Arbitration — Arbitration between two Member States of European Union — Delimitation of maritime and land borders — Arbitration agreement breached — Arbitration agreement unilaterally terminated — Final arbitration award — Validity of arbitration award contested — Arbitration award not implemented — Relationship between arbitration agreement and European Union law — European Union not a party to arbitration agreement between Member States

Jurisdiction — Treaties — European Union — Jurisdiction of the Court of Justice of the European Union — Treaty on the Functioning of the European Union, 2007 — Article 259 — Alleged failure of Member State to fulfil obligations — Competence of the European Union in border dispute — Alleged infringements of EU law ancillary to alleged infringement of arbitration agreement — Relationship between European Union law and arbitration agreement and award

International tribunals — Arbitration agreement — International law governing arbitration agreement — Arbitration award — Relationship between arbitration agreement and arbitration award and European Union law — Obligations of Member States of the European Union — Accession to European Union — Arbitration agreement referred to in accession agreement — Validity of arbitration award contested — Competence of European Union in border dispute — *Ratione materiae* of European Union law with respect to international legal instruments

International organizations — European Union — Member States — Obligations of Member States of the European Union — Accession to European Union — Arbitration agreement referred to in accession agreement — Where validity of arbitration award contested — Arbitration award not implemented — European Union not party to arbitration agreement between Member States — Relationship between arbitration agreement and arbitration award and European Union law — Scope *ratione materiae* of EU law in relation to international legal instruments — Competence of European Union in border dispute

Territory — Sea — Slovenia — Croatia — Delimitation of land and sea borders — Power to determine territory retained by European Union Member States — Delimitation of borders contested —

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Arbitration award delimiting borders contested — Action would require determination of borders between two European Union Member States — The law of the European Union

REPUBLIC OF SLOVENIA *v.* REPUBLIC OF CROATIA[1]

(Case C-457/18)

Court of Justice of the European Union (Grand Chamber).
31 *January* 2020

(Lenaerts, *President*; Silva de Lapuerta, *Vice-President*; Bonichot, Arabadjiev, Prechal, Rodin, Rossi and Jarukaitis, *Presidents of Chambers*; Ilešič, Malenovský, Šváby, Vajda (*Rapporteur*) and Biltgen, *Judges*; Pikamäe, *Advocate General*)

SUMMARY:[2] *The facts*:—The Republic of Slovenia ("Slovenia") initiated proceedings against the Republic of Croatia ("Croatia") in the Court of Justice of the European Union ("CJEU") in accordance with Article 259 of the Treaty on the Functioning of the European Union, 2007[3] ("TFEU"). Slovenia claimed that Croatia had failed to fulfil its obligations under the relevant treaties of the European Union ("EU") on grounds related to the implementation of an arbitration agreement and arbitration award[4] that sought to delimit the maritime and land borders between the two States.

The arbitration agreement was entered into bilaterally between Slovenia and Croatia prior to Croatia's accession to the EU. The arbitration award was not implemented or recognized by Croatia after a dispute arose during the proceedings that led Croatia to withdraw unilaterally from the arbitration agreement. Slovenia claimed that Croatia's failure to implement the arbitration award violated its obligations under EU law to respect the rule of law, the principle of sincere cooperation, and *res judicata*. Slovenia also argued that it had been prevented from complying with its obligation to implement EU law fully throughout its territory, and that Croatia had violated its obligations under a number of secondary EU laws, including the Common Fisheries Policy and the framework for maritime spatial planning.

[1] Slovenia was represented by M. Menard acting as agent and J. Thouvenin. Croatia was represented by G. Vidović Mesarek acting as agent and J. Stratford QC.

[2] Prepared by D. Peterson.

[3] Article 259 of the TFEU provided that: "A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union . . ."

[4] 179 ILR 1.

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Croatia objected to the proceedings and claimed that they were inadmissible. Croatia had withdrawn from the arbitration agreement after communications were sent between Slovenia's agent and an arbitrator during the deliberations of the arbitral tribunal. The tribunal held that Slovenia had acted in breach of the arbitration agreement, but that Croatia was not entitled to a unilateral termination. The tribunal had taken remedial action and it considered that the breach did not affect its ability to make a final award. Croatia disagreed and refused to recognize or implement the award.

Opinion of the Advocate General

Held:—The CJEU lacked jurisdiction. The claim was inadmissible.

(1) In accordance with Article 259 of the TFEU, the jurisdiction of the CJEU to declare that there had been an infringement by an EU Member State was conditional on there being a failure to fulfil an obligation under a relevant EU treaty. The Court's jurisdiction was dependent on the scope of EU law. As Slovenia's claim concerned an arbitration agreement and arbitration award governed by international law, the scope *ratione materiae* of EU law in relation to international legal instruments had to be examined (paras. 99-101).

(2) The situations in which the EU was bound by international law were limited and fell into three categories. First, the EU was bound by international agreements concluded by it and which were an integral part of the EU legal order. Secondly, the EU was bound by an international convention where it had assumed powers previously exercised by Member States in the field to which the convention applied. Thirdly, the EU was required to respect customary international law in the exercise of its powers. It followed that international agreements that did not fall within one of these categories were not acts of the EU and did not bind it. As they were not a matter of EU law, the CJEU had no jurisdiction to examine their validity or to interpret them (para. 104).

(3) The CJEU did not have the jurisdiction to rule on alleged infringements of obligations under EU law that were merely ancillary to those under an instrument of international law. Although Slovenia's claim formally referred to infringements of EU law, the allegation itself related to the purported infringement of international law which resulted from Croatia's failure to implement the arbitration award. The EU was not bound by the arbitration agreement or the award at issue as those legal instruments were not within the scope *ratione materiae* of EU law. Any infringements of EU law were therefore ancillary to the question of the delimitation of the land and maritime boundaries between the two Member States concerned (paras. 108, 127-30).

(4) The EU did not have either "territorial jurisdiction" under international law or any "EU territory" comparable to a "federal territory". The territorial scope of the EU could not be determined by the EU but was an objective fact that it had to accept. The delimitation of the territory of a Member State did not fall within the sphere of competence of the EU (para. 110).

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(5) Where an action was initiated under Article 259 of the TFEU that alleged a Member State was impeding the implementation of EU law on the territory of another Member State, the CJEU must look to public international law to define the extent of that territory (para. 111).

(6) The commitments made by Croatia during the accession process were not legal obligations under EU law and could not be relied upon as a basis for Slovenia's claim under Article 259 of the TFEU (para. 131).

(7) The EU did not have the power to determine the boundary of the respective territories belonging to two neighbouring States. Determining the limits of territory concerned the sovereignty of each Member State and was to be done in accordance with the rules of public international law. The EU could only act within the limits of the competences conferred upon it by Member States and any competence not conferred upon the EU remained with the Member States. Slovenia's claim concerned a competence reserved to the Member States (paras. 143-4).

(8) The arbitration award had not been implemented between the parties. Article 7(3) of the arbitration agreement obliged the parties to take necessary steps to implement the award and was thus not self-executing. The arbitration award was therefore not directly applicable. As determining the boundaries between Member States was not a competence conferred on the EU, and did not fall within the scope *ratione materiae* of EU law, the matters at issue could not form the subject matter of an action under Article 259 of the TFEU (paras. 148-9).

(9) Any finding that Croatia had committed the infringements alleged would be based on the premise that the boundary between Croatia and Slovenia had been determined. Determining that boundary was a matter falling within public international law and fell outside the jurisdictional competence of the CJEU (paras. 162-4).

Judgment of the Court of Justice

Held:—The CJEU lacked jurisdiction. The claim was inadmissible.

(1) The CJEU lacked the jurisdiction to rule on the interpretation of an international agreement concluded by Member States where the subject matter of the agreement fell outside an area of EU competence. It also lacked the jurisdiction to rule on an action alleging the failure of a Member State to fulfil its obligations where the infringement of provisions of EU law were ancillary to the alleged failure to comply with the obligations arising from the international agreement (paras. 91-2).

(2) Although Slovenia had alleged that Croatia had violated EU law, the alleged infringements outlined in Slovenia's first and second complaints arose from the alleged failure by Croatia to comply with the obligations arising from the arbitration agreement and arbitration award. The alleged infringements of secondary EU law contained in Slovenia's third to sixth complaints were founded on the premise that the land and sea border

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between Croatia and Slovenia had been determined in accordance with international law (paras. 93-101).

(3) The arbitration award had been determined by an international tribunal established under a bilateral arbitration agreement which was governed by international law. The EU was not a party to the arbitration agreement and the subject matter of the agreement did not fall within an area of EU competence. The links between the arbitration agreement and arbitration proceedings, and the process of negotiation and accession by Croatia to the EU, were not sufficient for the arbitration agreement and award to be considered an integral part of EU law (para. 102).

(4) The references to the arbitration agreement in the Act concerning the conditions of accession of the Republic of Croatia to the Treaty on European Union could not be interpreted as incorporating the commitments entered into by Croatia and Slovenia under the arbitration agreement into EU law (para. 103).

(5) The alleged infringements of EU law that were pleaded by Slovenia were ancillary to the alleged failure by Croatia to comply with its obligations under the arbitration agreement and award. An action alleging a failure to comply with obligations under Article 259 of the TFEU could only be initiated for non-compliance with obligations arising under EU law. The CJEU lacked the jurisdiction to rule on an alleged failure to comply with obligations arising from the arbitration agreement and arbitration award (para. 104).

(6) Pursuant to Article 77(4) of the TFEU, Member States retained the competence to determine the geographical demarcation of their borders, in accordance with international law. The CJEU could not step beyond the powers conferred upon it by Member States. The Court therefore lacked jurisdiction, in an action brought under Article 259 of the TFEU, to examine the extent and limits of the respective territories of Croatia and Slovenia by directly applying the border determined by the arbitration award in order to verify the existence of alleged infringements of EU law. As such, Slovenia's claim was inadmissible (paras. 105-7).

The text of the judgment of the Court of Justice commences at p. 190.
The following is the text of the Opinion of Advocate General Pikamäe:

OPINION OF ADVOCATE GENERAL PIKAMÄE[1]

1. Where a Member State brings an action for failure to fulfil obligations before the Court of Justice of the European Union under Article 259 TFEU, does the Court have jurisdiction to hear and determine that action if the claims that EU law has been infringed are based on the terms of an "arbitration award", made under a bilateral arbitration agreement falling within public international law, but which

[1] Delivered on 11 December 2019.] Original language: French.

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one of the parties claims has no legal value whatsoever? That is the main question arising in the present case, one of the rare instances of an action between States for failure to fulfil obligations under Article 259 TFEU,[2] the first paragraph of which provides that a Member State "which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union".

2. In its application, the Republic of Slovenia asks the Court of Justice, inter alia, to find that the Republic of Croatia has infringed Article 2 and Article 4(3) TEU and an entire series of provisions of secondary law concerning the common fisheries policy, the rules governing the movement of persons across borders (the Schengen Borders Code) and maritime spatial planning.

3. Before any substantive defence, the Republic of Croatia raised objections of lack of jurisdiction and inadmissibility in respect of the action to which this Opinion relates, and the Court decided to examine those objections separately before, if necessary, ruling on the substance of the case.

4. The Court must therefore examine whether the boundary dispute between the Republic of Croatia and the Republic of Slovenia, the attempt to resolve it and the resulting arbitration proceedings are matters of public international law that can serve as the basis of an action for failure to fulfil obligations under Article 259 TFEU. I will set out in this Opinion why in my view and as the Republic of Croatia claims, the Court does not have jurisdiction to rule on the present action. I also propose that the Court should uphold the Republic of Croatia's request that the European Commission's legal opinion contained in Annex C.2 to the Republic of Slovenia's response be removed from the case file.

I. LEGAL CONTEXT

A. International law

1. The arbitration agreement

5. The third recital in the preamble to the agreement signed on 4 November 2009 by the Republic of Croatia and the Republic of

[2] Formerly Article 170 of the EEC Treaty and Article 227 of the EC Treaty. On actions under those articles, see, in particular, judgments of 4 October 1979, *France* v. *United Kingdom* (141/78, EU:C:1979:225); of 16 May 2000, *Belgium* v. *Spain* (C-388/95, EU:C:2000:244); of 12 September 2006, *Spain* v. *United Kingdom* (C-145/04, EU:C:2006:543); of 16 October 2012, *Hungary* v. *Slovakia* (C-364/10, EU:C:2012:630); and of 18 June 2019, *Austria* v. *Germany* (C-591/17, EU:C:2019:504).

Slovenia ("the arbitration agreement") recalls the peaceful means for the settlement of disputes enumerated in Article 33 of the Charter of the United Nations.[3] Accordingly, Article 1 of the arbitration agreement sets up an arbitral tribunal.

6. Article 2 of that agreement establishes its composition and in particular the procedures for appointing and replacing its members.

7. Article 3 of the arbitration agreement, entitled "Task of the Arbitral Tribunal", provides in paragraph 1 that the arbitral tribunal is to determine (a) the course of the boundary between Croatia and Slovenia, (b) Slovenia's junction to the high sea, and (c) the regime for the use of the relevant maritime areas. Article 3(2) sets out the procedure for determining the subject matter of the dispute. Article 3(3) provides that the arbitral tribunal is to render an award on the dispute. According to Article 3(4), the arbitral tribunal has the power to interpret the arbitration agreement.

8. Under Article 4(a) of the arbitration agreement, when implementing the provisions of Article 3(1)(a) of that agreement, the arbitral tribunal is to apply the rules and principles of international law. According to Article 4(b) of the agreement, when implementing the provisions of Article 3(1)(b) and (c), the arbitral tribunal is to apply international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result by taking into account all relevant circumstances.

9. Article 6(2) of the arbitration agreement provides that, unless envisaged otherwise, the arbitral tribunal will conduct the proceedings according to the Permanent Court of Arbitration ("PCA") Optional Rules for Arbitrating Disputes between Two States. Article 6(4) provides that the arbitral tribunal, after consultation of the parties, is to decide expeditiously on all procedural matters by majority of its members.

10. Article 7(1) of the arbitration agreement provides inter alia that the arbitral tribunal will issue its award expeditiously after due consideration of all relevant facts pertinent to the case. Article 7(2) stipulates that the arbitration award will be binding on the parties and will constitute a definitive settlement of the dispute. According to Article 7(3), the parties will take all necessary steps to implement the award, including by revising national legislation, as necessary, within six months after the adoption of the award.

11. Under Article 9(1) of the arbitration agreement, the Republic of Slovenia will lift its reservations as regards opening and closing of the

[3] Signed in San Francisco on 26 June 1945.

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EU accession negotiation chapters where the obstacle is related to the dispute.

12. Under Article 11(3) of the arbitration agreement, all procedural timelines expressed in the agreement will start to apply from the date when the Republic of Croatia signs the Treaty between the Member States of the European Union and the Republic of Croatia concerning the accession of the Republic of Croatia to the European Union[4] ("the Accession Treaty").

2. *The Vienna Convention on the Law of Treaties*

13. The Vienna Convention on the Law of Treaties of 23 May 1969[5] ("the Vienna Convention") provides in paragraph 1 of Article 60, entitled "Termination or suspension of the operation of a treaty as a consequence of its breach":

> A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

B. *EU law*

1. *The Act of Accession*

14. Article 15 of the Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community[6] ("the Act of Accession"), annexed to the Accession Treaty, provides:

> The acts listed in Annex III shall be adapted as specified in that Annex.

15. Annex III to the Act of Accession sets out in point 5 the adaptations to be made to the regulation on the common fisheries policy[7] applicable at the time of Croatia's accession. Point 5 provides that points 11 and 12, entitled "Coastal waters of Croatia" and "Coastal waters of Slovenia" respectively, are added to Annex I to that regulation. Points 11 and 12 contain references to footnotes 2 and 3

[4] OJ 2012 L 122, p. 10.
[5] *UN Treaty Series*, vol. 1155, p. 331.
[6] OJ 2012 L 112, p. 21.
[7] Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (OJ 2002 L 358, p. 59).

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according to which the "regime shall apply from the full implementation of the arbitration award resulting from the Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia, signed in Stockholm on 4 November 2009".

2. Secondary law

(a) Regulation (EU) No 1380/2013

16. Article 5 of Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy,[8] entitled "General rules on access to waters", states in paragraphs 1 and 2:

> 1. Union fishing vessels shall have equal access to waters and resources in all Union waters other than those referred to in paragraphs 2 and 3, subject to the measures adopted under Part III.
>
> 2. In the waters up to 12 nautical miles from baselines under their sovereignty or jurisdiction, Member States shall be authorised, until 31 December 2022, to restrict fishing to fishing vessels that traditionally fish in those waters from ports on the adjacent coast, without prejudice to the arrangements for Union fishing vessels flying the flag of other Member States under existing neighbourhood relations between Member States and the arrangements contained in Annex I, fixing for each Member State the geographical zones within the coastal bands of other Member States where fishing activities are pursued and the species concerned. Member States shall inform the Commission of the restrictions put in place under this paragraph.

17. Annex I to Regulation No 1380/2013, entitled "Access to coastal waters within the meaning of Article 5(2)", refers in points 8 and 10, entitled "Coastal waters of Croatia" and "Coastal waters of Slovenia" respectively, to footnotes 2 and 3 according to which "the above mentioned regime shall apply from the full implementation of the arbitration award resulting from the Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia, signed in Stockholm on 4 November 2009".

18. The Republic of Slovenia also relies on the provisions of Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the

[8] Regulation amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC (OJ 2013 L 354, p. 22).

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rules of the common fisheries policy[9] and Commission Implementing Regulation (EU) No 404/2011 of 8 April 2011 laying down detailed rules for the implementation of Regulation No 1224/2009.[10]

(b) Schengen Borders Code

19. Article 4 of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)[11] ("the Schengen Borders Code"), entitled "Fundamental Rights", provides that "when applying this Regulation, Member States shall act in full compliance with relevant Union law, including . . . relevant international law, . . . obligations related to access to international protection".

20. Article 13 of the Schengen Borders Code establishes border surveillance whose main purpose, according to Article 13(1), is "to prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally". Article 13(2) to (5) of that code and Part A of Annex V determine the arrangements for that surveillance.

