovenia is based on EU law *exclusively*, while the instrument extraneous to the EU legal order (namely the arbitration award) is, as the Slovenian argument goes, only to be taken into account as matter of fact for the purpose of demarcating its territory vis-à-vis Croatia.

Furthermore, the relevance of the *European Schools* dictum needs to be assessed in the light of the limitations set therein regarding its application. More particularly, as seen above, the relevant pronouncement states that the Court lacks jurisdiction to rule: a) on the interpretation of an international agreement concluded between Member States whose subject matter falls outside the areas of EU competence; and b) on the obligations arising thereunder for Member States. Thus, the question arises as to whether, in examining Slovenia's action, the Court would necessarily have to rule a) on the interpretation of the arbitral award or b) on the obligations arising thereunder for Slovenia and Croatia.

This brings us to the second main point of the Court's argumentation regarding the subject matter of the dispute. In essence, the Court found that it lacked jurisdiction to rule on the action since this would involve ruling on Croatia's obligations under the arbitration agreement. The same question rears its head again. Would the Court *necessarily* have to pronounce on Croatia's obligations under international law in order to rule on

²⁷ *Ibid.*, paras 92-104.

²⁸ *European Schools*, cit., para. 1.

²⁹ *Ibid.*, paras 40-42.

³⁰ *Ibid.*, para. 41.

the action under Art. 259 TFEU? The Court assumes at different places throughout the judgment that ruling on the EU law action would involve by necessity ruling on the international law obligations of Croatia.³¹ However, this assumption is not as straightforward as it may seem.

Certainly, the adjudication of the action would require a prior determination of the respective territories of Slovenia and Croatia. In turn, this would require a decision about the legal effects of the arbitral award (which *prima facie* provides the boundary between the two States) within the EU legal order. Arguably, this decision does not require the Court to either rule on the interpretation of the arbitration agreement or on the obligations arising thereunder for the Member States. In this context, it needs to be stressed that the award merely purports to establish the land and maritime boundary between the two States, whereas the arbitration agreement contains the obligation to comply with the award. Thus, from a technical point of view, the subject matter of the action (which relates to infringements of EU law) does not necessarily directly involve ruling on the obligations arising under the agreement for Member States. Here, the sole relevant question is whether the boundary, as established by the arbitral award is something that the EU (and thus, by extension, the Court of Justice) should take into account in the context of interpreting and applying EU law; a determination that does not strictly speaking touch upon the obligations arising under the arbitration agreement.

Under this construction, the question of EU law is not ancillary to that of international law. Rather, the question of the effects of the final arbitral award within the EU legal order is an incidental one, in the sense of “a question of fact or law that does not ordinarily fall within the jurisdiction of a court or tribunal, but that must be decided in order for a court or tribunal to rule upon a primary question of fact or law that has jurisdiction”.³² In international judicial practice, there is evidence to support the proposition that international courts and tribunals have the power to decide matters incidental to the primary question before them.³³ It also needs to be borne in mind that the Court of Justice itself has not remained agnostic when faced with incidental questions of international law. Thus, for example in *Front Polisario*, the Court relied on international law in order to reach the conclusion that the territory of Western Sahara has “a separate and distinct status by virtue of the principle of self-determination”, and thus, the territorial scope of an agree-

³¹ *Slovenia v. Croatia*, cit., paras. 101 and 104.

³² B. LOVE, *Jurisdiction over Incidental Questions in International Law*, in *Proceedings of the ASIL Annual Meeting*, 2017, p. 317.

³³ B. CHENG, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge: Cambridge University Press, 1953, p. 266. According to Cheng, “[w]here a tribunal has jurisdiction in a particular matter, it is also competent with regard to all relevant incidental questions, subject to express provision to the contrary”. See also, Permanent Court of International Justice, *Certain German Interests in Polish Upper Silesia* (Germany v. Poland), judgment of 25 August 1925, p. 18; Arbitral Tribunal, *Chagos Marine Protected Area Arbitration* (Mauritius v. United Kingdom), award of 18 March 2015, para. 220.

ment concluded between the EU and Morocco could not have possibly been intended to include it.³⁴ More recently, in *Psagot*, the Court relied on the illegality, under international law, of the Israeli settlements established in occupied Palestinian territories for the purpose of interpreting Arts 9, para. 1, let. i), and 26, para. 2, let. a), of Regulation 1169/2011 on the provision of food information to consumers.³⁵

In this light, it becomes evident that the Court's line of reasoning in relation to the subject matter of the action is not as convincing as it may seem at first blush. By relying on a case that is distinctly different to the present one and by focusing exclusively on the arbitration agreement and the obligations arising thereunder for Member States, the Court left the vital question of the effects of the award *vis-à-vis* the EU legal order unanswered, thereby creating some doubts as to whether the EU law action is truly "ancillary" to a finding of violations of public international law.

