turn lead to tit-for-tat anti-dumping measures, adding fuel to the current crisis in globalization and international cooperation on trade regulation.

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doi:10.1017/ajil.2020.93

Subject-matter jurisdiction—European Union law—admission to international organizations—territorial disputes—arbitration

REPUBLIC OF SLOVENIA v. REPUBLIC OF CROATIA. No. C-457/18. *At* https://curia.europa.eu. Court of Justice of the European Union, January 31, 2020.

The Judgment of the Court of Justice of the European Union (CJEU) in *Slovenia v. Croatia* marks the anticlimax of a long-running territorial dispute. It is also only the sixth time the CJEU has issued a judgment in a case instituted by one European Union member against another. Among these cases, it is the first to consider an arbitral award in a dispute between members, the first to consider a boundary dispute between members, and the first to be dismissed for lack of jurisdiction. The Court found that it cannot rule on alleged infringements of European Union law when these arise from the breach of a treaty falling outside of the Union's subject-matter competence. Most directly, the Judgment may pose significant consequences for European Union internal affairs in the near term, such as Croatia's ambitions to join the Schengen Area and the Eurozone.[1] More broadly, several of the Court's findings will be relevant beyond the European legal order, particular those concerning the meaning and effect of "ancillary" legal questions, and the bilateral or multilateral character of a dispute involving admission to an international organization.

Croatia and Slovenia achieved independence as successor states to the Socialist Federal Republic of Yugoslavia in 1991. A year later, they entered into bilateral negotiations concerning their shared land and maritime boundaries.[2] In 2008, Slovenia—by then a member of the European Union—raised formal objections to accession negotiations between Croatia and the Union and their potential prejudicial effect on the boundary dispute.[3] The European Union began an initiative to facilitate the resolution of the dispute in January 2009, and

[1] *See* Thomas Bickl, *CJEU Judgment on* Slovenia v. Croatia*: What Role for International Law in EU-Accession Dispute Settlement?*, NCLOS BLOG, pt. IV(1) (Feb. 18, 2020), *at* https://site.uit.no/nclos/2020/02/18/cjeu-judgement-on-slovenia-v-croatia-what-role-for-international-law-in-eu-accession-dispute-settlement.

[2] Arbitration Between the Republic of Croatia and the Republic of Slovenia, Partial Award, para. 10, PCA No. 2012-04 (June 30, 2016), *at* https://pca-cpa.org/en/cases/3 [hereinafter Partial Award].

[3] *Id.*, para. 13 (recalling that "Slovenia raised reservations to seven of the negotiating chapters at the Intergovernmental Accession Conference of the European Union with Croatia . . .").

formally witnessed the two states conclude an arbitration agreement in November of that year.[4]

The parties' arbitration agreement was the first of its kind to be drafted under the auspices of the Union.[5] The agreement required Slovenia to lift its objections to Croatia's membership bid, which the latter achieved in 2013.[6] For Croatia, this provision was an essential condition underlying its consent to arbitrate. For its part, Slovenia asserted during the arbitration that it had similarly conditioned its consent to arbitrate upon the inclusion of a provision guaranteeing its territorial contact with the Mediterranean Sea.[7]

The fate of these proceedings was called into question in July 2015, when media sources reported that Slovenia's appointed arbitrator had disclosed to its Co-Agent confidential information regarding the tribunal's deliberations.[8] Disruptions to the proceedings cascaded over the following week. After the Slovenian arbitrator resigned, Slovenia appointed the president of the International Court of Justice (ICJ) as a replacement arbitrator.[9] The Croatian arbitrator then resigned, after which Croatia purported to terminate the arbitration agreement, leading Slovenia's replacement arbitrator to resign.[10] Nevertheless, the president of the arbitral tribunal reconstituted the tribunal through an appointment mechanism in the arbitration agreement, and the tribunal delivered a Partial Award in June 2016.[11] While finding that Slovenia had violated provisions of the parties' arbitration agreement, the tribunal concluded that the treaty remained in force and decided to continue the proceedings.[12] It issued its Final Award in June 2017.[13]