21. Article 17 of the Schengen Borders Code imposes an obligation of cooperation between Member States. Article 17(1) provides inter alia that the "Member States shall assist each other and shall maintain close and constant cooperation with a view to the effective implementation of border control, in accordance with Articles 7 to 16" and "shall exchange all relevant information".

(c) Directive 2014/89/EU

22. Recital 7 of Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 establishing a framework for maritime spatial planning[12] states:

The United Nations Convention on the Law of the Sea of 1982 ("Unclos") states in its preamble that issues relating to the use of ocean space are closely interrelated and need to be considered as a whole. Planning of ocean space is the logical advancement and structuring of obligations and of the use of rights

[9] Regulation amending Regulations (EC) No 847/96, (EC) No 2371/2002, (EC) No 811/2004, (EC) No 768/2005, (EC) No 2115/2005, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007, (EC) No 676/2007, (EC) No 1098/2007, (EC) No 1300/2008, (EC) No 1342/2008 and repealing Regulations (EEC) No 2847/93, (EC) No 1627/94 and (EC) No 1966/2006 (OJ 2009 L 343, p. 1).

[10] OJ 2011 L 112, p. 1.

[11] OJ 2016 L 77, p. 1.

[12] OJ 2014 L 257, p. 135.

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granted under Unclos and a practical tool in assisting Member States to comply with their obligations.

23. Article 2(4) of that directive states:

This Directive shall not affect the sovereign rights and jurisdiction of Member States over marine waters which derive from relevant international law, particularly Unclos. In particular, the application of this Directive shall not influence the delineation and delimitation of maritime boundaries by the Member States in accordance with the relevant provisions of Unclos.

24. Article 11(1) of Directive 2014/89 provides:

As part of the planning and management process, Member States bordering marine waters shall cooperate with the aim of ensuring that maritime spatial plans are coherent and coordinated across the marine region concerned. Such cooperation shall take into account, in particular, issues of a transnational nature.

II. FACTS AND PRE-LITIGATION PROCEDURE

25. On 25 June 1991, Slovenia and Croatia declared their independence from the Socialist Federal Republic of Yugoslavia. From 1992 to 2001, the Republic of Croatia and the Republic of Slovenia attempted to resolve the issue of the fixing of their land and maritime boundaries through bilateral negotiations.

26. The Republic of Slovenia became a member of the European Union on 1 May 2004.

27. On 4 November 2009, the Republic of Croatia and the Republic of Slovenia signed an arbitration agreement intended to resolve the boundary dispute between them, in which they undertook to be bound by the decision of an arbitral tribunal set up for that purpose. That agreement came into force on 29 November 2010.

28. On 9 December 2011, the Member States of the European Union and the Republic of Croatia signed the Accession Treaty. That treaty, ratified by the Republic of Croatia in January 2012, was published in the *Official Journal of the European Union* on 24 April 2012. The Republic of Croatia became a member of the European Union on 1 July 2013.

29. On 17 January 2012, pursuant to Article 2(1) of the arbitration agreement, the Republic of Croatia and the Republic of Slovenia appointed the president and two members of the arbitral tribunal.[13]

[13] Paragraph 17 of the partial award made by the arbitral tribunal on 30 June 2016 ("the partial award").

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The two further members of the tribunal who had to be appointed by the parties, under Article 2(2) of the arbitration agreement, were appointed at the end of January 2012.[14] The terms of appointment were signed in April 2012 and the Permanent Court of Arbitration ("PCA")[15] was appointed to act as Registry[16] by both the States in question.[17] Furthermore, under Article 6(2) of the arbitration agreement, the arbitral tribunal was obliged to conduct the proceedings according to the PCA Optional Rules for Arbitrating Disputes between Two States.[18]

30. The written procedure commenced on 11 February 2013 and the hearing was held from 2 to 13 June 2014.

31. It is apparent from the written submissions of the Republic of Croatia that a procedural issue arose during the arbitration proceedings, resulting from an *ex parte* communication during the arbitral tribunal's deliberations between the arbitrator appointed by the Republic of Slovenia and that State's agent acting before the arbitral tribunal. Following the publication of certain articles in the press, the two people concerned resigned their appointments as arbitrator and agent. On 30 July 2015, the arbitrator originally appointed by the Republic of Croatia also resigned.

32. By letter sent to the arbitral tribunal on 24 July 2015, the Republic of Croatia informed the tribunal that it was extremely concerned about the *ex parte* communication at issue, which, in its view, cast serious doubt on the integrity and impartiality of the arbitration proceedings as a whole, and applied for the proceedings before the arbitral tribunal to be temporarily suspended.[19]

33. On 29 July 2015, the Parliament of the Republic of Croatia unanimously adopted a resolution on the obligation of the Government of the Republic of Croatia to commence a procedure to terminate the arbitration agreement.

34. By *note verbale* of 30 July 2015, the Republic of Croatia notified the Republic of Slovenia that it considered itself entitled to terminate

[14] Paragraph 18 of the partial award.

[15] The PCA has 122 contracting parties which have acceded to one or both of the PCA's founding conventions. So far as concerns the present case, the Republic of Slovenia acceded to both conventions, on 1 October 1996 and 29 March 2004 respectively. The Republic of Croatia acceded to the 1899 Convention on 7 October 1998. See https://pca-cpa.org/en/about/introduction/contracting-parties/.

[16] See paragraph 148 of the final arbitration award made by the arbitral tribunal on 29 June 2017 ("the arbitration award at issue").

[17] Paragraph 19 of the partial award.

[18] Available at https://pca-cpa.org/en/documents/pca-conventions-and-rules/.

[19] Annex B.6 to the objection of inadmissibility.

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the arbitration agreement[20] on the ground of a material breach of that agreement by the Republic of Slovenia, for the purposes of Article 60(1) of the Vienna Convention. The Republic of Croatia stated that the *note verbale* constituted a notification, pursuant to Article 65(1) of the Vienna Convention, by which it proposed to terminate the arbitration agreement forthwith. The Republic of Croatia explained that in its view the impartiality and integrity of the arbitral proceedings had been irrevocably damaged, giving rise to a manifest violation of its rights. The arbitral tribunal received a copy of that *note verbale*.

35. By letter of 31 July 2015, the Republic of Croatia informed the arbitral tribunal that it had decided to terminate the arbitration agreement, explaining the reasons for so doing.

36. The Republic of Slovenia appointed a new arbitrator, who nevertheless resigned on 3 August 2015. The president of the arbitral tribunal subsequently appointed two new arbitrators to the two vacant posts in accordance with the procedure for the replacement of an arbitrator under Article 2 of the arbitration agreement.

37. By letter of 1 December 2015, the arbitral tribunal invited both parties to make new written and oral submissions "concerning the legal implications of the matters set out in [the Republic of] Croatia's letters of 24 July 2015 and 31 July 2015". The arbitral tribunal directed both parties to file their written submissions no later than 15 January 2016 (the Republic of Croatia) and 26 February 2016 (the Republic of Slovenia). In addition, the arbitral tribunal informed both parties that it intended to hold a hearing on those issues on 17 March 2016.

38. A hearing on those issues took place on 17 March 2016. The Republic of Slovenia filed a written memorial and participated in the hearing. The Republic of Croatia, for its part, did not participate in the hearing.

39. On 30 June 2016, the arbitral tribunal ruled on the procedural question by means of a partial award. The arbitral tribunal found, inter alia, that, by engaging in *ex parte* contact with the arbitrator originally appointed by it, the Republic of Slovenia had acted in breach of the arbitration agreement. Nevertheless, the nature of those breaches did not entitle the Republic of Croatia to terminate the arbitration agreement, which continued to apply. According to the arbitral tribunal, those breaches did not affect the ability of the arbitral tribunal, in its new composition, to issue an independent and impartial final award. The arbitral tribunal therefore found that there was no obstacle to the continuation of the proceedings under the arbitration agreement.

[20] See Annex B.6 to the objection of inadmissibility and paragraph 84 of the partial award.

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40. On 29 June 2017, the arbitral tribunal made a final arbitration award determining the land and maritime boundaries of the two States, which the Republic of Croatia claims is invalid and therefore of no binding effect.

41. On 16 March 2018, the Republic of Slovenia commenced the procedure provided for in Article 259 TFEU by making a complaint to the Commission alleging that the Republic of Croatia had infringed EU law.

42. The Commission did not issue a reasoned opinion within the three-month period provided for in Article 259 TFEU.

III. PROCEDURE BEFORE THE COURT AND FORMS OF ORDER SOUGHT

43. The Republic of Slovenia commenced the present action by document lodged at the Court Registry on 13 July 2018.

44. By a separate document of 21 December 2018, the Republic of Croatia submitted an objection of inadmissibility against the present action, under Article 151 of the Rules of Procedure of the Court of Justice. The Republic of Croatia claims that the action should be dismissed in its entirety as inadmissible, on the ground that, under Article 259 TFEU, the Court lacks jurisdiction to rule on the form of order sought by the Republic of Slovenia. In the alternative, it makes the same claim on the ground that the application does not comply with Article 21 of the Statute of the Court of Justice of the European Union and Article 120 of the Rules of Procedure of the Court of Justice.

45. The Republic of Slovenia filed its observations on that objection on 12 February 2019. It contends that the action is admissible, arguing, in essence, that the Court of Justice has jurisdiction to rule on the present action on the basis of Article 259 TFEU and that the action satisfies the requirements under Article 21 of the Statute of the Court of Justice of the European Union and Article 120 of the Rules of Procedure of the Court of Justice.

46. By decision of 14 May 2019, the Court referred the case to the Grand Chamber to rule on the objection of inadmissibility.

47. By letter of 7 June 2019 from the Court Registry, the Court requested the Commission, pursuant to the second paragraph of Article 24 of the Statute of the Court of Justice of the European Union, to reply in writing or, as applicable, at the hearing to questions relating to the provisions of Regulation No 1380/2013.

48. By letter of 31 May 2019, the Republic of Croatia requested the Court to remove from the case file the Commission's internal working document relating to the opinion of its Legal Service, contained in Annex C.2 to the Republic of Slovenia's response to the objection of inadmissibility.[21]

49. By letter of 20 June 2019 from the Court Registry, the Court requested the Commission to file its observations on that request.

50. The Commission filed those observations on 28 June 2019. In a separate letter, on the same day, the Commission answered the questions sent to it on 7 June 2019.

51. A hearing was held on 8 July 2019, at which the Republic of Croatia and the Republic of Slovenia were present, duly represented.

52. When asked at the hearing, the Republic of Slovenia stated that it maintained its application that the alleged infringements be put to an end.

IV. THE ARGUMENTS OF THE REPUBLIC OF SLOVENIA SET OUT IN THE APPLICATION

53. In support of its action, the Republic of Slovenia advances six complaints in its application.

54. By its first complaint, the Republic of Slovenia claims that, by unilaterally defaulting on the commitment, which it made during the process of accession to the European Union, to comply with the forthcoming arbitration award, the boundary delimited by the arbitration award at issue and the other obligations arising under that award, the Republic of Croatia, in breach of Article 2 TEU, is refusing to respect the value of the rule of law and the principles of sincere cooperation and *res judicata*.

55. By its second complaint, the Republic of Slovenia argues that, by unilaterally refusing to fulfil its obligations under the arbitration award at issue, the Republic of Croatia is preventing it from fully exercising its sovereignty throughout its mainland and maritime territory in compliance with the Treaties and rules of secondary law. By so doing, it is in breach of the duty of sincere cooperation laid down in Article 4(3) TEU and is jeopardising the attainment of the objectives of the European Union (including promoting and building peace, and an ever closer union between nations), the attainment of the objectives of the EU rules relating to the territory of the Member States, and the

[21] The Court has not yet ruled on that objection.

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effective implementation of EU law by the Republic of Slovenia. In that context, the Republic of Slovenia alleges that the Republic of Croatia is preventing it from fulfilling its obligation to implement a whole series of acts of secondary law.[22]

56. By its third complaint, the Republic of Slovenia claims that, by failing to respect either Slovenian territory or boundaries, the Republic of Croatia is infringing EU law in relation to the common fisheries policy.

57. The Republic of Slovenia submits in that respect that, by disputing the boundary as determined by the arbitration award at issue and objecting to the demarcation and application of that boundary, the Republic of Croatia is infringing the Republic of Slovenia's exclusive rights over its territorial waters and is preventing it from complying with its obligations under Regulation No 1380/2013.

58. In particular, the Republic of Slovenia criticises the Republic of Croatia for infringing the reciprocal access regime set up by Regulation No 1380/2013, which has applied to both those Member States since 30 December 2017 and grants 25 vessels of each of those Member States free access to the other Member State's territorial sea as determined according to international law, that is to say, the arbitration award at issue. It alleges that the Republic of Croatia is preventing implementation of the reciprocal access regime, is refusing to recognise the validity of the legislation adopted by the Republic of Slovenia for that purpose and, by systematically applying fines to them, is denying Slovenian fishermen free access to the territorial waters which the arbitration award at issue has defined as Slovenian and, a fortiori, free access to the Croatian waters falling within the scope of that regime.

59. By its fourth complaint, the Republic of Slovenia claims that the Republic of Croatia is infringing the Community control system established by Regulation No 1224/2009 and Implementing Regulation No 404/2011 for ensuring compliance with the rules of the common fisheries policy ("the control system") given that, first, the Republic of Croatia is preventing it from complying with its obligations under the

[22] The Republic of Slovenia refers, inter alia, to Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for Community action in the field of marine environmental policy (Marine Strategy Framework Directive) (OJ 2008 L 164, p. 19), Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), Regulation (EU) No 1143/2014 of the European Parliament and of the Council of 22 October 2014 on the prevention and management of the introduction and spread of invasive alien species (OJ 2014 L 317, p. 35) and Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1).

control system and, secondly, the Republic of Croatia is unlawfully exercising in Slovenian waters rights that belong to the Republic of Slovenia as the coastal State. Those regulations impose two series of obligations on flag Member States, that is to say, a monitoring obligation (Article 9(3) of Regulation No 1224/2009 and Articles 21 to 23 of Implementing Regulation No 404/2011) and an obligation to communicate data (Article 15 of Regulation No 1224/2009 and Articles 43 and 44 of Implementing Regulation No 404/2011).

60. By its fifth complaint, the Republic of Slovenia claims that the Republic of Croatia is infringing the Schengen Borders Code, given that the boundary between the two States is still an external border to which the provisions of Title II of that code apply. The Republic of Croatia is infringing both the border control obligations under Article 17 of the Schengen Borders Code and the border surveillance obligation laid down by Article 13 of that code. Furthermore, in refusing to recognise the arbitration award at issue, it is failing to fulfil the obligation laid down in Article 4 of that code to act in full compliance with the relevant provisions of the applicable international law.

61. By its sixth complaint, the Republic of Slovenia alleges that, by refusing to recognise the arbitration award at issue establishing the delimitation of the territorial waters between the two Member States, and by including Slovenian territorial waters in its maritime spatial planning,[23] the Republic of Croatia is infringing Article 4(1) and Article 8 of Directive 2014/89. By so doing, the Republic of Croatia makes any cooperation impossible, thereby infringing Article 11(1) of that directive which establishes the obligation of cooperation.

V. SUMMARY OF THE ARGUMENTS OF THE PARTIES ON THE OBJECTIONS OF LACK OF JURISDICTION AND INADMISSIBILITY

A. Grounds of challenge alleging that the Court of Justice lacks jurisdiction to hear and determine the present case

62. The first ground of challenge relating to lack of jurisdiction alleges that the claims made by the Republic of Slovenia are ancillary. According to the Republic of Croatia, those claims, as they appear in the application, are ancillary to resolution of the dispute concerning the validity and legal effects of the arbitration agreement and of the arbitration award at issue. In proceedings under Article 259 TFEU,

[23] Adopted on 13 October 2017.

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the Court of Justice has no jurisdiction to rule either on that dispute or on any such ancillary claims. The judgment in *Commission* v. *Belgium*[24] shows that, in such proceedings, the Court does not have jurisdiction to rule on the infringement of obligations under EU law if those obligations are ancillary to the prior settlement of a different dispute over which the Court does not have jurisdiction.

63. By its second ground of challenge relating to lack of jurisdiction, the Republic of Croatia contends that the true subject matter of the dispute between the two States consists of, first, the interpretation and applicability of the arbitration agreement, which does not form an integral part of EU law, and, secondly, the validity and any legal effects of the arbitration award at issue.

64. The Republic of Croatia emphasises in that respect that it disputes the very existence of the arbitration award at issue, since it validly terminated the arbitration agreement before that award was even made. Were the Court to examine those matters, it would have to address in particular, first, the issue of the validity of that termination and its effects, secondly, whether, after the termination at issue, the arbitral tribunal continued to exist, thirdly, whether that tribunal was entitled to decide whether it continued to exist and, fourthly, whether the termination at issue ended the work of the arbitral tribunal.[25] Furthermore, if it did examine those questions, the Court would have to assess the grounds in the partial award. However, those questions are matters of international law and, in particular, concern the interpretation of Article 60 of the Vienna Convention and of the arbitration agreement, which do not form an integral part of EU law.

65. By its third ground of challenge relating to lack of jurisdiction, the Republic of Croatia asserts that the Court does not have jurisdiction, under Article 259 TFEU, to rule either on the validity and effects of the arbitration agreement, on the ground that the agreement does not form an integral part of EU law, or on the validity and effects of the arbitration award at issue purportedly made on the basis of that arbitration agreement. According to the Republic of Croatia, any effect that resolution of the bilateral dispute may have on the functioning of EU law cannot extend the Court's jurisdiction beyond what is laid

[24] Judgment of 30 September 2010 (C-132/09, EU:C:2010:562).

[25] The Republic of Croatia submits in particular that, in that context, the Court has to rule on what effect the principle *nemo judex in causa sua* has on whether the arbitral tribunal, in partly the same composition, has jurisdiction to rule on its own jurisdiction. Should the Court find that the arbitration agreement remained valid, it would then have to rule on the legal effects of the arbitration award which, under the arbitration agreement, had to be implemented by the parties but has not yet been implemented.

down in the Treaties. The Republic of Slovenia's complaints relating to infringements of EU law, but whose resolution depends on prior settlement of the dispute relating to the validity and any legal effects of the arbitration agreement, are therefore insufficient to give the Court jurisdiction to hear and determine this dispute under Article 259 TFEU.