III.2. THE EFFECTS OF THE FINAL ARBITRAL AWARD WITHIN THE EU LEGAL ORDER

It needs to be stressed that, from an international law point of view, the final award rendered by the arbitral tribunal constitutes a final and binding settlement of the boundary dispute between the parties. This flows from Art. 7, para. 2, of the arbitration agreement which stipulates that "the award of the Arbitral Tribunal shall be binding on the Parties and shall constitute a definitive settlement of the dispute".³⁶ The issue of Croatia's termination of the arbitration agreement was addressed by the arbitral tribunal in its partial award. Therein, the tribunal, which has the competence to decide on its own jurisdiction under general international law³⁷ as well as to interpret the arbitration agreement pursuant to Art. 3, para. 4, thereof, concluded that the agreement remained in force between the parties.³⁸

The finality of the arbitral tribunal's award is closely linked to the *res judicata* principle. The principle means that the final adjudication of a court is the final word on the matter at bar.³⁹ According to the International Court of Justice: "[t]hat principle signifies that the decisions of the Court are not only binding on the parties, but are *final*, in the sense that they

³⁴ Court of Justice, judgment of 21 December 2016, C-104/16 P, *Council of the European Union v. Front Polisario* [GC], para. 92.

³⁵ Court of Justice, judgment of 12 November 2019, case C-363/18 *Organisation juive européenne and Vignoble Psagot*, paras 33-58.

³⁶ Art. 7, para. 2, of the arbitration agreement.

³⁷ International Court of Justice: *Nottebohm Case* (Liechtenstein v. Guatemala), judgment of 18 November 1953, p. 119; *Arbitral Award of 31 July* (Guinea-Bissau v. Senegal), judgment of 12 November 1991, para. 46.

³⁸ Partial award, cit., para. 225.

³⁹ W.S. DODGE, *Res Judicata*, in *Max Planck Encyclopedia of Public International Law*, January 2006, para. 1.

cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose".⁴⁰

According to some, *res judicata* constitutes a general principle of law⁴¹ within the meaning of Art. 38, para. 1, let. c), of the International Court of Justice Statute, whereas others see it as a rule of customary international law.⁴² Irrespective of its status, either as a customary rule of international law, or as a general principle of law, the principle is a well-settled rule of international law⁴³ and, as such, it forms part of the corpus of rules that the EU must respect in the exercise of its powers.⁴⁴

In this light, the question of the *res judicata* effects of the arbitral award arises. In order to answer it, the requirements for the application of *res judicata* need to be briefly mapped out. Under international law, the rule only applies where there is: a) identity of the parties; and b) identity of the question.⁴⁵ The first condition is satisfied *in casu* since both parties here are the same as in the case before the arbitral tribunal. Determining whether the second condition is satisfied is more complex however. In practice, this condition is often sub-divided into identity of the object (*petitum*) and identity of the grounds (*causa petendi*).⁴⁶ In this light, one may very well wonder whether the second condition (identity of the question) is met in the case at hand. After all, it is beyond dispute that the question before the Court of Justice is different to the one submitted to the arbitral tribunal – to the extent that the present question relates to violations of EU law.

However, there is evidence to support the view that the principle of *res judicata* also precludes the re-examination of issues that have already been determined by another international court or tribunal – even if there is no identity of the question. As Shany observes: “[w]hile historically the *res judicata* rule operated to block successive claims, it has been subsequently accepted that the rule may also preclude the relitigation of distinct issues settled between the parties in past proceedings (even involving different

⁴⁰ International Court of Justice, *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), judgment of 26 February 2007, para. 115. (Emphasis added).

⁴¹ Permanent Court of International Justice, *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, judgment of 16 December 1927, Dissenting Opinion by M. Anzilotti, p. 27.

⁴² Y. SHANY, *The Competing Jurisdictions of International Courts and Tribunals*, Oxford: Oxford University Press, 2004, p. 171.

⁴³ Arbitral Tribunal, *Trail Smelter Arbitration* (U.S.A. v. Canada), arbitral award of 11 March 1941, p. 1950.