Croatia refused to recognize the legality of the Final Award and rejected the tribunal's determinations therein. In response, Slovenia instituted CJEU proceedings against Croatia in July 2018, under Article 259 of the Treaty on the Functioning of the European Union (TFEU). Article 259 entitles a member state to bring suit over another member's failure "to fulfil an obligation under the Treaties" (referring to the TFEU and the Treaty on European Union (TEU)).[14] Slovenia claimed that Croatia's failure to implement the Final Award had violated its obligations to respect European Union law in several respects. It

[4] Arbitration Agreement Between the Government of the Republic of Slovenia and the Government of the Republic of Croatia, 2748 UNTS 48523 (Nov. 4, 2009) [hereinafter Arbitration Agreement].

[5] *See* Alexia Solomou, *A Commentary on the Maritime Delimitation Issues in the* Croatia v. Slovenia *Final Award*, EJIL:*Talk!* (Sep. 15, 2017), *at* https://www.ejiltalk.org/a-commentary-on-the-maritime-delimitation-issues-in-the-croatia-v-slovenia-final-award/#more-15548.

[6] Arbitration Agreement, *supra* note 4, Art. 9.

[7] Arbitration Between the Republic of Croatia and the Republic of Slovenia, Final Award, paras. 115–16, 934, Case No. 2012-04 (June 29, 2017) [hereinafter Final Award].

[8] Partial Award, *supra* note 2, para. 6. *See further* YOSHIFUMI TANAKA, THE PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES 112 (2018).

[9] Partial Award, *supra* note 2, paras. 37–46.

[10] *Id.*

[11] *See* Arbitration Agreement, *supra* note 4, Art. 2(2). *See also* Permanent Court of Arbitration Press Release, Tribunal Reconstituted by Appointment of Norwegian and Swiss Arbitrators, H.E. Mr. Rolf Fife and Professor Nicolas Michel (Sept. 25, 2015), *at* http://www.pcacases.com/web/sendAttach/1468.

[12] Partial Award, *supra* note 2, para. 231. *See further* Matko Ilic, Croatia v. Slovenia*: The Defiled Proceedings*, 9 ARB. L. REV. 347 (2017).

[13] *See generally* Brian McGarry, *Croatia-Slovenia*, INT'L MARITIME BOUNDARIES, Report No. 8-20 (Add. 1) (2018).

[14] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 2007 OJ (C 306) 1 (Dec. 13, 2007) [hereinafter TEU and TFEU]. *See also* TFEU, Art. 1(2).

argued that Croatia had breached the obligation to respect the rule of law (TEU Article 2) and the duty of sincere cooperation (TEU Article 4(3)), and that it had infringed upon Slovenia's rights and obligations under European Union secondary legislation concerning maritime policy.[15]

In December 2018, Croatia filed a motion of inadmissibility, arguing that the Court could not assert jurisdiction because the parties' dispute concerned the legal force of their arbitration agreement and the Final Award, which had only an ancillary connection to their obligations under EU law (paras. 75–77). After bifurcating the proceedings, the CJEU Grand Chamber convened hearings on admissibility and jurisdiction in July 2019. In December 2019, the CJEU advocate general issued an Opinion asserting that the Court lacked jurisdiction over the dispute.[16] The Court reached the same conclusion in its Judgment.

The Court affirmed that "the subject matter of an action for failure to fulfil obligations brought under Article 259 TFEU can only be non-compliance with obligations arising from EU law."[17] It characterized the jurisdictional threshold in such cases as requiring a more than "ancillary" connection between an alleged noncompliance with European Union law and external treaty obligations that purportedly give rise to that breach (para. 92). It noted that the obligations arising under the parties' arbitration agreement and the Final Award did not fall within the areas of exclusive or shared Union competence under TFEU Articles 3 to 6 (para. 102). While such provisions vest the Court with jurisdiction over disputes arising under agreements to which the Union is a party, the Court found that the Union's participation in the conclusion of the arbitration agreement did not mean that the agreement and resulting award should "be considered an integral part of EU law" (*id.*).