66. By its fourth ground of challenge relating to lack of jurisdiction, the Republic of Croatia claims that, in contrast to a dispute put to the Court under Article 273 TFEU, the present dispute is not required merely to relate to EU law. The Republic of Slovenia's complaints relating to infringements of EU law, which, however, depend on prior settlement of the dispute relating to the validity and any legal effects of the arbitration agreement, are therefore insufficient to give the Court jurisdiction to hear and determine this dispute under Article 259 TFEU.

67. By its fifth ground of challenge relating to lack of jurisdiction, the Republic of Croatia argues that any finding by the Court that the Republic of Croatia committed the purported infringements of EU law would be at the very most hypothetical. The Court does not have jurisdiction to rule on hypothetical infringements of EU law in proceedings under Article 259 TFEU.

68. By its sixth ground of challenge relating to lack of jurisdiction, the Republic of Croatia submits that this dispute does not raise any question of interpretation of EU law. It therefore cannot be argued in the present case that the Court has jurisdiction under Article 259 TFEU as a result of the need to resolve a dispute relating to the interpretation of EU law and to ensure uniform application of that law in that way.

69. The Republic of Slovenia claims that the Republic of Croatia's objection of lack of jurisdiction should be rejected.

70. In the first place, it contends that the objection is based on the false premiss that its application is seeking a finding that the Republic of Croatia failed to fulfil its obligations under the arbitration agreement or the arbitration award at issue, but not under EU law. This is an attempt by the Republic of Croatia unilaterally to misrepresent the subject matter of the action.

71. In that respect the Republic of Slovenia submits, first, that it follows from the provisions of the Treaties and the case-law that the Court's jurisdiction depends on the fact that, in the form of order sought in the application, the applicant State pleads an infringement of EU law or on the fact that EU law applies to that form of order. The Republic of Croatia cannot for its own benefit alter how the subject

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matter of the action is presented in the application, given that in the form of order sought in its application the Republic of Slovenia does not ask the Court in the slightest to find that the Republic of Croatia has failed to fulfil its obligations under international law, but asks it to find a failure to fulfil obligations owed by that Member State under EU law.

72. Secondly, the Republic of Slovenia contends that the Court is not prevented from having jurisdiction under Article 259 TFEU where the facts on which the alleged infringements of EU law are based also fall within the scope of international law. All that matters, in that respect, is that those facts relate to an infringement of obligations imposed by EU law. That does not, however, prevent the Court from having regard to substantive rules of international law that EU law has included or intended to include in its legal order.

73. Thirdly, the Republic of Slovenia submits that the existence of a bilateral dispute concerning the interpretation of an act of international law applicable between the parties to proceedings for failure to fulfil obligations likewise does not preclude the Court from having jurisdiction. Accordingly, in the judgment in *Spain* v. *United Kingdom*,[26] the Court interpreted a unilateral declaration by the United Kingdom reflecting the contents of an agreement between the Kingdom of Spain and the United Kingdom, even though there was a dispute between the parties concerning the meaning of that instrument of international law.

74. Fourthly, in order to rule on whether an action under Article 259 TFEU is admissible, it is only necessary to determine whether the basis of the form of order sought corresponds to "obligations under the Treaties". The Republic of Croatia is mistaken in suggesting that, in order to find that it has jurisdiction, the Court must be persuaded that a Member State has infringed its obligations under the Treaties. The interpretation and application of the rules of EU law are not questions that the Court should examine at that stage. They are, on the contrary, a matter for the examination on the merits.

75. In the second place, as regards the first ground of challenge relating to lack of jurisdiction, alleging that the claims concerning EU law are ancillary, the Republic of Slovenia submits that the Court is not required, in order to rule on the alleged infringements of EU law, to rule on a failure to fulfil obligations under international law or on acts contrary to international law committed by the Republic of Croatia. Given that the territories of the Republic of Croatia and of the

[26] Judgment of 12 September 2006 (C-145/04, EU:C:2006:543).

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Republic of Slovenia respectively are determined by the boundary set in accordance with international law, that is to say, the arbitration award at issue, it is therefore not incumbent on the Court either to find that international law has been infringed or to rule on an international dispute.

76. As regards the second ground of challenge relating to lack of jurisdiction, alleging that the "true" subject matter of the dispute is the interpretation of international law, the Republic of Slovenia asserts that the boundary between it and the Republic of Croatia is a matter of fact in respect of which the Court can rely on the outcome of the resolution of the territorial dispute and not a matter of law on which the Court might rule. The Court should, on the other hand, respect and apply international law, in so far as necessary in order to interpret or apply EU law.

77. In respect of the third ground of challenge relating to lack of jurisdiction, alleging that the dispute concerning the validity and any legal effects of the arbitration agreement should have been settled previously, the Republic of Slovenia asserts that, in order to determine the extent of and compliance with the obligations on the Member States under EU law, including the obligation not to prevent another Member State from implementing and applying EU law in its own territory, the starting point must be the boundary between the Member States concerned, as established under international law. The Court must have regard to the existing elements of international law, as facts.

78. The Republic of Slovenia adds that whether or not the arbitration agreement and the legal effects of the arbitration award at issue are valid is not the subject matter of the dispute before the Court, does not fall within its jurisdiction and, in any event, has been resolved in the partial award of the arbitral tribunal. The fact that the arbitration award at issue is not satisfactory to the Republic of Croatia does not mean that there is an unresolved boundary dispute or that the Court should rule on that question, which has already been determined.

79. Furthermore, the Republic of Croatia's argument that the arbitration award at issue is not directly applicable—besides being not a matter of admissibility but for examination on the merits—is incorrect, since that award is binding under international law, and definitively establishes the boundary between the two Member States.

80. As regards the fifth ground of challenge relating to lack of jurisdiction, concerning the hypothetical nature of the infringements of EU law alleged against it, according to the Republic of Slovenia the Republic of Croatia merely states that it did not fail to fulfil its obligations under EU law. Such an argument in fact goes to the

substance of the case. In any event, this is a matter of actual rather than hypothetical infringements that are occurring daily and which the Republic of Slovenia is trying to bring to an end by means of the present action under Article 259 TFEU.

81. As regards the sixth ground of challenge relating to lack of jurisdiction, alleging that the present case does not raise any questions of interpretation of EU law, because the parties share the same understanding of their obligations under EU law, the Republic of Slovenia asserts that the existence of a dispute concerning the interpretation or application of EU law is not, inherently, a precondition for the Court to have jurisdiction under Article 259 TFEU. It is sufficient for the Republic of Slovenia to claim that the Republic of Croatia has failed to fulfil its obligations under EU law.

B. Grounds of challenge alleging that the application is inadmissible

82. In the alternative, in the event that the Court finds that it does have jurisdiction to hear and determine this dispute, the Republic of Croatia claims that the application, which does not comply with the requirements of Article 21 of the Statute of the Court of Justice of the European Union and Article 120 of the Rules of Procedure of the Court of Justice, must be dismissed as inadmissible. In the form of order that it seeks in the application, the Republic of Slovenia does not expressly indicate the subject matter of the dispute, which according to the Republic of Croatia is a failure by the Republic of Croatia to fulfil its obligations under the arbitration award at issue. According to the Republic of Croatia, the form of order sought does not mention a purported infringement of the arbitration award at issue, and the application does not set out any legal arguments showing that there is a valid arbitration award, with the effect that the Republic of Croatia is unable to prepare its defence and reply to those arguments.

83. The Republic of Slovenia contends that the action satisfies all the requirements of Article 21 of the Statute of the Court of Justice of the European Union and Article 120 of the Rules of Procedure of the Court of Justice. The subject matter of the action is properly and precisely defined, summarised at the beginning of the application, developed and supported by precise facts and clear arguments, and is mentioned once again in the form of order sought in the application. The alleged infringements of EU law are defined precisely and do not generate any doubt.

84. The Republic of Croatia's assertion that it is unable to prepare its defence against the allegation of infringement of the arbitration

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award at issue is therefore, according to the Republic of Slovenia, also incorrect. Even assuming that the Court has to take that allegation into account, it relates to the substance of the case rather than to its admissibility.

C. The request that the opinion of the Commission's Legal Service be removed from the proceedings

85. The Republic of Croatia has requested the Court, in accordance with Article 151 of the Rules of Procedure of the Court of Justice, to remove from the case file the Commission's legal opinion contained at pages 38 to 45 of Annex C.2 to the Republic of Slovenia's response to the objection of inadmissibility ("the legal opinion at issue").

86. In support of its request, the Republic of Croatia claims that the legal opinion at issue is an internal document that the Commission has never made public. Unauthorised dissemination of that opinion could, according to the Commission, adversely affect its smooth functioning.

87. The Commission, relying on the order of 23 October 2002 in *Austria* v. *Council*,[27] contends that to produce internal documents of that nature in proceedings before the Court, unless such production has been authorised by the institution concerned or ordered by the Court, would be contrary to the public interest in institutions being able to receive the advice of their legal services, given in full independence. According to the Commission, the legal opinion at issue is an internal document that was not intended to be published and to which the public was not given access. The Commission states that production of the opinion in proceedings before the Court was not authorised. The legal opinion at issue should therefore be removed from the case file.

VI. ANALYSIS

88. The Republic of Croatia contends that the Court has no jurisdiction to rule on the action for failure to fulfil obligations and, in the alternative, that the action is inadmissible on the ground that it does not comply with the requirements under Article 21 of the Statute of the Court of Justice of the European Union and Article 120 of the Rules of Procedure of the Court of Justice. I would indicate at this stage that, for the reasons set out below, I believe that the Court does not

[27] C-445/00, EU:C:2002:607.

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have jurisdiction to examine the present action and that it is therefore unnecessary to analyse whether it is admissible in the light of any failure to comply with the above-mentioned provisions.

89. First, before examining the grounds of challenge relating to lack of jurisdiction and inadmissibility, it is necessary to examine the request that the opinion of the Commission's Legal Service be removed from the proceedings (section A). Secondly, in the context of examining the Court's jurisdiction, it seems to me necessary (i) to make a number of preliminary remarks on the Court's jurisdiction, in particular where international legal instruments are involved (section B), and (ii) to examine the subject matter of the action in the light of those remarks, analysing the specific complaints advanced by the applicant (section C).

A. The request that the opinion of the Commission's Legal Service be removed from the proceedings

90. The Republic of Croatia has requested the Court under Article 151 of the Rules of Procedure of the Court of Justice to remove the legal opinion at issue from the case file.

91. First, it must be noted that, by its order of 23 October 2002 in *Austria* v. *Council*,[28] the Court ordered that the opinion of the Commission's Legal Service produced as an annex to Austria's application for annulment of a regulation should be removed from the case file. In paragraph 12 of that order, the Court stated in particular that it would be contrary to public policy, which requires that the institutions can receive the advice of their legal service, given in full independence, to allow such internal documents to be produced in proceedings before the Court unless such production has been authorised by the institution concerned or ordered by the Court.

92. In the present case, it should be noted that the legal opinion in question comes from the Commission's Legal Service and was prepared for the attention of the Head of Cabinet of the Commission's President. That opinion was prepared in the context of the procedure that was initiated by the Republic of Slovenia under the second paragraph of Article 259 TFEU for the purpose of first bringing the matter before the Commission. The opinion contains an analysis of the claims made against the Republic of Croatia, with the aim of obtaining the Head of Cabinet's agreement to preparing a reasoned opinion

[28] C-445/00, EU:C:2002:607.

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under the third paragraph of Article 259 TFEU. It is clear that the legal opinion at issue was not intended to be published.[29]

93. Secondly, according to the case-law, removal of an institution's legal opinion is justified where there is a foreseeable risk of the institution concerned being obliged, in the pending court proceedings relating to the validity of a decision made by that institution, publicly to adopt a position in respect of the opinion issued by its own legal service. That prospect would inevitably have adverse repercussions on the interest of the institution concerned in seeking legal advice and its ability to receive frank, objective and comprehensive advice from its legal service.[30]

94. In the present instance, in the procedure provided for in the second paragraph of Article 259 TFEU, the Commission, after the matter was brought before it by the Republic of Slovenia, did not issue a reasoned opinion under the third paragraph of that article. It has therefore not expressed its official position on that procedure. The present case can therefore be distinguished from the above-mentioned cases, which concerned court proceedings relating to the *validity* of a decision adopted and defended by the institution concerned. Nevertheless, despite that distinction, I believe that the considerations expressed in point 93 of this Opinion are relevant, *mutatis mutandis*, to the present case. Indeed, it is not inconceivable that the Commission may subsequently decide to intervene in the proceedings before the Court or that it may be requested to submit observations, with the consequence that it would have to express its official opinion on the case brought before the Court and therefore take a position publicly on the advice issued by its own legal service. It therefore appears that removal of the legal opinion at issue is justified in the light of that institution's interest in seeking and receiving frank, objective and comprehensive advice from its Legal Service.[31]

95. Furthermore, the Court of Justice has already held that to allow a Member State to include in the case file a legal opinion whose disclosure has not been authorised by the institution at issue would

[29] That document can therefore be described as "legal advice" within the meaning of Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

[30] Judgment of 1 July 2008, *Sweden and Turco* v. *Council* (C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 42), and order of 14 May 2019, *Hungary* v. *Parliament* (C-650/18, not published, EU:C:2019:438, paragraph 16).

[31] Judgment of 1 July 2008, *Sweden and Turco* v. *Council* (C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 42), and order of 14 May 2019, *Hungary* v. *Parliament* (C-650/18, not published, EU:C:2019:438, paragraph 16).

be tantamount in particular to circumventing the procedure for requesting access to such a document under Regulation No 1049/2001.[32] In the present case, as the Commission stated in its written observations, the legal opinion at issue was not made accessible to either the parties or the public, but was disclosed as an annex to a press article.[33] It must therefore be found that the Republic of Slovenia did not obtain the legal opinion at issue in accordance with the procedures laid down by Regulation No 1049/2001.

96. In those circumstances, and bearing in mind that the Commission informed the Court that it did not wish the document in question to be produced in the present action, I propose that the request of the Republic of Croatia seeking removal from the case file of the document appearing at pages 38 to 45 of Annex C.2 to the Republic of Slovenia's response to the objection of inadmissibility should be granted.

B. Preliminary remarks on the jurisdiction of the Court of Justice

97. It is necessary, first of all, to make a few preliminary remarks about the Court's jurisdiction over actions for failure to fulfil obligations (1), secondly, to determine the scope *ratione materiae* of EU law where international legal instruments are involved (2) and, thirdly, to examine the territorial scope of EU law (3).

1. The Court's jurisdiction over actions for failure to fulfil obligations

98. Under Article 19 TEU the Court is responsible for ensuring that the law is observed in the interpretation and application of the Treaties.[34] Under Article 19(3)(a), the Court is to rule in accordance with the Treaties on actions brought by a Member State, an institution or a natural or legal person. That jurisdiction is embodied in the action for failure to fulfil obligations under Article 259 TFEU.

[32] See, to that effect, order of 29 January 2009, *Donnici* v. *Parliament* (C-9/08, not published, EU:C:2009:40, paragraph 18).

[33] Press article appearing at pages 32 to 37 of Annex C.2 to the Republic of Slovenia's response to the objection of inadmissibility.

[34] Judgment of 19 July 2016, *H* v. *Council and Commission* (C-455/14 P, EU:C:2016:569, paragraph 40). Furthermore, the Court has already held that an international agreement cannot affect the exclusive jurisdiction of the Court in regard to the resolution of disputes between Member States concerning the interpretation and application of EU law (judgment of 30 May 2006, *Commission* v. *Ireland* (C-459/03, EU:C:2006:345, paragraph 132)).

99. The procedure pursuant to Article 259 TFEU is designed to obtain a declaration that the conduct of a Member State is in breach of EU law and to terminate that conduct.[35] Under that provision, the jurisdiction of the Court to declare that there is an infringement by a Member State is conditional on there being a failure to fulfil "an obligation under the Treaties". In that context, it is not for the Court to consider what objectives are pursued in an action for failure to fulfil obligations brought before it.[36]

100. In the expression "obligation under the Treaties", the word "Treaties" implies that an action can be brought for alleged infringements of the EU and FEU Treaties and of the Charter of Fundamental Rights of the European Union, provided that the Member State's conduct falls within their scope.[37] It is furthermore clear that the expression also refers to measures of secondary law.[38]

101. The Court's jurisdiction therefore depends on the scope of EU law.[39] Since the present case concerns an international arbitration agreement and an arbitration award under that agreement, I propose to examine the scope *ratione materiae* of EU law where international legal instruments are involved.

2. *Scope* ratione materiae *of EU law where legal instruments of international law are involved*

102. Since the arbitration agreement and the arbitration award at issue, on which the present action turns, are instruments of international law, it is necessary to determine their relationship with EU law, whether they form an integral part of the EU legal order and whether the European Union is bound by them.

(a) Instruments of international law in the case-law of the Court

103. According to settled case-law, "the European Union is bound, . . . when exercising its powers, to observe international law in its entirety, including not only the rules and principles of general and

[35] Judgment of 16 October 2012, *Hungary* v. *Slovakia* (C-364/10, EU:C:2012:630, paragraph 67 and the case-law cited).

[36] See, to that effect and by analogy, judgment of 21 June 1988, *Commission* v. *United Kingdom* (416/85, EU:C:1988:321, paragraph 9 and the case-law cited).

[37] See Opinion of Advocate General Tanchev in *Commission* v. *Poland* (*Independence of the Supreme Court*) (C-619/18, EU:C:2019:325, point 48 and footnote 19).

[38] Judgment of 6 April 2017, *Commission* v. *Germany* (C-58/16, not published, EU:C:2017:279, paragraph 36).

[39] In relation to jurisdiction *ratione materiae*, see judgment of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraph 76).