⁴⁴ Court of Justice, judgment of 24 November 1992, case C-286/90, *Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp.*, para. 9.

⁴⁵ Permanent Court of Arbitration, *Pious Fund of California* (USA v. Mexico), award of 14 October 1902, p. 5; ICSID, decision of 14 November 2005, case no. ARB/97/3, *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic*, para. 72.

⁴⁶ Dissenting Opinion by M. Anzilotti, cit., p. 23; *Trail Smelter Arbitration*, cit., p. 1952; B. CHENG, *General principles of Law as Applied by International Courts and Tribunals*, cit., pp. 339-340.

disputes)".⁴⁷ Although the International Court of Justice has not pronounced itself on the matter, the proposition that a point of fact or law that has been finally determined by an international court or tribunal cannot be relitigated in subsequent proceedings, irrespective of their subject-matter ("issue preclusion") seems to be well entrenched in the practice of international tribunals⁴⁸ and in the literature.⁴⁹

Ultimately, whether there is enough evidence to support the view that "issue preclusion" has become part and parcel of the international law doctrine of *res judicata* is a matter of perspective. A legitimate argument could have been made by the Court of Justice to the effect that, in the absence of an authoritative pronouncement by the International Court of Justice on the matter, it is unclear whether "issue preclusion" is really an element of the international rule of *res judicata*, and that, therefore, the concept could not play a role in its reasoning. However, what matters for present purposes is that the Court here failed to address the arbitral award's *res judicata* effects altogether; an omission that, arguably, weakens the persuasive force of its line of reasoning.

IV. CONCLUSIONS

Undeniably, the *Slovenia v. Croatia* case was a complex one, loaded as it was with political overtones. Here the Court of Justice was faced with a stark choice. Examining Slovenia's claim on the merits would imply accepting that the dispute between the two States had been, from a legal point of view, settled by the arbitral award – which remains contested by Croatia. On the other hand, dismissing the action as ancillary to the broader dispute, as the Court did *in casu*, implies that the dispute is still unresolved and thus, it arguably undermines the final judgment of an international tribunal. The previous exposition has shown that there are grounds to question the Court's findings. The excessive focus on the arbitration agreement (instead of the award) and the failure to engage with the *res judicata* effects of the award within the EU legal order have muddled the waters and ultimately, shed some doubt on the Court's conclusion.

At the same time, from a purely EU law point of view, it needs to be stressed that the Court was left with little room for manoeuvre. As the Court noted in its judgment, Croatia's Act of Accession only makes a passing and neutral reference to the (then

⁴⁷ Y. SHANY, *The Competing Jurisdictions*, cit., p. 23. In this sense, arguably, the *res judicata* rule in international law has incorporated the common law concept of "issue preclusion". See V. LOWE, *Res Judicata and the Rule of Law in International Arbitration*, in *African Journal International & Comparative Law*, 1996, p. 41.

⁴⁸ ICSID: award of 10 December, case no. ARB/10/6 *RSM Production Corporation and others v. Grenada*, para. 7.1.2; decision of 10 May 1988, case no. ARB/81/1, *Amoco Asia Corporation v. Republic of Indonesia*, para. 30. See also the relevant dicta from the *Delgado* case (1881) and from the *Machado* case (1871) decided by the Spanish-USA Claims Commission as quoted in B. CHENG, *General Principles of Law as Applied by International Courts and Tribunals*, cit, pp. 343-344.

⁴⁹ Y. SHANY, *The Competing Jurisdictions*, cit., p. 23; V. LOWE, *Res Judicata and the Rule of Law*, cit., p. 41; B. CHENG, *General Principles of Law as Applied by International Courts and Tribunals*, cit, pp. 343-344.

forthcoming) arbitral award for the purpose of determining the date on which the regime governing access to the coastal waters of the two States would become applicable.⁵⁰ This, as the Court correctly points out, is a far cry from providing for an express obligation to respect the award.⁵¹ In this sense, it would be advisable that, in the future, a stronger link between the act of accession and EU law is made – thereby providing the Court with a more solid EU law basis to entertain possible infringement proceedings arising from similar circumstances.

⁵⁰ *Slovenia v. Croatia*, cit., para. 103. See also Council Decision of 5 December 2011 on the admission of the Republic of Croatia to the European Union, Annex III, point 5, para. 2, let. a).

⁵¹ *Slovenia v. Croatia*, cit., para. 103.