In characterizing territorial disputes as principally beyond its competence, the Court further emphasized that "it is for each Member State to determine the extent and limits of its own territory, in accordance with the rules of public international law."[18] Although the Court acknowledged that the Act of Accession concerning Croatia's entry into the European Union had specifically modified the Union's Common Fisheries Policy in anticipation of "the full implementation of the arbitration award," it found that this narrow concession to the parties' bilateral territorial regime "cannot be interpreted as meaning that the Act of Accession incorporated into EU law . . . the obligation to observe the border established in the arbitration award."[19] Acknowledging that "effect has not been given to the arbitration award,"[20] the Court found that "applying directly the border determined by the arbitration award in order to verify the existence of the infringements of EU law" would "encroach upon the powers reserved for the Member States regarding geographical determination of their borders" (para. 107).

[15] Para. 1 (referring to the Schengen Code and the EU's 2009 Fisheries Control Regulations, 2013 Fisheries Regulation, and 2014 Maritime Planning Directive).

[16] *See* Republic of Slovenia v. Republic of Croatia, C-457/18, 2019 EU:C:2019:1067, para. 164.

[17] Para. 104. *See also* para. 91, *citing* Commission v. Belgium, C-132/09, 2010 EU:C:2010:562, para. 44.

[18] Para. 105, *citing* TEU, *supra* note 14, Art. 52; TFEU, *supra* note 14, Arts. 77(4), 355; Aktiebolaget NN v. Skatteverket, C-111/05, 2007 EU:C:2007:195, para. 54.

[19] Para. 103, *citing* Treaty Concerning the Accession of the Republic of Croatia to the European Union, 2013 OJ (L 300), Annex III, pt. 5, nn. 2–3 (Nov. 9, 2013); Council Regulation (EC) No. 2371/2002, 2002 OJ (L 358), Annex I, pts. 11–12 (Dec. 31, 2002).

[20] Para. 106, *citing* Regulation (EU) No. 1380/2013, 2013 OJ (L 354), Annex I, pts. 8, 10 (Dec. 28, 2013).

https://doi.org/10.1017/ajil.2020.104 Published online by Cambridge University Press

The Court concluded by noting that the parties remained obligated under Article 4(3) TEU "to strive sincerely to bring about a definitive legal solution consistent with international law, as suggested in the Act of Accession, that ensures the effective and unhindered application of EU law" (para. 109). In this respect, the Court suggested that the parties might resubmit the dispute by special agreement under TFEU Article 273, which confers jurisdiction upon it "in any dispute between Member States which relates to the subject matter of the Treaties" (*id.*). Under that procedure, the parties could enhance the Court's jurisdiction beyond its usual parameters by consent.

* * * *

The Judgment of the CJEU has consequences for the prospect of further European Union enlargement. The Court's findings may make members more reluctant to remove objections to the admission of states with whom they have substantial bilateral disputes, particularly those concerning territorial boundaries. To the extent that a Union member is willing to resolve its dispute with a neighboring state through third-party dispute settlement, the present case calls into question whether it would be wise to do so through arbitration. The CJEU Judgment makes clear that the member would need to rely upon an external institutional structure to address issues arising from noncompliance. While states can refer noncompliance to the UN Security Council if it threatens international peace and security,[21] few interstate mechanisms *directly* enforce legal decisions. One such example can be found in certain environmental treaties in which implementation committees supervise member compliance.[22]

The underlying dispute raises several questions concerning the law of treaties, in particular concerning the relationship between treaty performance and treaty termination. Even if Croatia had been within its rights to terminate the arbitration agreement,[23] that question remains independent of Croatia's accession to the European Union. The 1969 Vienna Convention on the Law of Treaties, to which Croatia and Slovenia are parties, provides that treaty termination "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination."[24] Nevertheless, where the performance of treaty obligations occurs at different times, the principle of unjust enrichment may preclude one party from withdrawing after it has obtained the benefits of the treaty (but before its counterpart has obtained the same).[25] By concluding that it lacks jurisdiction in the present case, the CJEU signaled that it would not rely on such principles to give effect to a quid pro quo undergirding an agreement on accession—at least to the extent that it was reflected in an external instrument.