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customary international law, but also the provisions of international conventions that are binding on it".[40]

104. It is to my mind apparent from that case-law that the situations in which the European Union is bound by international law are very limited. First, the European Union is bound by international agreements concluded by it pursuant to the provisions of the Treaties, which are, from the date of their entry into force, an integral part of the EU legal order.[41] Secondly, the European Union is bound by an international convention where it has assumed the powers previously exercised by the Member States in the field to which that convention applies.[42] Thirdly, the European Union must respect customary international law in the exercise of its powers.[43] It follows that international conventions that do not fall within the categories referred to above are not acts of the European Union and do not bind it. Since they are not a matter of EU law, the Court of Justice has no jurisdiction to examine their validity or to interpret them.

(b) The ancillary nature of the claims relating to obligations under EU law

105. In support of its first ground of challenge relating to lack of jurisdiction, the Republic of Croatia submitted that the judgment in *Commission* v. *Belgium*[44] shows that, in an action for failure to fulfil obligations, the Court does not have jurisdiction to rule on the alleged infringement of obligations under EU law "if those obligations are ancillary to the prior settlement of a different dispute over which the Court does not have jurisdiction".

106. To my mind, it is apparent from *Commission* v. *Belgium* that, in the context of an action for failure to fulfil obligations, the involvement of instruments of international law, which are not EU acts, can

[40] See, in particular, judgment of 27 February 2018, *Western Sahara Campaign UK* (C-266/16, EU:C:2018:118, paragraph 47 and the case-law cited).

[41] See, in particular, judgment of 27 February 2018, *Western Sahara Campaign UK* (C-266/16, EU:C:2018:118, paragraphs 45 and 46 and the case-law cited). The Court has jurisdiction to interpret the provisions of such agreements (see, recently, judgment of 11 July 2018, *Bosphorus Queen Shipping* (C-15/17, EU:C:2018:557, paragraph 44)).

[42] See, to that effect, judgments of 22 October 2009, *Bogiatzi* (C-301/08, EU:C:2009:649, paragraph 33), and of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraph 63).

[43] In respect of customary international maritime law, see, in particular, judgment of 24 November 1992, *Poulsen and Diva Navigation* (C-286/90, EU:C:1992:453, paragraphs 9 and 10). As regards the customary principle of self-determination, see, in particular, judgment of 21 December 2016, *Council* v. *Front Polisario* (C-104/16 P, EU:C:2016:973, paragraph 88). As regards the customary principle of good faith, see, in particular, judgment of 11 July 2018, *Bosphorus Queen Shipping* (C-15/17, EU:C:2018:557, paragraph 45).

[44] Judgment of 30 September 2010 (C-132/09, EU:C:2010:562).

adversely affect the Court's jurisdiction to examine an alleged infringement of EU law. The situation concerns an alleged failure to fulfil obligations, which formally relates to EU law but, in actual fact, concerns an instrument of international law that falls outside the scope *ratione materiae* of EU law and therefore the jurisdiction of the Court. Accordingly, in that judgment, the Court held that it did not have jurisdiction to rule on the alleged infringement of obligations under EU law that were merely ancillary to those under an instrument of international law.

107. More specifically, in that case, the Commission alleged infringement both of the 1962 Establishment Agreement, concluded on 12 October 1962 between the Board of Governors of the European School and the Government of the Kingdom of Belgium, and of Article 10 EC (now Article 4(3) TEU). The Court analysed the substance of the application initiating proceedings, which enabled it to assess the exact scope of the Commission's complaint against the Kingdom of Belgium. The Court found that the infringement of the provision of EU law was merely the consequence of failure by the Member State concerned to fulfil its obligations under that establishment agreement, and formally reflected that finding in the term "ancillary" applied to the alleged infringement of Article 10 EC. Having found, on conclusion of a second analysis, that the agreement in question did not form part of EU law but fell within international law alone, the Court logically held that it had no jurisdiction to rule on the action for failure to fulfil obligations brought by the Commission.

108. I believe that the reasoning expounded in that judgment is significant for the present case. I therefore propose to examine the criteria set out in that judgment in my analysis of the specific complaints advanced by the applicant in support of the action (section C below).

3. The territorial scope of EU law

109. It must be noted that, according to the form of order sought in the application, the Court has not formally been asked to assess whether the arbitration agreement applies or whether the arbitration award at issue is valid, but is called upon to rule on whether provisions of EU law, such as Article 2 and Article 4(3) TEU and those relating to the common fisheries policy, the Schengen Borders Code and maritime spatial planning, have been infringed by the Republic of Croatia and are therefore applicable in the present case.

110. In that regard, the European Union, unlike a State, does not have either "territorial jurisdiction" under international law, that is to

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say, any rights to exercise sovereignty over its territory, or any "EU territory" comparable to "federal territory".[45] "EU territory" is in fact the geographical space referred to in Article 52 TEU and Article 355 TFEU which define the territorial scope of the Treaties.[46] Specifically, Article 52 TEU provides, in its first paragraph, that the Treaties are to apply to the Member States.[47] The detailed rules governing the territorial scope of the Treaties are laid down in Article 355 TFEU. Article 52 TEU and Article 355 TFEU are relevant not only to determining the external border of the European Union, but also to establishing the respective competences of the Member States to implement EU law. To that effect, in *Aktiebolaget NN*,[48] the Court held, in relation to Article 299 EC, now Article 355 TFEU, that, "in the absence, in the Treaty, of a more precise definition of the territory falling within the sovereignty of each Member State, *it is for each of the Member States* to determine the extent and limits of that territory, in accordance with the rules of international public law".[49]

111. The territorial scope of EU law is therefore not determined a priori by the European Union but is instead an objective fact that it has to accept. It follows that, in an action brought under Article 259 TFEU, such as that in the present case, in which a Member State is alleged to be impeding the implementation of EU law on the territory of another Member State, delimitation of the territory covered by the jurisdiction of a Member State does not fall within the sphere of competence of the European Union, which must, in that respect, look to public international law and the EU instruments in conformity with that law that define the extent of that territory.

4. Interim conclusion

112. In the light of the foregoing, in my view the Court's jurisdiction in an action for failure to fulfil obligations depends on the scope of EU law. EU law involves, first, two series of treaty-based international rules, that is to say, the international conventions concluded by the European Union pursuant to the provisions of the Treaties and

[45] See J. Ziller, "Champ d'application de l'Union—Application territoriale", *Europe Traité*, JurisClasseur, fascicule 470, 2013, paragraph 4.

[46] Judgment of 4 May 2017, *El Dakkak and Intercontinental* (C-17/16, EU:C:2017:341, paragraph 22).

[47] Judgment of 15 December 2015, *Parliament and Commission* v. *Council* (C-132/14 to C-136/14, EU:C:2015:813, paragraph 64).

[48] Judgment of 29 March 2007 (C-111/05, EU:C:2007:195).

[49] Judgment of 29 March 2007, *Aktiebolaget NN* (C-111/05, EU:C:2007:195, paragraph 54); emphasis added.

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those where the European Union has assumed the powers previously exercised by the Member States in the field to which the conventions in question apply, and, secondly, the customary rules of public international law that are binding on the European Union in the exercise of its powers. In the context of actions for failure to fulfil obligations,[50] the Court does not, on the other hand, have jurisdiction to resolve disputes between Member States relating to the validity, interpretation and application of international conventions that do not fall within EU law. The Court has for that reason held that it had no jurisdiction in a situation in which the application formally related to EU law, whereas the alleged infringement in fact related to an instrument of international law falling outside the scope *ratione materiae* of EU law and therefore the jurisdiction of the Court, meaning that the complaints alleging infringement of EU law were ancillary. The territorial scope of the Treaties is defined in Article 52 TEU and Article 355 TFEU and is an objective fact predetermined by the Member States which the European Union has to accept. Indeed, in the absence, in the Treaties, of a more precise definition of the territory falling within the sovereignty of each Member State, it is for each of them to determine the extent and limits of that territory, in accordance with the rules of public international law. Since, in the context of an action for failure to fulfil obligations, the Court has jurisdiction only to rule on the conduct of a Member State that is in breach of EU law, it has no jurisdiction to examine inter-State territorial disputes.

C. Subject matter of the action

113. In order to determine, in the light of the foregoing remarks, whether the Court has jurisdiction to hear and determine the application of the Republic of Slovenia seeking a declaration that the Republic of Croatia has infringed provisions of EU law, the Court cannot confine itself to formally examining the wording of the complaints contained in the form of order sought in the application, but should analyse the substance of the complaints put forward by the Republic of Slovenia.[51]

[50] It is not inconceivable that the Court could have jurisdiction in disputes of that kind in the context of an action under Article 273 TFEU, pursuant to which the Court has "jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties".

[51] See point 107 of this Opinion, as regards, in particular, the reasoning set out in the judgment of 30 September 2010, *Commission* v. *Belgium* (C-132/09, EU:C:2010:562).

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1. Analysis of the specific complaints of the Republic of Slovenia

114. The six complaints raised by the Republic of Slovenia can be broken down as follows: the first two allege infringements of the provisions of primary law (Article 2 and Article 4(3) TEU) and the other four allege infringements of secondary law, that is to say, obligations under the common fisheries policy established in Regulation No 1380/2013 (third complaint), under the control system established by Regulation No 1224/2009 and Implementing Regulation No 404/2011, both relating to the common fisheries policy (fourth complaint), under the Schengen Borders Code (fifth complaint) and, lastly, under the maritime spatial planning arrangements established by Directive 2014/89 (sixth complaint).

115. Those complaints can be divided into two categories, that is to say, complaints alleging infringement of primary law and complaints alleging infringement of secondary law. On examination, it can be seen that the arguments put forward in support of those complaints vary in structure depending on the category to which they belong.

116. The complaints alleging infringement of primary law seek to show that the Republic of Croatia's failure to apply the arbitration agreement and to implement the arbitration award at issue constitutes an infringement of the value of the rule of law enshrined in Article 2 TEU and of the principle of sincere cooperation set out in Article 4(3) TEU.

117. More specifically, in its first complaint, alleging infringement of the value of the rule of law enshrined in Article 2 TEU, the Republic of Slovenia takes the view that, by unilaterally defaulting on the commitment, which it made during the process of accession to the European Union, to comply with the forthcoming arbitration award, the boundary delimited by the arbitration award at issue and the other obligations arising under that award, the Republic of Croatia is refusing to respect the value of the rule of law enshrined in that article and, accordingly, is infringing the principles of sincere cooperation and *res judicata*. In relation to the second complaint, alleging infringement of the principle of sincere cooperation enshrined in Article 4(3) TEU pursuant to which the European Union and the Member States, in full mutual respect, are to assist each other in carrying out tasks which flow from the Treaties, it must be noted that the Republic of Slovenia alleges two types of infringement by the Republic of Croatia, that is to say, jeopardising the attainment of the European Union's objectives[52] and obstructing the implementation of EU law on Slovenian territory.

[52] Paragraphs 62 to 71 of the application.

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118. Its arguments relating to those two complaints indicate to me that the Republic of Slovenia is seeking to demonstrate that the Republic of Croatia's failure to apply the arbitration agreement and to implement the arbitration award at issue constitutes an infringement of EU law, in particular of Article 2 TEU and the principles of sincere cooperation and *res judicata*.

119. In contrast, the complaints alleging infringement of the provisions of secondary law are based on the premiss that the boundary between the Republic of Croatia and the Republic of Slovenia has been determined by the arbitration award at issue, with the effect that the refusal to implement it constitutes an infringement of those provisions by the Republic of Croatia.

120. Given the structural difference between the complaints relating to primary law and those relating to secondary law, they should be examined in two parts.

2. Complaints alleging infringement of primary law

121. Having regard to my interim conclusion (point 112 of this Opinion), it is necessary to examine the relationship between, on the one hand, the arbitration agreement and the arbitration award at issue that was made under it and, on the other hand, EU law.

(a) The relationship between the arbitration agreement and the arbitration award at issue, on the one hand, and EU law, on the other

122. It needs to be emphasised that the arbitration agreement and, by extension, the arbitration award at issue made under that agreement do not correlate to any of the situations in which the European Union is bound by international law, as described in points 103 and 104 of this Opinion.

123. As regards the first scenario considered in point 104 of this Opinion, that is to say, where the European Union is bound by international agreements that it has concluded pursuant to the provisions of the Treaty, it should be noted that the arbitration award at issue was made by an international tribunal set up pursuant to a bilateral arbitration agreement. It is common ground that the European Union was not a party either to the arbitration agreement or in the arbitration proceedings in which that award was made. The European Union offered its good offices to the parties[53] and signed the

[53] See Annex A.3 to the application and, more generally, A. Geddes and A. Taylor, "'Those Who Knock on Europe's Door Must Repent?' Bilateral Border Disputes and EU Enlargement", *Political*

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agreement in question only as a "witness". Under Article 4(a) and (b) of the arbitration agreement, the arbitral tribunal is to apply the rules and principles of international law as well as fairness and the principle of good neighbourly relations. In accordance with Article 8 of that agreement, the accession negotiations were not to affect the work of the arbitral tribunal, which was to continue in accordance with Article 9. The agreement, of which the European Union took note by a document of 25 September 2009,[54] therefore does not provide for the application of EU law. It is therefore apparent that the arbitration award at issue is a decision made by an arbitral tribunal set up pursuant to a bilateral arbitration agreement and applies, in particular, international law.

124. So far as concerns the second scenario envisaged in point 104 of this Opinion, that is to say, where the European Union is bound by an international convention if it has assumed the powers previously exercised by the Member States in the field to which the convention applies, it is clear that there was no transfer of powers from the Member States to the European Union in the field to which the arbitration agreement applies.

125. The third scenario referred to in point 104 of this Opinion, in which the European Union must respect the rules of customary international law, arises only where the European Union exercises its powers, which is not the situation in the present case, since the arbitration agreement and the arbitration award at issue are international instruments outside the European Union's sphere of competence.

126. As regards whether the arbitration agreement or the arbitration award at issue may have been incorporated into EU law by the Act of Accession of the Republic of Croatia, it is apparent from the case file before the Court that one of the *political* conditions for the Republic of Croatia to accede to the European Union was the resolution of its boundary dispute with the Republic of Slovenia.[55] It is not contested

Studies, vol. 64, No 4, pp. 930 to 947. "Good offices" is defined as "action by a third party, usually a State or international organisation, that intervenes in a dispute between two or more parties, at least one of which is a State, to propose to the parties that have accepted its involvement means of settlement with a view to settling their dispute peacefully" (definition [of the French expression "bons offices"] available at www.operationspaix.net/15-lexique-bons-offices.html).

[54] See, in that regard, Annex A.3 to the application, which contains an exchange of letters between the representatives of the Croatian and Swedish Governments brought to the attention of the Conference on the Republic of Croatia's accession to the European Union.

[55] See, in that regard, Annex A.3 to the application, which contains an exchange of letters of 25 September 2009 between the representatives of the Croatian and Swedish governments.

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that, at the time when the Accession Treaty was signed, the arbitration agreement had been entered into but the arbitration proceedings had not yet commenced.[56] However, nothing in the case file suggests that the political condition in question was embodied in any specific provisions of the Act of Accession or of the Accession Treaty. I am in fact of the view that the reference to the forthcoming arbitration award in Annex III to the Act of Accession, which is moreover the only reference in that act to the dispute concerning the boundary between the Republic of Croatia and the Republic of Slovenia, must be analysed as a statement that the rules regarding the common fisheries policy had to be modified in order to define the coastal waters of the two States at issue, for the purpose of applying the specific neighbourhood relations regime. Given the wording of that reference,[57] it cannot be construed as a legal obligation under EU law requiring the Republic of Croatia to resolve its dispute with the Republic of Slovenia in respect of their common boundary in accordance with the terms of the forthcoming arbitration award.[58]

127. In the light of the foregoing, I do not believe that the European Union is bound by the arbitration agreement for the purposes of the case-law cited in point 103 of this Opinion, or by the award at issue for which that agreement provides, since those legal instruments are not within the scope *ratione materiae* of EU law.

128. In order to examine, in particular, whether the Court has jurisdiction to hear and determine the two complaints advanced by the applicant alleging infringement of primary law, it is appropriate, first, to examine the first complaint, alleging infringement of the value of the rule of law enshrined in Article 2 TEU (b), and secondly, to analyse the second complaint, alleging infringement of the principle of sincere cooperation enshrined in Article 4(3) TEU (c).

[56] See points 27 to 29 of this Opinion.

[57] It will be recalled that, as indicated in point 15 of this Opinion, Annex III provides that "the above-mentioned regime shall apply from the full implementation of the arbitration award resulting from the Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia, signed in Stockholm on 4 November 2009".

[58] That interpretation is, furthermore, borne out by the Commission's answer to the questions put by the Court on 28 July 2019, in which it states that the "wording of the footnotes [to points 8 and 10 of Annex I to Regulation No 1380/2013], which reflects the contents of the Act of Accession, provides that the regimes governing access to the coastal waters of each State will apply only from full implementation of the arbitration award resulting from the arbitration agreement . . .". The Commission adds that the wording of that provision can be understood as meaning "that the drafters of the provision did not intend the access provisions to apply with immediate effect or automatically from a given date".

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(b) The first complaint, alleging infringement of the value of the rule of law enshrined in Article 2 TEU

129. It should be noted at the outset that the Republic of Slovenia invokes the value of the rule of law both on its own and in combination with the principles of sincere cooperation and *res judicata*. In both instances, I believe that what has been said regarding the ancillary nature of allegations relating to purported infringements of EU law, set out in points 105 and 107 of this Opinion, applies when assessing this complaint.

130. In fact, although the form of order sought in the application formally refers to infringements of the value of the rule of law and of the principles of sincere cooperation and *res judicata*, the allegation itself relates to the purported infringement of international law, by the Republic of Croatia, resulting from failure to implement the arbitration award at issue. As emerges from point 127 of this Opinion, the European Union is bound neither by the arbitration agreement nor by the arbitration award at issue provided for by it; the matter of any infringements of EU law is therefore ancillary to that of delimitation of the land and maritime boundaries between the two Member States concerned.

