Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

31 January 2020*

(Failure of a Member State to fulfil obligations — Article 259 TFEU — Jurisdiction of the Court — Determination of the common border between two Member States — Border dispute between the Republic of Croatia and the Republic of Slovenia — Arbitration agreement — Arbitration proceedings — Notification by the Republic of Croatia of its decision to terminate the agreement because of an irregularity alleged by it to have been committed by a member of the arbitral tribunal — Arbitration award made by the arbitral tribunal — Alleged failure by the Republic of Croatia to observe the arbitration agreement and the border established by the arbitration award — Principle of sincere cooperation — Request that a document be removed from the case file — Protection of legal advice)

In Case C-457/18,

ACTION for failure to fulfil obligations under Article 259 TFEU, brought on 13 July 2018,

Republic of Slovenia, represented by M. Menard, acting as Agent, and J.-M. Thouvenin, avocat,

applicant,

v

Republic of Croatia, represented by G. Vidović Mesarek, acting as Agent, and J. Stratford QC,

defendant,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, A. Prechal, S. Rodin, L.S. Rossi and I. Jarukaitis, Presidents of Chambers, M. Ilešič, J. Malenovský, D. Šváby, C. Vajda (Rapporteur) and F. Biltgen, Judges,

Advocate General: P. Pikamäe,

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure and further to the hearing on 8 July 2019,

after hearing the Opinion of the Advocate General at the sitting on 11 December 2019,

gives the following

* Language of the case: Croatian.

Judgment

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 676/2007, (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.

…

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, 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 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.

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 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*, 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 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 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.

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.

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).

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.

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 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).

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, 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.**

[Signatures]