[21] UN Charter, Art. 35(1).

[22] *See, e.g.*, Convention on Environmental Impact Assessment in a Transboundary Context, MoP Decision III/2, 1989 UNTS 309, 30 ILM 800 (Feb. 25, 1991); Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal, CoP Decision VI/12, 1673 UNTS 57, 28 ILM 657 (Mar. 22, 1989). *See also* Adoption of the Paris Agreement, Paris Agreement, paras. 103–04, Art. 15, UN Doc. FCCC/CP/2015/L.9/Rev/1 (Dec. 12, 2015).

[23] *See further* Partial Award, *supra* note 2, paras. 225–31 (finding that Slovenia's violations of the parties' arbitration agreement were curable and did not entitle Croatia to terminate the agreement).

[24] Vienna Convention on the Law of Treaties, Art. 70(1)(b), 1155 UNTS 331, 8 ILM 679 (May 23, 1969).

[25] *See, e.g.*, Fisheries Jurisdiction (UK v. Ice.), Jurisdiction of the Court, Judgment, 1973 ICJ Rep. 3, para. 34 (Feb. 2). *See further* Stephan Wittich, *Article 70*, *in* Vienna Convention on the Law of Treaties 1293–94 (Oliver Dörr & Kirsten Schmalenbach eds., 2018).

https://doi.org/10.1017/ajil.2020.104 Published online by Cambridge University Press

Moreover, the CJEU's characterization of this dispute in bilateral terms is questionable in light of the process of accession to international organizations. In general international law, a vote by a member on the admission of another state cannot be characterized solely as the member's internal act vis-à-vis the organization—it is also an act of that state in its external capacity.[26] In the European Union, each member possesses a veto over the admission of a state. Here, each incurred expanded legal obligations as a result of its decision to not exercise that veto. The costs of participating in the Union increase with each newly admitted member, and such costs further increase when this accession introduces an internecine dispute. Every member thus has a legal interest in the fulfillment of an arbitration agreement concluded in connection with the accession.[27] Viewed from another angle, one can argue that members implicitly relied on the Union's assurance of a final and binding resolution of this territorial dispute.

The faith which member states placed in the arbitration is evident in the roles that the Union undertook on their behalf during the conclusion of the arbitration agreement. The parties, along with the Council of the European Union, signed the agreement in Stockholm, as Sweden was then president of the Council. The European Commission president, and its head representative for EU enlargement, prepared the list of arbitrators from which the parties could constitute the tribunal.[28] Moreover, the agreement selected Brussels as "[t]he place of arbitration"—a curious choice for interstate proceedings convened in The Hague, but not in light of Brussels' centrality to the Union.[29] The choice of seat seemed to imply the legal character of the European Union's interests in the arbitration agreement. Of course, the CJEU's dictum that "the European Union is not a party"[30] to the present case confirms that, in its view, these features do not imbue the legal interests of the Union or its members with any jurisdictional significance. But from the perspective of public international law, this rigid approach is idiosyncratic. It does not account for the ways in which international organizations assume legal obligations in treaties between their members without being a formal party thereto.[31]

By distinguishing the parties' arbitration agreement and the Act of Accession, the CJEU strengthens characterizations of the European Union legal system as a largely self-contained *lex specialis*, with limited connection to public international law. Nonetheless, the Court's

[26] *Cf.* Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 ICJ Rep. 1948 57 (May 28); Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment, 2011 ICJ Rep. 644, 654 (Dec. 5). *See further* HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY, at para. 67 (6th ed. 2018).

[27] *See* SCHERMERS & BLOKKER, *supra* note 26, paras. 88, 1752, 1755. Analogy may also be drawn to host state agreements, to which members consent on the condition that the host state will not inhibit the functioning of the organization. *See further* Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, 1988 ICJ Rep. 12 (Apr. 26).

[28] Arbitration Agreement, *supra* note 4, Art. 2(1).