131. Furthermore, as I have already indicated in point 126 of this Opinion, the attempt to link the commitments made during the Republic of Croatia's accession to the European Union with those values and principles is not to my mind sufficient for those values and principles to serve as an independent basis for the action. The line of argument based on failure to fulfil commitments made during the accession process must therefore also be rejected, since those commitments are not legal obligations under EU law and cannot be relied upon for the purposes of Article 259 TFEU.

132. In any event and for the sake of completeness, in the first place, even assuming that the alleged infringements do fall within the scope of EU law, I would question whether a complaint based on the value of the rule of law enshrined in Article 2 TEU is admissible in an action for failure to fulfil obligations under Article 259 TFEU. The Court has recently had recourse to that value in numerous cases.[59] I note,

[59] See judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraph 32) in which the Court held that "Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals." It reiterated the same passage in the judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 50 and the case-law cited), and of 24 June 2019, *Commission* v. *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 47).

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however, that, in the case-law, the value of the rule of law has not been referred to on its own, but always with a provision that "gives concrete expression" to it or of which it is "a specific manifestation",[60] that is to say, Article 19 TEU. The link between the value of the rule of law and the jurisdiction of the European Union was in that way based on the fact that judicial review in the EU legal order is ensured not only by the Court of Justice but also by national courts and tribunals.

133. Admittedly, as regards implementation of Article 2 TEU, it is widely accepted that Article 7 TEU and the failure to fulfil obligations procedure are complementary[61] and that an action for failure to fulfil obligations can, in principle, address an infringement of Article 2 TEU.[62] Nevertheless, the fact remains that an action for failure to fulfil obligations is a remedy that is linked to the fields that fall within the scope of EU law—which, as set out in points 130 and 131 of this Opinion, the present case does not—and that requires specific legal obligations to be invoked.[63] Nonetheless, the Court can still have recourse to Article 2 TEU for interpretative purposes, in order to determine whether EU law has been infringed. My view is therefore that, even assuming that the Court has jurisdiction to examine the first complaint, alleging infringement of the rule of law, in the circumstances of the present case, that value cannot be relied upon on its own.

[60] The expression used by Advocate General Tanchev in his Opinion in *Commission* v. *Poland (Independence of the ordinary courts)* (C-192/18, EU:C:2019:529, point 71).

[61] See, to that effect, Opinions of Advocate General Tanchev in *Commission* v. *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:325, points 50 and 51) and C. Hillion, "Overseeing the Rule of Law in the EU: Legal Mandate and Means", in Closa and Kochenov, pp. 66 to 74.

[62] See, in particular, O. Mader, "Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law", *Hague Journal on the Rule of Law*, vol. 11, No 1, April 2019, paragraph 3.4.2.

[63] See, in particular, Ruffert (Calliess/Ruffert, *EUV/AEUV Kommentar*, 4th edition, 2011, Article 7 TEU, paragraph 29, pp. 160 and 161), who emphasises that the action for failure to fulfil obligations was designed in order to sanction "specific individual infringements" of EU rules whereas the mechanism established by Article 7 TEU relates to infringements of EU values which, since they are "general infringements", cannot be sanctioned using the remedy of an action for failure to fulfil obligations. According to Heintschel von Heinegg (Vedder/Heintschel von Heinegg, *Europäisches Unionsrecht*, 2nd edition, 2018, Article 7 TEU, paragraph 29, pp. 112 and 113), infringements of Article 2 TEU can only be alleged using the mechanism under Article 7 TEU, given that by definition they are of a "particular nature", capable of threatening the fundamental principles of the European Union. He adds that only the Member States meeting within the Council of the European Union can bring that type of infringement to an end, using their political influence. According to that writer, the Court of Justice, on the other hand, cannot address those infringements in an action for failure to fulfil obligations, because it is prohibited from ruling on political matters. Furthermore, the Court's only penalty mechanism is that under Article 260 TFEU, which that commentator considers to be inadequate to penalise infringements of that kind. This leads him to conclude that actions for failure to fulfil obligations are not applicable in the case of infringements under Article 2 TEU.

134. In the second place, in so far as the first complaint concerns the principle of good faith, which is manifested in EU law in the principle of sincere cooperation, and the principle of *res judicata*, since neither the arbitration agreement nor the arbitration award are either EU acts or international conventions binding on the European Union,[64] it is not sufficient to invoke those principles in conjunction with the value of the rule of law if a specific provision of EU law or a specific provision binding on the European Union is not invoked. No such tie exists where a complaint alleges failure to implement the arbitration award and to perform the arbitration agreement, which are bilateral instruments governed exclusively by international law.

135. My view is therefore that, in those circumstances, the Court does not have jurisdiction to hear and determine the complaint based on the value of the rule of law, because that complaint is ancillary to the question of the infringement of obligations under international law.

(c) The second complaint, alleging infringement of the principle of sincere cooperation enshrined in Article 4(3) TEU

136. First, the Republic of Slovenia contends in essence that, by refusing to fulfil its obligations under the arbitration award at issue, the Republic of Croatia is preventing it from fully exercising its sovereignty throughout its territory. It alleges that this conduct jeopardises attainment of the objectives of the European Union.[65] Secondly, the Republic of Slovenia alleges that the Republic of Croatia is preventing it from fulfilling its obligation to implement Directive 2008/56, Directive 92/43, Regulation No 1143/2014 and Directive 2000/60.

137. As already indicated in points 105 to 107 of this Opinion, the claims based on that principle are ancillary to resolution of the international dispute relating to the validity and implementation of the arbitration award at issue. It is to my mind particularly revealing in that respect how the Republic of Slovenia has worded its second complaint. It asserts that, "by unilaterally refusing to fulfil its obligations under the arbitration award [at issue]", the Republic of Croatia has infringed the principle of sincere cooperation.[66] The Republic of Croatia is in that way preventing it from fully exercising its sovereignty

[64] See points 103 and 104 of this Opinion.

[65] The Republic of Slovenia adduces the following objectives: promoting and building peace, an ever closer union between nations and the attainment of the objectives of the EU provisions relating to the territory of the Member States.

[66] Page 3 of the application, summary of the second complaint.

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throughout its mainland and maritime territory in compliance with the Treaties and provisions of secondary law.[67]

138. In any event, the second complaint, alleging infringement of the principle of sincere cooperation enshrined in Article 4(3) TEU, should be rejected. According to my research, that principle has constituted an independent basis for obligations in cases where the European Union was party to a mixed agreement[68] or in the situation of fulfilment of the obligations under the EU Treaty and the FEU Treaty.[69] However, in the present case, the conduct at issue does not fall within either of those two situations. As can be seen from the foregoing analysis, in my view neither the arbitration agreement nor the arbitration award at issue constitute acts of EU law or international obligations binding on the European Union.[70] Performance of that agreement and implementation of that award are not obligations under the EU Treaty or the FEU Treaty. The only way in which the objectives of the European Union can be invoked is therefore by applying the framing of powers theory. According to that theory, exercise of the powers reserved to the Member States is restricted in the interests of attaining the objectives of the European Union.[71] Nevertheless, unlike the cases in which the Court has applied the

[67] Ibid.

[68] Article 4(3) TEU could be applied on its own, in particular because the subject of the dispute fell within the sphere of the external relations of the European Union and because the European Union was a party to the agreement. The Court accordingly held that, where the subject matter of an agreement or convention falls partly within the competence of the European Union and partly within that of its Member States, it is essential to ensure close cooperation between the Member States and the EU institutions, both in the process of negotiation and conclusion and *in the fulfilment of the commitments entered into*. The Court inferred therefrom that the obligation to cooperate flows from the requirement of unity in the international representation of the European Union (judgment of 20 April 2010, *Commission* v. *Sweden*, C-246/07, EU:C:2010:203, paragraph 73). See also, judgment of 30 May 2006, *Commission* v. *Ireland* (C-459/03, EU:C:2006:345).

[69] The Member States are obliged, under, inter alia, the principle of sincere cooperation laid down in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and compliance with EU law and, under the second subparagraph of Article 4(3) TEU, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations under the Treaties or resulting from the acts of the EU institutions (see, to that effect, judgment of 14 September 2017, *The Trustees of the BT Pension Scheme*, C-628/15, EU:C:2017:687, paragraph 47). According to the Court, that principle does not authorise a Member State to circumvent the obligations that are imposed upon it by EU law (judgment of 18 October 2016, *Nikiforidis*, C-135/15, EU:C:2016:774, paragraph 54).

[70] See points 122 to 127 of this Opinion.

[71] On the framing of powers, see, L. Azoulai, "The 'Retained Powers' Formula in the Case Law of the European Court of Justice: EU Law as Total Law?", *European Journal of Legal Studies*, vol. 2, No 4, 2011, pp. 192 to 219; J. Lindeboom, "Why EU Law Claims Supremacy", *Oxford Journal of Legal Studies*, vol. 38, summer 2018, pp. 328 to 356, https://doi.org/10.1093/ojls/gqy008; and E. Neframi, "Le principe de coopération loyale comme fondement identitaire de l'Union européenne", *Revue du Marché Commun et de l'Union Européenne*, No 556, 2012, pp. 197 to 203.

framing of powers,[72] the present case concerns conduct, that is to say, a failure to implement the arbitration award, that has no link to EU provisions.

139. My view is therefore that, in those circumstances, the Court does not have jurisdiction to hear and determine the complaint alleging infringement of Article 4(3) TEU.

140. I therefore consider that the complaints alleging infringement of primary law must be rejected, since the Court does not have jurisdiction to examine a dispute that is primarily international, the infringement of EU law being merely ancillary. It is necessary to examine the complaints alleging infringements of provisions of secondary law.

3. Complaints based on secondary law

141. As is apparent from the general analysis of the complaints alleging infringements of secondary law advanced by the Republic of Slovenia, that party is relying, in support of those complaints, on the premiss that the boundary between the Republic of Croatia and the Republic of Slovenia has been determined by the arbitration award at issue made on the basis of the arbitration agreement. However, as I have observed several times in this Opinion, that agreement and the arbitration award at issue are not matters of EU law. Similarly, as I stated in the section relating to preliminary remarks, in particular points 109 to 112 of this Opinion, it can be seen from Article 52 TEU and Article 355 TFEU that the territorial scope of the Treaties is an objective fact predetermined by the Member States which the European Union has to accept. Against that background, it is necessary to examine whether the arbitration award at issue can be applied directly in the context of an action for failure to fulfil obligations.

(a) The arbitration award at issue is not self-executing and has not been implemented

142. On the one hand, I consider that, in principle, it would be possible to accept the Republic of Slovenia's thesis that a decision of a recognised international court, such as the International Court of Justice ("the ICJ") or the PCA, constitutes a legal fact for this Court

[72] See, by way of example, regarding direct taxation, judgments of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraph 21); of 11 August 1995, *Wielockx* (C-80/94, EU:C:1995:271, paragraph 16); and of 16 July 1998, *ICI* (C-264/96, EU:C:1998:370, paragraph 19).

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(*res judicata*).[73] In the present instance, in implementation of the arbitration agreement,[74] the proceedings before the arbitral tribunal at issue were conducted under the auspices of a permanent arbitral institution, the PCA,[75] which was appointed to act as Registry[76] by both the States in question.[77]

143. On the other hand, to my mind, under EU law (Article 52 TEU and Article 355 TFEU) and, in particular, as regards the Member States' responsibility for implementing that law, it is vital not only that the boundary between those States is legally and politically delimited, but that the delimitation is also implemented and operational. The Treaties do not give the European Union any power to determine where the respective territories belonging to two neighbouring States begin and end. Determining the extent and limits of territory concerns the sovereignty of each Member State, in accordance with the rules of public international law, as can be seen, *mutatis mutandis*, from *Aktiebolaget NN*.[78]

144. It is to be noted, for that purpose, that, first, under the principle of conferral enshrined in Article 5(2) TEU, the European Union is to act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein[79] and that, second, according to Article 4(1) TEU, any competence not conferred upon the European Union remains with the Member States. In my view, the present case concerns a competence reserved to the Member States. Accordingly, to enable EU law to be applied, the State boundaries must not only be determined under public international law, but must also be delimited in factual terms.

145. Even though the disputed boundary between the Republic of Croatia and the Republic of Slovenia has been determined by the arbitration award at issue, as is apparent from the documents before

[73] In its judgment of 21 December 2016, *Council* v. *Front Polisario* (C-104/16 P, EU:C:2016:973, paragraphs 88 to 91), the Court recently referred to the ICJ's consultative opinions as "sources of law", which I believe should nevertheless be distinguished from "legal facts".

[74] Under Article 6(2) of the arbitration agreement, the arbitral tribunal was obliged to conduct the proceedings according to the PCA Optional Rules for Arbitrating Disputes between Two States. Those Rules are available at https://pca-cpa.org/fr/documents/pca-conventions-and-rules/.

[75] The PCA is established in The Hague and was created by the Conventions for the Pacific Settlement of International Disputes concluded in The Hague in 1899 and 1907.

[76] See paragraph 148 of the arbitration award at issue.

[77] See footnote 17 of this Opinion.

[78] Judgment of 29 March 2007 (C-111/05, EU:C:2007:195, paragraph 54).

[79] See, to that effect, Opinion 2/94 (*Accession of the Community to the ECHR*) of 28 March 1996 (EU:C:1996:140, paragraph 24); judgments of 1 October 2009, *Commission* v. *Council* (C-370/07, EU:C:2009:590, paragraph 46), and of 25 October 2017, *Commission* v. *Council (CMR-15)* (C-687/15, EU:C:2017:803, paragraph 48).

the Court, it should be noted that, in the present case, the Republic of Croatia fiercely contests the applicability and validity of the arbitration award at issue. Indeed, it cannot be overlooked that, by *note verbale* of 30 July 2015, the Republic of Croatia notified the Republic of Slovenia that it was terminating the arbitration agreement and that the procedure under Article 65 of the Vienna Convention was potentially applicable.[80] That notification was also given to the arbitral tribunal on 31 July 2015. Accordingly, from the time of that notification, the Republic of Croatia withdrew from the arbitration proceedings and no longer took part in them. In its written submissions and at the hearing, it argued that, by issuing the award at issue, the arbitral tribunal had exceeded its powers.[81]

146. More generally, it should be noted that it is not unknown, in the history of international law and even today,[82] for one of the parties to arbitration proceedings not to recognise the validity of an award made by an arbitral tribunal or to refuse to implement that award.[83] Indeed, even though there is no binding mechanism for reviewing inter-State arbitration awards, a State that disputes such an award can bring a dispute concerning the validity of that award before the ICJ.[84]

147. In that context, it is hardly surprising that the Republic of Croatia, in order to explain its reasons for not recognising the arbitration award at issue, relies on a claim that the arbitral tribunal exceeded

[80] Paragraph 84 of the partial arbitration award.

[81] Paragraphs 87 to 92 of the objection of inadmissibility.

[82] By way of example, the People's Republic of China does not recognise the arbitration award made by the PCA in the arbitration concerning the South China Sea (*Republic of Philippines* v. *People's Republic of China*, No 2013-19, award of 12 July 2016).

[83] See, for example, award of 15 June 1911, *Chamizal* case, *Repertory of International Arbitral Jurisprudence*, No 1073; Boundary between Canada and the United States of America, *United States of America* v. *United Kingdom*, award of 10 January 1831 by William I of the Netherlands, *Repertory of International Arbitral Jurisprudence*, Nos 1054 and 1080; and Treaty of Limits of 1858, *Costa Rica* v. *Nicaragua*, award of 22 March 1888 by American President G. Cleveland, *Repertory of International Arbitral Jurisprudence*, No 1003.

[84] See G. Giraudeau, *Les différends territoriaux devant le juge international: entre droit et transaction*, pp. 122 to 125. See, in particular, the cases of the *Arbitral Award Made by the King of Spain on 23 December 1906* (judgment of the ICJ of 18 November 1960 in *Honduras* v. *Nicaragua*, ICJ Reports 1960, p. 214) and of the *Arbitral Award of 31 July 1989* (judgment of the ICJ of 12 November 1991, *Guinea–Bissau* v. *Senegal*, ICJ Reports 1992, p. 76). In the first case, Nicaragua had refused to give effect to the arbitration award made in 1906, leading the Government of Honduras to bring proceedings before the ICJ for a declaration to that effect. In its judgment of 18 November 1960, the ICJ confirmed that the award in question was valid. In the second case, Guinea–Bissau had refused to apply the 1989 arbitration award concerning the maritime delimitation to be effected between Guinea–Bissau and Senegal. On the basis of the declarations made by those two States, Guinea–Bissau therefore brought proceedings before the ICJ, under Article 36(2) of the Statute of the ICJ. In its judgment of 12 November 1991, the ICJ held that the award in question was valid.

its powers merely by issuing that award.[85] In practice, when a State disputes an inter-State arbitration award, that award represents in reality merely an attempt to resolve the dispute in question since, in public international law and given the fact that it can be regarded as inherently executory, there is no binding mechanism, independent of the sovereign will of the States, that ensures the implementation of inter-State arbitration awards.[86]

148. Even supposing that, from an international law perspective, the partial award contains a legal assessment of the facts that are referred to in point 145 of this Opinion,[87] it is nevertheless true that the award has not, to date, been implemented in the relations between the Republic of Croatia and the Republic of Slovenia. I note in that respect that according to Article 7(3) of the arbitration agreement, "the parties shall take all necessary steps to implement the award, including by revising national legislation, as necessary, within six months after the adoption of the award". I concur to that effect with the argument of the Republic of Croatia, put forward at the hearing, that the arbitration award at issue is not self-executing,[88] which is to my mind tantamount to saying that it is not directly applicable.[89]

149. I am therefore of the view that the arbitration award at issue has not been implemented in the relations between the Republic of Croatia and the Republic of Slovenia, and that therefore, from an EU law perspective, the boundary between those two Member States has not been established either within the meaning of Article 52 TEU and

[85] Paragraphs 87 to 92 of the objection of inadmissibility.

[86] L. N. Caldeira Brant, *L'autorité de la chose jugée en droit international public*, pp. 209 to 211.

[87] See paragraphs 148 to 225 of the partial award.