[29] *Id.* Art. 6(7).

[30] Para. 102.

[31] In the context of arbitration treaties, see, e.g., Indus Waters Kishenganga Arbitration (Pak. v. India), Case No. 2011-01, Partial Award (Feb. 18, 2013); *id.*, Final Award (Dec. 20, 2013). The International Bank for Reconstruction and Development is a signatory to the 1960 Indus Waters Treaty underlying this arbitration, and is bound in respect of certain obligations specified therein. *See further* LAURENCE BOISSON DE CHAZOURNES, FRESH WATER IN INTERNATIONAL LAW 216 (2013).

https://doi.org/10.1017/ajil.2020.104 Published online by Cambridge University Press

framing of its jurisdiction in relation to "ancillary" questions may well contribute to a broader corpus of case law addressing this concept beyond the Union's borders. This feature of the decision can be viewed alongside the treatment of similar doctrines by courts and tribunals in interstate cases.

From the perspective of general international law, the CJEU Judgment arrives in a rich jurisprudential context. Arbitrations instituted under the UN Convention on the Law of the Sea have been particularly notable in this regard. Such tribunals have been increasingly called upon to determine whether they may exercise jurisdiction while severing related questions that fall beyond their *ratione materiae* jurisdiction (including sovereignty questions in territorial disputes).[32] In drawing upon the Permanent Court of International Justice's development of a doctrine of necessary and ancillary jurisdiction,[33] these cases also elicit reference to the doctrine of indispensable parties. The ICJ has construed this doctrine such that it cannot exercise jurisdiction if this logically necessitates that it first determine legal rights and obligations beyond its *ratione personae* jurisdiction.[34]

The CJEU's reasoning parallels these developments under public international law, despite the self-contained character of European Union law. The Court does this by framing TEU Articles 2 and 4(3) as general principles which are violated only by first breaching a more specific obligation under European Union law. International courts have similarly found that they lack jurisdiction in disputes where the sole potential breaches of their constitutive treaties concern provisions on good faith or abuse of rights.[35] Before the CJEU, litigants must therefore assert a breach of a more prescriptive treaty rule than the general duties of respect for the rule of law and sincere cooperation found in TEU Articles 2 and 4(3). In the present case, the Court clarified that this primary rule must fall closer (i.e., be less "ancillary") to the core domains of European Union competence than bilateral treaty obligations concerning a territorial dispute. In particular, the Court's characterization of "integral part[s] of EU law" implies that it can never assert jurisdiction when the primary rule derives from an arbitration agreement or award.[36]

Slovenia v. Croatia caps a trilogy of failures in the parties' boundary saga: an unratified 2001 treaty,[37] a denounced arbitration agreement, and a jurisdictional dismissal. Given the parties' acknowledgement that "effect has not been given to the arbitration award," the CJEU

[32] *See*, *e.g.*, Chagos Marine Protected Area (Mauritius v. UK), Award, 31 RIAA 359, para. 220 (Mar. 18, 2015); The "Enrica Lexie" Incident (It. v. India), Award, PCA 2015-28, paras. 765–66 (May 21, 2020). *See further* Valentin Schatz, *The Award Concerning Preliminary Objections in* Ukraine v. Russia*: Observations Regarding the Implicated Status of Crimea and the Sea of Azov*, EJIL: *Talk!* (Mar. 20, 2020), *at* https://www.ejiltalk.org/the-award-concerning-preliminary-objections-in-ukraine-v-russia-observations-regarding-the-implicated-status-of-crimea-and-the-sea-of-azov (identifying such questions as well in the *South China Sea* arbitration, and a pending case between Mauritius and Maldives before the International Tribunal for the Law of the Sea).

[33] *See further* Peter Tzeng, *Supplemental Jurisdiction Under UNCLOS*, 38 HOUSTON J. INT'L L. 499, 567–68 (2016) (discussing in this context the *Mavrommatis Palestine Concessions* and *Certain German Interests in Polish Upper Silesia* cases).