[88] By way of secondary point, as regards whether ICJ judgments are self-executing, see the judgment of the United States Supreme Court of 25 March 2008, *Medellín* v. *Texas* (552, US 491 (2008)). The Supreme Court had to decide whether an individual could rely on the ICJ judgment of 31 March 2004 in *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*, ICJ Reports 2004, pp. 12 to 73, before the US courts. The Supreme Court summarised the distinction drawn in the case-law between self-executing international obligations that are immediately applicable in the same way as federal law, and treaties that require domestic implementing measures. In that case, the Supreme Court held that no provision of the treaties governing the effects of ICJ judgments in the area concerned, that is to say, first, the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, secondly, Article 94 of the Charter of the United Nations and, thirdly, the Statute of the ICJ, made those judgments self-executing (US 507 to 512). Accordingly, to be capable of being relied upon before the US courts, ICJ judgments must have been implemented and made applicable by federal law (US 504), and the legislature can, for that purpose, pass laws making those judgments applicable in domestic law (US 527).

[89] See J. Verhoeven, "La notion d''applicabilité directe' du droit international", RBDI, 243, No 13-14, 1986. According to a broad definition, "a rule of international law is directly applicable where, without requiring any domestic implementing measure, it can be applied in the State where that rule is in force".

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Article 355 TFEU or within the meaning of the *Aktiebolaget NN*[90] case-law, according to which it is for each Member State to determine the extent and limits of its territory, in accordance with the rules of public international law. Given that determining the boundaries between Member States is not a competence conferred on the European Union, for the purposes of Article 5(2) TEU, and does not fall within the scope *ratione materiae* of EU law, the matters at issue cannot be the subject matter of an action for failure to fulfil obligations under Article 259 TFEU.

150. In the light of the foregoing, the specific complaints based on secondary law advanced by the applicant in support of its action should be examined separately. It is necessary to analyse whether the Court of Justice has jurisdiction to hear and determine the complaints in support of the action based on, first, (section b) Article 5(2) of and Annex I to Regulation No 1380/2013 (third complaint) and, secondly, (section c) the control system, inspection and the implementation of the control system under Regulation No 1224/2009 and Implementing Regulation No 404/2011 (fourth complaint), Articles 4 and 17, in conjunction with Article 13, of the Schengen Borders Code (fifth complaint) and Articles 2(4) and 11(1) of Directive 2014/89 (sixth complaint).

(b) The third complaint, alleging infringement of Regulation No 1380/2013

151. By its third complaint, the Republic of Slovenia claims that, by failing to respect its territory, the Republic of Croatia has infringed EU law in relation to the common fisheries policy, specifically Article 5(2) of and Annex I to Regulation No 1380/2013.[91]

152. I note at the outset that, unlike other acts of secondary law invoked by the Republic of Slovenia, Regulation No 1380/2013 contains an explicit reference to the forthcoming arbitration award. According to the footnotes to points 8 and 10, entitled "Coastal waters of Croatia" (point 8) and "Coastal waters of Slovenia" (point 10), of Annex I to Regulation No 1380/2013, "the above mentioned regime shall apply from the full implementation of the arbitration award . . .". Since Regulation No 1380/2013 is an EU legislative act within the meaning of Article 297 TFEU, the Court clearly has jurisdiction to decide whether the requirements for that regulation to apply are satisfied, that is to say, whether the specific neighbourhood relations

[90] Judgment of 29 March 2007 (C-111/05, EU:C:2007:195).

[91] See, in particular, the summary of the complaints at page 3 of the application and the form of order sought in the application.

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regime under Article 5(2) of that regulation, in the light of the precise indications in Annex I, applies.

153. However, to the extent that, by that third complaint, alleging infringement of Article 5(2) of and Annex I to Regulation No 1380/2013,[92] the Republic of Slovenia is seeking a declaration that the Republic of Croatia has infringed the regime established in that article, my view is that the Court does not have jurisdiction to examine that complaint.

154. It should be observed in that respect that Article 5(1) of Regulation No 1380/2013 provides for equal access to waters and resources in all EU waters, with the exception of those referred to, in particular, in Article 5(2). Article 5(2) authorises the Member States, in the waters up to 12 nautical miles from baselines under their sovereignty or jurisdiction, until 31 December 2022, to restrict fishing to fishing vessels that traditionally fish in those waters from ports on the adjacent coast, without prejudice to the arrangements for EU fishing vessels flying the flag of other Member States under existing neighbourhood relations between Member States and the arrangements contained in Annex I, fixing for each Member State the geographical zones within the coastal bands of other Member States where fishing activities are pursued and the species concerned. Annex I to that regulation defines the conditions of access to coastal bands within the meaning of Article 5(2) of the regulation. According to the footnotes to points 8 and 10 of Annex I to Regulation No 1380/2013, entitled "Coastal waters of Croatia" (point 8) and "Coastal waters of Slovenia" (point 10), "the above mentioned regime shall apply from the full implementation of the arbitration award . . .". In the absence of further clarification of that wording, it is necessary to interpret it in order to understand the scope of that reference to the forthcoming arbitration award.

155. The Court has already stated that the expression "the above mentioned regime" referred to certain specific arrangements giving EU fishing vessels flying the flags of other Member States the right to fish in the 12-mile zones under pre-existing neighbourhood relations between Member States.[93] That expression should therefore be

[92] I would note that, in the form of order applied for in the application, the Republic of Slovenia criticises the Republic of Croatia for a series of acts (see page 41 of the application), *all* of which it describes as infringements of Article 5(2) of and Annex I to Regulation No 1380/2013.

[93] In its judgment of 19 March 2005, *Spain* v. *Council* (C-91/03, EU:C:2005:174, paragraph 44), the Court, inter alia, interpreted Article 17(2) of and Annex I to Regulation No 2371/2002, now Article 5(2) of and Annex I to Regulation No 1380/2013 respectively, which were worded similarly. The Court stated that Annex I to the contested regulation, to which Article 17(2) referred, fixed for each of the Member States the geographical zones within the coastal bands of other Member States where those activities were pursued and the species concerned.

understood as referring to the specific reciprocal access regime "applicable to Union fishing vessels flying the flags of other Member States under pre-existing neighbourhood relations between Member States" ("the specific regime under neighbourhood relations").

156. As regards the expression "from the full implementation of the arbitration award" in points 8 and 10 of Annex I to Regulation No 1380/2013, which reflect the contents of the Act of Accession,[94] it follows that the final award is an act that dictates the application *ratione temporis* of the specific regime under neighbourhood relations, the arrangements for which are laid down in Annex I to the regulation. Accordingly, that regime cannot come into force before "full implementation" of the future arbitration award by the Republic of Croatia and the Republic of Slovenia. In other words, the purpose of points 8 and 10 of Annex I is to suspend applicability of that regime pending resolution of the dispute concerning the contested boundaries between those two States. In the present instance, as the Republic of Croatia confirmed at the hearing, the arbitration award at issue has not been implemented, because that Member State believes that it has validly terminated the arbitration agreement[95] and refuses to recognise the arbitration award at issue made under it. I am therefore of the view that, so far as the Croatian and Slovenian coastal waters are concerned, the aforementioned specific regime under neighbourhood relations does not apply *ratione temporis*. Given that the applicant alleges that the Republic of Croatia has infringed the specific regime under neighbourhood relations, established in Article 5(2) of Regulation No 1380/2013, which applied neither during the alleged failures to fulfil obligations nor during these proceedings, because the arbitration award at issue has not been implemented, in my view the Court does not have jurisdiction to examine the third complaint.

(c) The fourth to sixth complaints in support of the action

157. For the fourth to sixth complaints advanced by the Republic of Slovenia, it relies on provisions relating to the control system established by Regulation No 1224/2009 and Implementing Regulation No 404/2011 (fourth complaint), Articles 4 and 17, in conjunction with Article 13, of the Schengen Borders Code (fifth complaint) and Articles 2(4) and 11(1) of Directive 2014/89 (sixth complaint).

[94] See point 15 of this Opinion.

[95] I would point out that Article 7(3) of the arbitration agreement stipulates an obligation to "take all necessary steps" to implement the arbitration award within six months after its adoption.

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158. First, in respect of the fourth complaint, alleging infringement of the provisions in Regulation No 1224/2009 and Implementing Regulation No 404/2011, the conduct criticised is the fact that "Croatian police patrol boats, without authorisation from the Republic of Slovenia, are accompanying Croatian fishing vessels when they fish in Slovenian waters, thereby preventing Slovenian fishing inspectors from carrying out controls." The applicant adds that "the Croatian authorities are imposing fines on Slovenian fishing vessels for unlawful boundary crossing and illegal fishing when they fish in Slovenian waters which [the Republic of] Croatia claims for itself" and that the Republic of Croatia "is not sending [the Republic of] Slovenia the data regarding the activities of Croatian vessels in Slovenian waters, as is required by those two regulations". It concludes that, by so doing, the Republic of Croatia "is not permitting the [Republic of Slovenia] to carry out controls in waters under its sovereignty and jurisdiction and is not respecting the Republic of Slovenia's exclusive jurisdiction over its territorial waters as a coastal State".[96]

159. Secondly, in relation to the fifth complaint, alleging infringement of the Schengen Borders Code, I note that, according to the Republic of Slovenia, the Republic of Croatia "does not recognise the boundaries established by the arbitration award as a common boundary with [the Republic of] Slovenia, is not cooperating with [that State] to protect that "external border" and is not in a position to guarantee adequate protection of that border", thereby contravening Articles 4, 13 and 17 of that code.

160. Thirdly, as regards the sixth complaint, based on an alleged infringement of Directive 2014/89, it should be noted that the Republic of Slovenia relies directly on the failure to implement the arbitration award at issue delimiting territorial waters for the purposes of Article 2(4) of that directive. According to the applicant, the Republic of Croatia includes Slovenian waters in its maritime spatial planning and, consequently, prevents harmonisation with the maps of the Republic of Slovenia

161. It should be stated in that respect that the Republic of Slovenia's arguments relating to the alleged infringement of secondary law are based on the premiss that the disputed boundary has in fact been determined. That statement is corroborated by the events invoked by the Republic of Slovenia in support of its claims, from which it is

[96] Summary of pleas at pages 3 and 4 and in paragraphs 100 to 109 of the application.

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apparent that those events would not have occurred if there had been an operational boundary between the Republic of Croatia and the Republic of Slovenia. However, as can be seen from points 145 to 150 of this Opinion, in my view that is not the case, because the arbitration award at issue has never been implemented. This means that the Republic of Slovenia is seeking, by implication, to have the arbitration award at issue implemented. However, such an application for implementation falls outside the European Union's sphere of competence. If the Court had to rule on the fourth to sixth complaints worded in that way, it would find itself having to rule on the issue of the disputed boundary whereas, as can be seen from points 143 and 144 of this Opinion, that competence lies with the Member States (see point 110 of this Opinion). The alleged infringements of secondary law are therefore inherently ancillary to the question of determining, on the basis of the facts, the boundary between the Republic of Croatia and the Republic of Slovenia. I therefore propose that the Court should find that it does not have jurisdiction to hear and determine the fourth to sixth complaints put forward by the Republic of Slovenia in support of its action.

162. In the light of the foregoing, I propose that the Court should find that it does not have jurisdiction to hear and determine the complaint based on primary law and on secondary law and, therefore, to rule on the present action in its entirety.

163. It is therefore unnecessary to examine further the matter of the Republic of Croatia's grounds of challenge relating to the inadmissibility of the application.

D. Summary of the analysis

164. Although the complaint alleging failures to fulfil obligations advanced by the Republic of Slovenia might, at first sight, appear to be complaint relating to EU law for the purposes of Article 259 TFEU, after in-depth analysis I have reached the conclusion that any finding that the Republic of Croatia has committed the infringements alleged would be based on the premiss that the boundary between the Republic of Croatia and the Republic of Slovenia has been determined. Determining that boundary is, by its very nature, a matter falling within public international law, as is confirmed by analysing the arbitration agreement and the arbitration award at issue, which cannot be regarded as acts of EU law. Questions concerning the validity, interpretation and implementation of those two international legal instruments cannot be the subject matter of a failure to

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fulfil obligations under Article 259 TFEU. Furthermore, I find that the arbitration award at issue has not been implemented in the relations between those two Member States, and is moreover not self-executing. It follows that, under EU law, the disputed boundary has not been established between the Republic of Croatia and the Republic of Slovenia for the purposes of Article 52 TEU and Article 355 TFEU. Since the alleged failures to fulfil obligations advanced by the Republic of Slovenia relate to the disputed boundary between those two Member States, those allegations must be found to be merely ancillary to resolution of the international dispute, which does not fall within EU law and over which the Court does not have jurisdiction.

165. Ultimately, I am bound to say that it is regrettable that the boundary dispute could not be definitively resolved even once the arbitration award at issue was made. Nevertheless, I am persuaded that the resolution of that dispute must be a political one.

VII. COSTS

166. Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

167. It is apparent from the grounds set out above that the Republic of Slovenia is the unsuccessful party in the present case and must bear its own costs and pay those of the Republic of Croatia.

VIII. CONCLUSION

168. In the light of the foregoing, I propose that the Court should:

– remove from the case file the opinion of the European Commission's Legal Service contained in Annex C.2 to the Republic of Slovenia's response to the objection of inadmissibility;
– declare that the Court of Justice of the European Union does not have jurisdiction to hear and determine the present action;
– order the Republic of Slovenia to bear its own costs and pay those of the Republic of Croatia.

[Report: EU:C:2019:1067]

[The text of the judgment of the Court of Justice commences on the following page.]

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JUDGMENT OF THE COURT OF JUSTICE*

1. By its application, the Republic of Slovenia requests the Court to declare that the Republic of Croatia has failed to fulfil its obligations under:

– Article 4(3) TEU, in that it has jeopardised the attainment of the objectives of the European Union, in particular peace building and ever closer union among the peoples of Europe, and has prevented the Republic of Slovenia from complying with its obligation to implement EU law fully throughout its territory;
– the principle of the rule of law, enshrined in Article 2 TEU, which is an essential condition of membership of the European Union and obliges the Republic of Croatia to respect the territory of the Republic of Slovenia as determined by the final award made on 29 June 2017 by the tribunal established in the arbitration procedure relating to the territorial and maritime dispute between those two States (Permanent Court of Arbitration, Case No 2012-04; "the arbitration award"), in accordance with international law;
– Article 5(2) of Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC (OJ 2013 L 354, p. 22) and Annex I thereto, in that the Republic of Croatia has refused to implement the reciprocal access regime laid down by Regulation No 1380/2013, has not recognised the effect of the legislation that the Republic of Slovenia has adopted to implement that reciprocal access regime, has refused Slovenian nationals the right to fish in the Slovenian territorial sea and has prevented the Republic of Slovenia from enjoying rights, such as the adoption of measures for the conservation and management of fish stocks, provided for by that regulation;
– the system of control, of inspection and of implementation of the rules as provided for by Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No 847/96, (EC) No 2371/2002, (EC) No 811/2004, (EC) No 768/2005, (EC) No 2115/2005, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007, (EC) No 676/

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2007, (EC) No 1098/2007, (EC) No 1300/2008, (EC) No 1342/2008 and repealing Regulations (EEC) No 2847/93, (EC) No 1627/94 and (EC) No 1966/2006 (OJ 2009 L 343, p. 1), and by Commission Implementing Regulation (EU) No 404/2011 of 8 April 2011 laying down detailed rules for the implementation of Council Regulation (EC) No 1224/2009 establishing a Community control system for ensuring compliance with the rules of the Common Fisheries Policy (OJ 2011 L 112, p. 1), in that the Republic of Croatia has prevented the Republic of Slovenia from carrying out the task assigned to it under that system, as well as the monitoring, control and inspection of fishing vessels and, when inspections reveal any breaches of the rules of the common fisheries policy, procedures and enforcement measures against the persons responsible for the breach, and in that it has itself exercised the rights which those regulations grant to the Republic of Slovenia as the coastal State;

– Articles 4 and 17, read in conjunction with Article 13, of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2016 L 77, p. 1; "the Schengen Borders Code"); and
– Articles 2(4) and 11(1) of Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 establishing a framework for maritime spatial planning (OJ 2014 L 257, p. 135), in that it has adopted and implemented the "Spatial planning strategy of the Republic of Croatia".

LEGAL CONTEXT

International law

The Vienna Convention

2. Article 60 of the Vienna Convention on the Law of Treaties of 23 May 1969 (*United Nations Treaty Series*, vol. 1155, p. 331; "the Vienna Convention"), headed "Termination or suspension of the operation of a treaty as a consequence of its breach", provides in paragraphs 1 and 3:

> 1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
>
> . . .

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3. A material breach of a treaty, for the purposes of this article, consists in:

. . .

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

. . .

3. Article 65 of the Vienna Convention, headed "Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty", states in paragraphs 1 and 3:

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

. . .

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations [signed in San Francisco on 26 June 1945].

The arbitration agreement

4. An arbitration agreement between the Republic of Slovenia and the Republic of Croatia was signed in Stockholm on 4 November 2009 ("the arbitration agreement").

5. Article 1 of the arbitration agreement sets up an arbitral tribunal.

6. Article 2 of the arbitration agreement establishes the composition of the arbitral tribunal and, in particular, the procedures for appointing and replacing its members.

7. Article 3 of the arbitration agreement, headed "Task of the Arbitral tribunal", provides in paragraph 1 that the arbitral tribunal is to determine (a) the course of the maritime and land boundary between Croatia and Slovenia, (b) Slovenia's junction to the high sea and (c) the regime for the use of the relevant maritime areas. Article 3(2) sets out the procedure for determining the precise subject matter of the dispute, Article 3(3) provides that the arbitral tribunal is to render an award on the dispute and Article 3(4) gives the arbitral tribunal the power to interpret the arbitration agreement.

8. Under Article 4(a) of the arbitration agreement, the arbitral tribunal is to apply, for the determinations referred to in Article 3(1)(a) of that agreement, the rules and principles of international law. Article 4(b) of the agreement states that the arbitral tribunal is to apply,

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for the determinations referred to in Article 3(1)(b) and (c), international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result by taking into account all relevant circumstances.

9. Article 6(2) of the arbitration agreement provides that, unless envisaged otherwise, the arbitral tribunal is to conduct the proceedings according to the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States. Article 6(4) provides that the arbitral tribunal, after consultation of the parties, is to decide expeditiously on all procedural matters by majority of its members.

10. Article 7(1) of the arbitration agreement states inter alia that the arbitral tribunal is to issue its award expeditiously after due consideration of all relevant facts pertinent to the case. Article 7(2) provides that the arbitration award is to be binding on the parties and is to constitute a definitive settlement of the dispute. Under Article 7(3), the parties are to take all necessary steps to implement the award, including by revising national legislation, as necessary, within six months after the adoption of the award.

11. Pursuant to Article 9(1) of the arbitration agreement, the Republic of Slovenia is to lift its reservations as regards the opening and closing of negotiation chapters in respect of the accession of the Republic of Croatia to the European Union where the obstacle is related to the dispute.

12. Under Article 11(3) of the arbitration agreement, all procedural timelines expressed in the agreement are to start to apply from the date of the signature of the Treaty between the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Croatia concerning the accession of the Republic of Croatia to the European Union (OJ 2012 L 112, p. 10; "the Treaty concerning the accession of Croatia to the European Union"). The date of signature was 9 December 2011.

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EU law

Primary law

13. Article 15 of the Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community (OJ 2012 L 112, p. 21; "the Act of Accession"), annexed to the Treaty concerning the accession of Croatia to the European Union, provides:

The acts listed in Annex III shall be adapted as specified in that Annex.

14. Point 5 of Annex III to the Act of Accession, headed "Fisheries", adapted Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (OJ 2002 L 358, p. 59) by adding points 11 and 12, respectively headed "Coastal waters of Croatia" and "Coastal waters of Slovenia", to Annex I to that regulation. The footnotes to points 11 and 12 state, in identical terms, that "[the] regime [governing access to the coastal waters of Croatia and Slovenia under neighbourhood relations] shall apply from the full implementation of the arbitration award resulting from the [arbitration agreement]". Those points and footnotes were, in essence, reproduced in Regulation No 1380/2013, which repealed Regulation No 2371/2002.

Secondary law

– Regulation (EC) No 1049/2001

15. As provided in Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43):

The institutions shall refuse access to a document where disclosure would undermine the protection of:

. . .

– court proceedings and legal advice,

. . .

unless there is an overriding public interest in disclosure.

– Regulation No 1224/2009 and Implementing Regulation No 404/2011

16. Regulation No 1224/2009, as stated in Article 1 thereof, establishes a Community system for control, inspection and

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enforcement to ensure compliance with the rules of the common fisheries policy.

17. Implementing Regulation No 404/2011 lays down detailed rules for the application of that control system.

– *Regulation No 1380/2013*

18. Article 5(1) and (2) of Regulation No 1380/2013 states:

> 1. Union fishing vessels shall have equal access to waters and resources in all Union waters other than those referred to in paragraphs 2 and 3, subject to the measures adopted under Part III.
>
> 2. In the waters up to 12 nautical miles from baselines under their sovereignty or jurisdiction, Member States shall be authorised, until 31 December 2022, to restrict fishing to fishing vessels that traditionally fish in those waters from ports on the adjacent coast, without prejudice to the arrangements for Union fishing vessels flying the flag of other Member States under existing neighbourhood relations between Member States and the arrangements contained in Annex I, fixing for each Member State the geographical zones within the coastal bands of other Member States where fishing activities are pursued and the species concerned. Member States shall inform the Commission of the restrictions put in place under this paragraph.

19. Annex I to Regulation No 1380/2013, headed "Access to coastal waters within the meaning of Article 5(2)", lays down, in points 8 and 10, access regimes concerning, respectively, the "coastal waters of Croatia" and the "coastal waters of Slovenia". The footnotes to those points specify, in identical terms, that "[the] regime [governing access to the coastal waters of Croatia and Slovenia under neighbourhood relations] shall apply from the full implementation of the arbitration award resulting from the [arbitration agreement]".

– *Directive 2014/89*

20. Directive 2014/89, as provided in Article 1(1) thereof, establishes a framework for maritime spatial planning aimed at promoting the sustainable growth of maritime economies, the sustainable development of marine areas and the sustainable use of marine resources.

21. Article 2 of Directive 2014/89, headed "Scope", provides in paragraph 4:

> This Directive shall not affect the sovereign rights and jurisdiction of Member States over marine waters which derive from relevant international law, particularly [the United Nations Convention on the Law of the Sea (Unclos), which was signed in Montego Bay on 10 December 1982 and entered into force on 16 November 1994 (*United Nations Treaty Series*,

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vols. 1833, 1834 and 1835, p. 3)]. In particular, the application of this Directive shall not influence the delineation and delimitation of maritime boundaries by the Member States in accordance with the relevant provisions of Unclos.

22. Article 11 of Directive 2014/89, headed "Cooperation among Member States", states in paragraph 1:

As part of the planning and management process, Member States bordering marine waters shall cooperate with the aim of ensuring that maritime spatial plans are coherent and coordinated across the marine region concerned. Such cooperation shall take into account, in particular, issues of a transnational nature.

– *The Schengen Borders Code*

23. Article 4 of the Schengen Borders Code, headed "Fundamental Rights", states:

When applying this Regulation, Member States shall act in full compliance with relevant Union law, including the Charter of Fundamental Rights of the European Union . . ., relevant international law, including the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 [(*United Nations Treaty Series*, vol. 189, p. 150, No 2545 (1954))], obligations related to access to international protection, in particular the principle of *non-refoulement*, and fundamental rights. . . .

24. Article 13(1) and (2) of the Schengen Borders Code provides:

1. The main purpose of border surveillance shall be to prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally. A person who has crossed a border illegally and who has no right to stay on the territory of the Member State concerned shall be apprehended and made subject to procedures respecting Directive 2008/115/EC [of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98)].

2. The border guards shall use stationary or mobile units to carry out border surveillance.

That surveillance shall be carried out in such a way as to prevent and discourage persons from circumventing the checks at border crossing points.

25. Article 17 of the Schengen Borders Code, headed "Cooperation between Member States", provides in paragraphs 1 to 3:

1. The Member States shall assist each other and shall maintain close and constant cooperation with a view to the effective implementation of border

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control, in accordance with Articles 7 to 16. They shall exchange all relevant information.

2. Operational cooperation between Member States in the field of management of external borders shall be coordinated by the [European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union].

3. Without prejudice to the competences of the Agency, Member States may continue operational cooperation with other Member States and/or third countries at external borders, including the exchange of liaison officers, where such cooperation complements the action of the Agency.

Member States shall refrain from any activity which could jeopardise the functioning of the Agency or the attainment of its objectives.

Member States shall report to the Agency on the operational cooperation referred to in the first subparagraph.

BACKGROUND TO THE DISPUTE

26. On 25 June 1991, the Republic of Croatia and the Republic of Slovenia proclaimed their independence vis-à-vis the Socialist Federal Republic of Yugoslavia. From 1992 to 2001 those two States tried to resolve the issue of establishment of their common land and sea borders through bilateral negotiations. The negotiations remained unsuccessful in respect of certain segments of those borders.

27. The Republic of Slovenia became a member of the European Union on 1 May 2004.

28. On 4 November 2009, the Republic of Croatia and the Republic of Slovenia signed the arbitration agreement, intended to resolve the border dispute between them. Under that agreement, which entered into force on 29 November 2010, they undertook to submit the dispute to the arbitral tribunal which was set up by the agreement and whose award would be binding on them.

29. Following ratification by all the Contracting States in accordance with their respective constitutional rules, the Treaty concerning the accession of Croatia to the European Union entered into force on 1 July 2013. The Republic of Croatia became a member of the European Union on the same date.

30. It is apparent from the file for the present case that, in the course of the arbitration proceedings before the arbitral tribunal, a procedural issue arose on account of unofficial communications in the course of its deliberations between the arbitrator appointed by the Republic of Slovenia and that State's Agent before the arbitral tribunal. Following the publication in the press of certain articles indicating the content of

those communications, the arbitrator and agent concerned resigned from their respective appointments.

31. By letter of 24 July 2015, the Republic of Croatia sent extracts from those communications to the arbitral tribunal and, in the light of the fundamental loss of trust that in its view was caused by the communications, requested the arbitral tribunal to suspend the arbitration proceedings.

32. By *note verbale* of 30 July 2015, the Republic of Croatia informed the Republic of Slovenia that it considered that the latter was responsible for one or more material breaches of the arbitration agreement, for the purposes of Article 60(1) and (3) of the Vienna Convention, and that it was consequently entitled to terminate the arbitration agreement. It stated that the *note verbale* constituted a notification, pursuant to Article 65(1) of the Vienna Convention, by which it proposed to terminate the arbitration agreement forthwith. The Republic of Croatia explained that, in its view, as a result of the unofficial communications referred to in paragraph 30 of the present judgment, the impartiality and integrity of the arbitration proceedings had been irrevocably damaged, giving rise to a manifest violation of its rights.

33. On the same date, the member of the arbitral tribunal appointed by the Republic of Croatia resigned from his appointment.

34. By letter of 31 July 2015, the Republic of Croatia informed the arbitral tribunal that it had decided to terminate the arbitration agreement and told it the reasons for so doing.

35. On 13 August 2015, the Republic of Slovenia informed the arbitral tribunal that it had raised an objection to the Republic of Croatia's notification of its decision to terminate the arbitration agreement and took the view that the arbitral tribunal had the power and the duty to continue the proceedings.

36. On 25 September 2015, the president of the arbitral tribunal appointed two new arbitrators to the two vacant posts, in accordance with the procedure for replacing arbitrators that is laid down in Article 2 of the arbitration agreement.

37. By letter of 1 December 2015, the arbitral tribunal requested both parties to file written submissions "concerning the legal implications of the matters set out in [the Republic of] Croatia's letters of 24 July 2015 and 31 July 2015" and it held a hearing on this issue on 17 March 2016. Only the Republic of Slovenia responded to the arbitral tribunal's request and took part in the hearing.

38. On 30 June 2016, the arbitral tribunal ruled on the procedural issue by means of a partial award. It held, in particular, that the Republic of Slovenia, by engaging in unofficial contact with the

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arbitrator originally appointed by it, had acted in breach of the arbitration agreement. The arbitral tribunal nevertheless took the view that, in view of the remedial action subsequently taken, those breaches had not affected its ability, in its new composition, to make a final award independently and impartially on the dispute between the parties, in accordance with the applicable rules, so that the breaches had not defeated the object and purpose of the arbitration agreement. The arbitral tribunal concluded that the Republic of Croatia was not entitled to terminate the arbitration agreement under Article 60(1) of the Vienna Convention and that it therefore remained in force.

39. On 29 June 2017, the arbitral tribunal made the arbitration award, by which it delimited the sea and land borders between the Republic of Croatia and the Republic of Slovenia.

PRE-LITIGATION PROCEDURE

40. By letter of 29 December 2017, the Republic of Slovenia drew the Commission's attention to the Republic of Croatia's rejection of the arbitration award and stated that that Member State's refusal to implement the award rendered it impossible for the Republic of Slovenia to exercise its sovereignty over sea and land areas which, in accordance with international law, formed part of its territory. That being so, the Republic of Slovenia stated that it was impossible for it to comply both with its obligation under international law to implement the arbitration award and with its obligation under the Treaties to implement EU law in its territory. In the light of the threat that that situation posed for the values of the European Union and for compliance with EU law, the Republic of Slovenia requested the Commission to act without delay to bring the Republic of Croatia's breach of the arbitration agreement and of the arbitration award to an end, as that breach had to be regarded as a failure by the Republic of Croatia to comply with the obligations owed by it under the Treaties.

41. Following a number of maritime incidents in the waters allocated to the Republic of Slovenia by the arbitration award, the Republic of Slovenia, by letter of 16 March 2018, initiated the procedure for a declaration of failure to fulfil obligations against the Republic of Croatia by bringing the matter before the Commission, in accordance with the second paragraph of Article 259 TFEU.

42. On 17 April 2018, the Republic of Croatia submitted written observations to the Commission. Both parties took part in a hearing before the Commission.

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43. The Commission did not deliver a reasoned opinion within the three-month period laid down in the fourth paragraph of Article 259 TFEU.

PROCEDURE BEFORE THE COURT

44. By document lodged at the Court Registry on 13 July 2018, the Republic of Slovenia brought the present action.

45. By separate document of 21 December 2018, the Republic of Croatia raised an objection of inadmissibility in respect of the present action, under Article 151(1) of the Rules of Procedure of the Court of Justice.

46. The Republic of Slovenia responded to the objection on 12 February 2019.

47. By decision of 21 May 2019, the Court referred the case to the Grand Chamber for a ruling on the objection of inadmissibility.

48. By separate document lodged at the Court Registry on 31 May 2019, the Republic of Croatia, pursuant to Article 151 of the Rules of Procedure, requested the removal from the case file of the internal Commission working document relating to the opinion of its Legal Service, which appears at pages 38 to 45 of Annex C.2 to the Republic of Slovenia's response to the objection of inadmissibility ("the document at issue").

49. By letters from the Court Registry of 3 and 12 June 2019, the parties were requested, by way of measures of organisation of procedure provided for in Article 62(1) of the Rules of Procedure, to answer a question at the forthcoming hearing and to produce certain documents. The parties duly produced the documents.

50. By letter from the Court Registry of 7 June 2019, the Court requested the Commission, pursuant to the second paragraph of Article 24 of the Statute of the Court of Justice of the European Union, to reply in writing or, as the case may be, at the hearing to questions relating to the provisions of Regulation No 1380/2013.

51. On 11 June 2019, the Republic of Slovenia submitted its observations on the Republic of Croatia's request that the document at issue be removed from the case file.

52. By letter from the Court Registry of 20 June 2019, the Court asked the Commission to submit its observations on that request.

53. On 28 June 2019, the Commission submitted its observations in that regard. In a separate letter of the same day, it replied to the questions that the Court had asked it in the letter of 7 June 2019.

54. A hearing concerning the objection of inadmissibility took place on 8 July 2019, in the presence of the Republic of Croatia and the Republic of Slovenia.

THE REQUEST THAT THE DOCUMENT AT ISSUE BE REMOVED FROM THE CASE FILE

Arguments of the parties

55. The Republic of Croatia requests the Court to remove the document at issue from the file for the present case.

56. In support of its request, the Republic of Croatia submits that the document at issue is an internal opinion of the Commission's Legal Service which was issued during the pre-litigation phase of the present proceedings for failure to fulfil obligations and has never been made public by the Commission. Retention of that document in the case file would not only have adverse effects on the proper functioning of the Commission but also be contrary to the requirements of a fair hearing.

57. The Republic of Slovenia contends that the Republic of Croatia's request should be rejected.

58. First, the Republic of Slovenia submits that it had access to the document at issue by means of a hyperlink in an article published on the website of a German weekly publication and states that both that article and the opinion of the Commission's Legal Service are still accessible online. Thus, the fact that it had access to the document at issue is not contrary to Regulation No 1049/2001 as that document is public.

59. Second, the Republic of Slovenia contends that the Republic of Croatia, which is not the author of the document at issue, is not entitled to act in place of the Commission in order to defend the latter's interests by requesting that that document be removed from the case file.

60. Third, the Republic of Slovenia contends that no guidance can be derived in the present case from the judgment of 1 July 2008, *Sweden and Turco* v. *Council* (C-39/05 P and C-52/05 P, EU:C:2008:374), and the order of 14 May 2019, *Hungary* v. *Parliament* (C-650/18, not published, EU:C:2019:438), given that the cases which gave rise to that judgment and that order concerned the unauthorised use of documents in disputes involving the institution which was their author. The situation in the present proceedings is of a different kind since the Commission, which is the author of the document at issue, is not participating in the proceedings as a defendant.

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61. In any event, the Republic of Slovenia states that the production of the document at issue is not capable of undermining the interests protected by Article 4 of Regulation No 1049/2001 and that the Republic of Croatia has not stated how retention of that document in the case file would undermine them.

62. Fourth, the Republic of Slovenia contends that, on the assumption that the Commission intervenes in the present case or that the Court requests it to submit its observations, disclosure of the document at issue would have no substantive effect on the observations that it would submit to the Court. Indeed, it could be anticipated that in that case the Commission would, in principle, follow the assessment of its Legal Service.

63. The Commission, for its part, submits that the document at issue, which is an internal working document relating to an opinion of its Legal Service, should be removed from the case file. It observes that that document was not intended for the public and that it has not disclosed it to the public or authorised its production in proceedings before the Court. Nor has the Court ordered its production.

Findings of the Court

64. The document at issue is an internal note, drawn up by the Commission's Legal Service and addressed to the Commission President's Head of Cabinet, relating to the pre-litigation procedure initiated by the Republic of Slovenia pursuant to Article 259 TFEU, in which a legal assessment of the relevant questions of law is set out. Therefore, that document undeniably contains legal advice.

65. It is not in dispute, first, that the Republic of Slovenia did not request authorisation from the Commission to produce the document at issue before the Court, second, that the Court has not ordered it to be produced in the present action and, third, that the Commission has not disclosed it in the context of an application for public access to documents of the institutions, under Regulation No 1049/2001.

66. In accordance with settled case-law, it would be contrary to the public interest, which requires that the institutions should be able to benefit from the advice of their legal service, given in full independence, to allow such internal documents to be produced in proceedings before the Court unless their production has been authorised by the institution concerned or ordered by the Court (order of 14 May 2019, *Hungary* v. *Parliament*, C-650/18, not published, EU:C:2019:438, paragraph 8 and the case-law cited).

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67. That interest is reflected in Article 4 of Regulation No 1049/2001, which provides in paragraph 2 that "the institutions shall refuse access to a document where disclosure would undermine the protection of … court proceedings and legal advice, … unless there is an overriding public interest in disclosure". Even though that provision is not applicable in the present proceedings since the Republic of Slovenia annexed the document at issue to its response to the objection of inadmissibility without the Commission's authorisation, the fact remains that it has a certain indicative value for the purpose of the weighing up of interests that is required in order to rule on the request for that document's removal from the file (see, to that effect, order of 14 May 2019, *Hungary* v. *Parliament*, C-650/18, not published, EU:C:2019:438, paragraphs 9, 12 and 13).