[34] *See* East Timor (Port. v. Austl.), Judgment, 1995 ICJ Rep. 90, para. 34 (June 30), *citing* Monetary Gold Removed from Rome in 1943 (It. v. Fr., UK, U.S.), Judgment, 1954 ICJ Rep. 19, 32 (June 15); Certain Phosphate Lands in Nauru (Nauru v. Austl.), Judgment, 1992 ICJ Rep. 240, para. 55 (June 26).

[35] *See*, *e.g.*, M/V "Louisa" (St. Vincent v. Spain), Judgment, 2013 ITLOS Rep. 4, paras. 136–37 (May 28).

[36] Para. 102.

[37] Treaty between the Republic of Slovenia and the Republic of Croatia on the Common State Border, Drnovšek–Račan Agreement on the Common State Border (July 20, 2001), *available at* http://www.assidmer.net/doc/Drnovsek-Racan_Agreement.pdf.

https://doi.org/10.1017/ajil.2020.104 Published online by Cambridge University Press

arguably engages in legal fiction by asserting that it would need to determine the continued validity of the arbitration agreement to identify a breach of the principle of the rule of law. The Court could have viewed *pacta sunt servanda* as a component of this principle,[38] which may create obligations independent of a treaty's continued existence.[39] More specifically, international courts have recognized that when parties conclude a treaty to resolve a territorial dispute, the regime they establish "achieves a permanence which the treaty itself does not necessarily enjoy."[40] The CJEU might have thus considered whether the territorial character of the parties' agreement produced obligations that survive its alleged termination.[41] The CJEU Judgment instead adopts a formalistic approach, which disregards the object and purpose of the agreement as both a territorial treaty and an accession instrument. In so doing, the Court appears to be more concerned with avoiding the impression that it has assumed the functions of an arbitral appeals court.

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doi:10.1017/ajil.2020.104

Supreme Court of Canada—act of state doctrine—customary international law—international human rights violations—business and human rights—civil claims—doctrine of adoption

NEVSUN RESOURCES LTD. V. ARAYA. Case No. 37919. *At* https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18169/index.do.
Supreme Court of Canada, February 28, 2020.

In *Nevsun Resources Ltd. v. Araya*, the Supreme Court of Canada declined to dismiss a series of customary international law claims brought by Eritrean refugees against a Canadian mining corporation for grave human rights abuses committed in Eritrea. In doing so, the Supreme Court opened the possibility of a novel front for transnational human rights litigation: common law tort claims based on customary international law. Under the doctrine of adoption, customary international law is directly incorporated into the Canadian common law. However, Canadian courts have not yet upheld a private right of action for violations of

[38] *See* Christina Binder, *The* Pacta Sunt Servanda *Rule in the Vienna Convention on the Law of Treaties: A Pillar and Its Safeguards*, *in* INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION: FESTSCHRIFT IN HONOUR OF GERHARD HAFNER 317, 341 (Isabelle Buffard, James Crawford, Alain Pellet & Stephan Wittich eds., 2008).

[39] *See* HUGH THIRLWAY, THE SOURCES OF INTERNATIONAL LAW 32 (2014), *citing* Gerald G. Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, *in* SYMBOLAE VERZIJL 164 (Frederik M. van Asbeck ed., 1958).

[40] *See* Territorial and Maritime Dispute (Nicar. v. Colom.), Preliminary Objections, Judgment, 2007 ICJ Rep. 832, paras. 88–89 (Dec. 13), *citing* Territorial Dispute (Libya/Chad), Judgment, 1994 ICJ Rep. 6, paras. 72–73 (Feb. 3). *See also* Northern Cameroons (Cameroon v. UK), Preliminary Objections, Judgment, 1963 ICJ Rep. 1963 15, 35–36 (Dec. 2).

[41] Concluding that territorial treaties do not imply any right of denunciation, see Second Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, 64–70, UN Doc. A/CN.4/156, Add.1–3 (June 5, 1963). *See further* Laurence R. Helfer, *Terminating Treaties*, *in* THE OXFORD GUIDE TO TREATIES 634, 637–38 (Duncan Hollis ed., 2012).