68. In that regard, it should be observed that, in relying upon and producing, in the present action for failure to fulfil obligations under Article 259 TFEU, a legal opinion from the Commission's Legal Service which was drawn up after the matter was brought before the Commission and contains a legal assessment of the relevant questions of law, the Republic of Slovenia seeks to confront the Republic of Croatia and, as the case may be, also the Commission with that opinion in the present proceedings. To authorise the opinion to be retained in the case file, when its disclosure has not been authorised by the Commission, would effectively permit the Republic of Slovenia to circumvent the procedure set up by Regulation No 1049/2001 for applying for access to such a document (see, to that effect, order of 14 May 2019, *Hungary* v. *Parliament*, C-650/18, not published, EU:C:2019:438, paragraph 14 and the case-law cited).

69. The mere fact that the Republic of Slovenia is relying on the document at issue in proceedings before the Court against a party other than the institution from which the advice contained in it comes has no bearing on the public interest of the institutions in being able to benefit from the advice of their legal service, given in full independence, and does not therefore render superfluous the weighing up of interests that is required in order to rule on the request that that document be removed from the case file (see, by analogy, order of 23 October 2002, *Austria* v. *Council*, C-445/00, EU:C:2002:607, paragraph 12).

70. In the case in point, there is a foreseeable, far from hypothetical, risk that the Commission, which neither delivered a reasoned opinion under the third paragraph of Article 259 TFEU on the Republic of Slovenia's complaints nor made known its position on those complaints by intervening before the Court in support of the form of order sought

by one or other of the parties, will consider itself to be compelled, on account of the unauthorised production in the present proceedings of the document at issue, to take a position publicly on advice that was quite clearly intended for internal use. Such a prospect would inevitably have negative consequences for the Commission's interest in seeking legal advice and in receiving frank, objective and comprehensive advice (see, by analogy, judgment of 1 July 2008, *Sweden and Turco* v. *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 42, and order of 14 May 2019, *Hungary* v. *Parliament*, C-650/18, not published, EU:C:2019:438, paragraph 16).

71. So far as concerns the existence of an overriding public interest justifying retention of the document at issue in the file for the present case, besides the fact that the legal advice contained in that document does not relate to a legislative procedure in respect of which increased openness is required (see, to that effect, judgment of 1 July 2008, *Sweden and Turco* v. *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraphs 46, 47, 67 and 68), it should be pointed out that, for the Republic of Slovenia, the interest in the document's retention consists in the ability to rely on that legal advice in support of its response to the objection of inadmissibility raised by the Republic of Croatia. That being so, the production of that legal advice appears to be guided by the Republic of Slovenia's own interest in supporting its arguments in its response to the objection of inadmissibility and not by any overriding public interest (see, to that effect, order of 14 May 2019, *Hungary* v. *Parliament*, C-650/18, not published, EU:C:2019:438, paragraph 18).

72. The fact that, as submitted by the Republic of Slovenia, it had access to the document at issue through the website of a weekly publication in which an article appeared that referred to that advice by means of a hyperlink cannot, given that unauthorised publication of the advice is involved, call the foregoing considerations into question (see, by analogy, order of 14 May 2019, *Hungary* v. *Parliament*, C-650/18, not published, EU:C:2019:438, paragraph 17).

73. Accordingly, the Republic of Croatia's request that the document at issue be removed from the case file must be granted.

JURISDICTION OF THE COURT

Arguments of the parties

74. The Republic of Croatia requests the Court to dismiss the present action in its entirety as inadmissible. It relies in particular, in this respect, on three complaints of lack of jurisdiction.

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75. In the first place, the Republic of Croatia submits that the Republic of Slovenia's contentions that it infringed obligations owed by it under EU law are ancillary to settlement of the dispute concerning the validity and legal effects of the arbitration agreement and the arbitration award. As was held in the judgment of 30 September 2010, *Commission* v. *Belgium* (C-132/09, EU:C:2010:562), the Court lacks jurisdiction to rule on the infringement of obligations arising from EU law if those obligations are ancillary to prior settlement of another dispute that does not fall within the jurisdiction of the Court.

76. In the second place, the Republic of Croatia maintains that the real subject matter of the dispute between the two States relates (i) to the validity and legal effects of the arbitration agreement, which does not form an integral part of EU law, and (ii) to the validity and any legal consequences of the arbitration award, which has not yet been implemented. Such a dispute must therefore be resolved pursuant to the rules of international law and its outcome does not depend on the application of EU law.

77. In the third place, the Republic of Croatia contends that the Court lacks jurisdiction under Article 259 TFEU to rule on the validity and effects of either the arbitration agreement, which is an international agreement not forming an integral part of EU law, or the arbitration award made on the basis of that agreement. The arbitration agreement is the very basis of the infringements of EU law pleaded by the Republic of Slovenia.

78. The Republic of Slovenia contends that the objection of inadmissibility raised by the Republic of Croatia should be dismissed in so far as the latter contends that the Court lacks jurisdiction to rule on the present action.

79. In the first place, the Republic of Slovenia submits that, by those arguments, the Republic of Croatia seeks to misrepresent unilaterally the subject matter of the action.

80. In that regard, first, the Republic of Slovenia states that in its application it confines itself to pleading an infringement of primary and secondary EU law.

81. Second, the Republic of Slovenia submits that jurisdiction of the Court under Article 259 TFEU is not precluded where the facts upon which the allegations of infringement of EU law are based are covered by both EU law and international law. All that matters, in that regard, is that those facts relate to an infringement of obligations imposed by EU law. That does not, however, prevent the Court from taking account of the substantive rules of international law that EU law has integrated or had the intention of integrating into its legal system.

82. Third, the Republic of Slovenia, relying on the judgment of 12 September 2006, *Spain* v. *United Kingdom* (C-145/04, EU:C:2006:543), submits that the existence of a bilateral dispute concerning the interpretation of an act of international law applicable between the parties to proceedings for failure to fulfil obligations does not preclude the Court from having jurisdiction to rule in those proceedings.

83. Fourth, for the purpose of deciding whether the Court has jurisdiction under Article 259 TFEU, all that matters is whether the basis of the form of order sought in the application concerns "obligations under the Treaties".

84. The Republic of Slovenia submits that its application fulfils the conditions necessary for an examination under Article 259 TFEU. It indeed follows from the form of order sought in the application and from the grounds put forward in support of the application that the complaints which it raises are derived from primary EU law and a set of acts of secondary law. The Republic of Slovenia states that, in the form of order sought in the application, it does not ask the Court to find a failure to fulfil obligations owed by the Republic of Croatia under international law. The reference made in the application to the arbitration award is there only as a factual matter relevant for the interpretation of EU law, in order to describe the territory on which the Member States must comply with their obligations under EU law.

85. In the second place, the Republic of Slovenia examines the complaints of lack of jurisdiction put forward by the Republic of Croatia.

86. As regards, in particular, the complaint of lack of jurisdiction relating to the ancillary nature of the alleged infringements of EU law, the Republic of Slovenia submits that, since the respective territories of the Republic of Croatia and the Republic of Slovenia are determined by the border set in accordance with international law, in this instance by the arbitration award, the Court is not being asked either to find a breach of international law or to rule on an international dispute. The Republic of Slovenia states that the border between the two States, as drawn by the arbitration award, is a point of fact which the Court may and must take into account and not a legal question upon which the Court could rule. In any event, the Court must observe and apply international law, to the extent necessary in order to interpret or apply EU law.

87. As regards the complaints of lack of jurisdiction alleging, first, that the real subject matter of the dispute is constituted by the interpretation and application of international law and, second, that the

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Court lacks jurisdiction to rule on the validity and effects of an international agreement which does not form part of EU law, the Republic of Slovenia states that the question of the validity of the arbitration agreement and of the validity and legal effects of the arbitration award is not the subject matter of the dispute before the Court, does not fall within the Court's jurisdiction and, in any event, was resolved by the partial award of 30 June 2016. The fact that the Republic of Croatia does not agree with the arbitration award cannot mean that there is an unresolved border dispute or that the Court should rule on that question which has already been decided.

88. Finally, the Republic of Slovenia submits that the Republic of Croatia's argument that the arbitration award is not directly applicable falls not within the examination as to jurisdiction but within the examination as to the merits. In any event, that argument is misconceived as the arbitration award is binding under international law and thus establishes definitively the border between the two Member States.

Findings of the Court

89. It should be noted that, under the first paragraph of Article 259 TFEU, "a Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union".

90. In the present case, it is clear from the wording of the form of order sought in the application that the Republic of Slovenia bases its action for failure to fulfil obligations on the alleged infringement by the Republic of Croatia of its obligations under (i) Article 4(3) TEU, (ii) Article 2 TEU, (iii) Article 5(2) of Regulation No 1380/2013, read in conjunction with Annex I to that regulation, (iv) the system of control, of inspection and of implementation of the rules as provided for by Regulation No 1224/2009 and by Implementing Regulation No 404/2011, (v) Articles 4 and 17 of the Schengen Borders Code, read in conjunction with Article 13 of that code, and (vi) Articles 2(4) and 11(1) of Directive 2014/89.

91. It should also be noted that the Court, in the context of an action for failure to fulfil obligations, has already held that it lacks jurisdiction to rule on the interpretation of an international agreement concluded by Member States whose subject matter falls outside the areas of EU competence and on the obligations arising under it for them (see, to that effect, judgment of 30 September 2010, *Commission* v. *Belgium*, C-132/09, EU:C:2010:562, paragraph 44).

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92. It is clear from that case-law that the Court lacks jurisdiction to rule on an action for failure to fulfil obligations, whether it is brought under Article 258 TFEU or under Article 259 TFEU, where the infringement of provisions of EU law that is pleaded in support of the action is ancillary to the alleged failure to comply with obligations arising from such an agreement.

93. Therefore, in order to appreciate exactly the nature and scope of the alleged infringements, the form of order sought in the application must be read in the light of the Republic of Slovenia's complaints as set out in the grounds of the application.

94. It is apparent from those grounds that, by its first complaint, alleging infringement of Article 2 TEU, the Republic of Slovenia seeks a declaration that, by unilaterally defaulting on the commitment entered into during the EU accession process to comply with the forthcoming arbitration award, to observe the border determined by the arbitration award and to comply with the other obligations arising from that award, the Republic of Croatia is refusing to abide by the rule of law enshrined in that provision and is infringing, in that respect, the principles of sincere cooperation and *res judicata*.

95. By the second complaint, alleging infringement of the principle of sincere cooperation enshrined in Article 4(3) TEU, the Republic of Slovenia submits that, by refusing to recognise and observe the border determined by the arbitration award, the Republic of Croatia is jeopardising the attainment of the objectives of the European Union and is preventing EU law—the application of which depends on determination of the territories of the Member States—from being implemented throughout Slovenian territory.

96. By its third and fourth complaints, the Republic of Slovenia contends that, by not respecting Slovenian territory or its borders, as established by the arbitration award, the Republic of Croatia is infringing EU law in the area of the common fisheries policy.

97. In particular, as regards the third complaint, the Republic of Slovenia argues that, by contesting the border as determined by the arbitration award and by opposing the demarcation and application of that border, the Republic of Croatia is infringing the exclusive rights of the Republic of Slovenia over its territorial waters, is preventing it from complying with its obligations under Regulation No 1380/2013 and, by unilateral conduct constituting a clear breach of the arbitration agreement, is preventing application of the regime, established by that regulation, governing access to the coastal waters of Croatia and Slovenia under neighbourhood relations, a regime which has applied to those two Member States since 30 December 2017, that is to say,

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since the day following the day on which the six-month period laid down in Article 7(3) of the arbitration agreement for implementation of the arbitration award expired.

98. By the fourth complaint, the Republic of Slovenia asserts that the Republic of Croatia is infringing the Community control system established by Regulation No 1224/2009 and Implementing Regulation No 404/2011 in order to ensure compliance with the rules of the common fisheries policy, since the Republic of Croatia, on account of failure to observe their common sea border as determined by the arbitral award, first, is preventing the Republic of Slovenia from complying with its obligations under that control system and, second, is unlawfully exercising, in Slovenian waters, rights that belong to the Republic of Slovenia as coastal State.

99. By its fifth complaint, the Republic of Slovenia contends that, since the border between the Republic of Croatia and the Republic of Slovenia, as determined by the arbitration award, remains an external border to which the provisions of the Schengen Borders Code that relate to external borders apply, the Republic of Croatia is infringing both the obligations to control that border and the obligation requiring its surveillance, imposed by that code. Furthermore, it is failing to fulfil the obligation to act in full compliance with the relevant provisions of applicable international law that are prescribed in that code, by refusing to recognise the arbitration award.

100. By its sixth complaint, the Republic of Slovenia contends that, by refusing to recognise the arbitration award which established the demarcation of territorial waters between those two Member States and, in particular, by including Slovenian territorial waters in its maritime spatial planning, the Republic of Croatia is infringing Directive 2014/89. In so doing, the Republic of Croatia also makes any cooperation provided for by that directive impossible.

101. It follows from the foregoing that the alleged infringements of primary EU law that are covered by the first and second complaints result, according to the Republic of Slovenia itself, from the alleged failure by the Republic of Croatia to comply with the obligations arising from the arbitration agreement and from the arbitration award made on the basis of that agreement, in particular the obligation to observe the border established in that award. Likewise, the alleged infringements of secondary EU law that are covered by the third to sixth complaints are founded on the premiss that the land and sea border between the Republic of Croatia and the Republic of Slovenia has been determined in accordance with international law, namely by the arbitration award. The Republic of Croatia's refusal to give effect to

the award is said consequently to prevent the Republic of Slovenia from implementing throughout its territory the provisions of secondary EU law at issue and from enjoying the rights which are conferred upon it by those provisions and to prevent, in the sea areas that the dispute concerns, application of the provisions of secondary EU law that make reference to the full implementation of the arbitration award resulting from the arbitration agreement.

102. In that regard, it must be stated that the arbitration 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 referred to in Articles 3 to 6 TFEU and to which the European Union is not a party. It is true that the European Union offered its good offices to both parties to the border dispute with a view to its resolution and that the Presidency of the Council signed the arbitration agreement on behalf of the European Union, as a witness. Furthermore, there are links between, on the one hand, the conclusion of the arbitration agreement, and the arbitration proceedings conducted on the basis of that agreement, and on the other, the process of negotiation and accession by the Republic of Croatia to the European Union. Such circumstances are not, however, sufficient for the arbitration agreement and the arbitration award to be considered an integral part of EU law.

103. In particular, the fact that point 5 of Annex III to the Act of Accession added points 11 and 12 to Annex I to Regulation No 2371/2002 and that the footnotes to points 11 and 12 refer, in neutral terms, to the arbitration award made on the basis of the arbitration agreement, in order to determine the date on which the regime governing access to the coastal waters of Croatia and Slovenia under neighbourhood relations will be applicable, cannot be interpreted as meaning that the Act of Accession incorporated into EU law the international commitments entered into by the Republic of Croatia and the Republic of Slovenia under the arbitration agreement, in particular the obligation to observe the border established in the arbitration award.

104. It follows that the infringements of EU law pleaded are ancillary to the alleged failure by the Republic of 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. Since 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, the Court, in accordance with what has been stated in paragraphs 91 and 92 of the present judgment, lacks jurisdiction to rule in the present

action on an alleged failure to comply with the obligations arising from the arbitration agreement and the arbitration award, which are the source of the Republic of Slovenia's complaints regarding alleged infringements of EU law.

105. It should be added in this regard that, in the absence, in the Treaties, of a more precise definition of the territories falling within the sovereignty of the Member States, 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 (see, to that effect, judgment of 29 March 2007, *Aktiebolaget NN*, C-111/05, EU:C:2007:195, paragraph 54). Indeed, it is by reference to national territories that the territorial scope of the Treaties is established, for the purposes of Article 52 TEU and Article 355 TFEU. Moreover, Article 77(4) TFEU points out that the Member States have competence concerning the geographical demarcation of their borders, in accordance with international law.

106. In the case in point, Article 7(3) of the arbitration agreement provides that the parties are to take all necessary steps to implement the arbitration award, including by revising national legislation, as necessary, within six months after the adoption of that award. Furthermore, the footnotes relating to points 8 and 10 of Annex I to Regulation No 1380/2013 state that, as regards the Republic of Croatia and the Republic of Slovenia, the regime, laid down in that annex, governing access to the coastal waters of those Member States under neighbourhood relations "shall apply from the full implementation of the arbitration award". It is not in dispute, as the Advocate General has also observed in essence in point 164 of his Opinion, that effect has not been given to the arbitration award.

107. In those circumstances, it is not for the Court—if it is not to step beyond the powers conferred upon it by the Treaties and encroach upon the powers reserved for the Member States regarding geographical determination of their borders—to examine, in the present action brought under Article 259 TFEU, the question of the extent and limits of the respective territories of the Republic of Croatia and the Republic of Slovenia, by applying directly the border determined by the arbitration award in order to verify the existence of the infringements of EU law at issue.

108. In the light of all the foregoing considerations, it must be held that the Court lacks jurisdiction to rule on the present action for failure to fulfil obligations.

109. This conclusion is without prejudice to any obligation arising —for both of the Member States concerned, in their reciprocal relations but also vis-à-vis the European Union and the other Member

States—from 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 in the areas concerned, and to bring their dispute to an end by using one or other means of settling it, including, as the case may be, by submitting it to the Court under a special agreement pursuant to Article 273 TFEU.

COSTS

110. Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

111. Since the Republic of Croatia has applied for costs and the Republic of Slovenia has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Grand Chamber) hereby:

1. Orders that the internal working document of the European Commission relating to the opinion of its Legal Service, which appears at pages 38 to 45 of Annex C.2 to the Republic of Slovenia's response to the objection of inadmissibility, be removed from the file for Case C-457/18;
2. Declares that the Court of Justice of the European Union lacks jurisdiction to rule on the Republic of Slovenia's action, brought on the basis of Article 259 TFEU, in Case C-457/18;
3. Orders the Republic of Slovenia to pay the costs.

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