Common Market Law Review **58**: 1–18, 2021.
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Inter-Member State international law in the EU legal order: Some thoughts on *Slovenia* v. *Croatia*

Case C-457/18, *Republic of Slovenia* v. *Republic of Croatia*, Judgment of the Court of Justice (Grand Chamber) of 31 January 2020, EU:C:2020:65.

1. Introductory remarks

In spite of occasional interest by legal scholarship and case law, the status of agreements concluded between Member States is still an elusive notion under EU law. In principle, it flows naturally from the intersection between international law and the "new legal order of international law" created by the Treaties. On the one hand, outside the scope of EU law, Member States retain sovereignty and are therefore fully entitled to establish legal relations with other Member States governed by international law. On the other hand, within the scope of EU law, the conclusion of an inter-Member State agreement normally amounts to a breach of the Treaties; the consequence of that breach being governed by international law[1] or by the special legal order established by the Treaties[2].

In principle, the legal regime of inter-Member State agreements, under international as well as under EU law, is inspired by an "either/or" model; they are either fully irrelevant or fully relevant. While normally they are unidentified objects flying in the sidereal space outside the legal order established by the Treaties, sometimes they break the seal of that normative space, and tend to subvert its legal harmony.

This dichotomous conception is mirrored by two provisions in the Treaties. Article 344 TFEU prohibits Member States from submitting disputes concerning the interpretation or the application of EU law to settlement methods other than those provided by the Treaties. Article 273 TFEU confers on the parties to an inter-Member State dispute related to the subject matter of the Treaties, the power to refer the dispute to the Court of Justice.

1. Under Art. 41 of the Vienna Convention on the Law of Treaties, two or more parties to a multilateral treaty may conclude an agreement between themselves if the treaty expressly allows this. Otherwise, some of the parties to a treaty may conclude *inter se* agreements on two conditions: that the agreement does not affect the legal position of the other parties under the treaty; and if the modification is not incompatible with the effective execution of the object and purpose of that treaty.
2. See *infra* sections 5.4. and 5.5.

Albeit nominally governing inter-Member State disputes, these two provisions can be useful to determine the legal regime of an inter-Member State agreement under EU law. On the one hand, disputes between Member States on the interpretation or the application of an *inter se* agreement within the scope of EU law must be settled by the Court on the basis of EU law, using the ordinary remedies provided for by the Treaties. On the other hand, disputes concerning agreements, merely relating to the subject matter of the Treaties, can be referred by the parties to the Court of Justice through ~~instruments of international law~~ and will be settled on the basis of international law. The reality, however, is a bit less dichotomous and much more nuanced than that. More often than not, inter-Member State disputes and inter-Member State agreements straddle the borders between EU law and international law or are otherwise related in a variety of manners to both legal orders. This creates serious difficulties in determining their appropriate legal regime.

The case annotated here offers a vivid example of the difficulties inherent in the either/or model entailed by Articles 344 and 273 TFEU. Although appearing at first sight as unequivocally referring to international law, on closer inspection the case reveals a number of possible links with the EU legal order, whose relevance for the purposes of Article 344 or Article 273 TFEU is highly controversial. In spite of these difficulties, or perhaps precisely because of them, Case C-457/18 represents an invaluable opportunity to reflect on a topic which up to now has remained relatively unexplored.

2. Factual and legal context of the case

The case is notorious and stems from a dispute about common land and sea borders between two States, Slovenia and Croatia, which arose from the dissolution of the former Yugoslavia. This dispute dragged on for years and, after the accession of Slovenia to the Union, a provisional settlement was reached in 2009. The two States then agreed, under the auspices of the EU, that they would submit the dispute to arbitration. This solution was considered by Slovenia to be a political condition for lifting its veto to the accession of Croatia to the Union. At the time of its conclusion, therefore, the arbitration agreement had as parties one Member State – Slovenia – and a third State – Croatia.

The proceedings commenced in 2012 and, on 1 July 2013, Croatia became a member of the European Union. In 2015, the international press reported improper communications between an arbitrator appointed by Slovenia and one of the agents of that State. In consequence thereof, and of other

subsequent events,[3] and following sharp exchanges between the parties, on 30 July 2015, Croatia, by a diplomatic *note verbale*, qualified the Slovenian conduct as a material breach of the arbitration agreement under Article 60 of the Vienna Convention on the law of treaties. Croatia terminated the agreement and invited the arbitral tribunal to discontinue its work.[4]

However, the arbitral tribunal, through a partial award delivered in June 2016, while declaring that Slovenia had breached the arbitration agreement, found that the illicit conduct by Slovenia did not make it impossible to continue the proceedings and, therefore, the breach did not defeat the object and purpose of the agreement. Consequently, the termination of that agreement, unilaterally proclaimed by Croatia, was invalid and devoid of legal effect.

In June 2017, the arbitral tribunal delivered its final award and determined the land and sea borders between Slovenia and Croatia. This award, however, remained ineffective as Croatia maintained its view on the invalidity of the arbitration agreement and refused to comply with the terms of the awards rendered by the tribunal. As a result of this stalemate, in June 2018 Slovenia brought an action for infringement against Croatia under Article 259 TFEU, and asked the Court of Justice to find that, by failing to abide by the award, Croatia had failed to fulfil a number of obligations under EU law.

These infringements can be grouped into three categories. First, in the view of Slovenia, the refusal to implement the award breached the values of the Union under Article 2 TEU, in particular the obligation, "common to the Member States", to respect the rule of law, including international law and judicial decisions based on international law. Second, Slovenia argued that the lack of compliance with the award prevented it from exercising its government authority necessary to implement EU law on its territory. Third, disrespect of the arbitral award by Croatia was alleged to breach obligations flowing from secondary provisions under the Common Fisheries Policy and the Schengen Borders Code.

3. Opinion of the Advocate General

At the outset of his Opinion, the Advocate General listed the categories of international law sources which, under the ECJ case law, are binding on the EU: agreements concluded by the EU, agreements concluded by the Member States in matters where the EU has assumed the powers previously exercised

3. Permanent Court of Arbitration, *In the Matter of an Arbitration Between the Republic of Croatia and the Republic of Slovenia*, Partial award of 30 June 2016, paras. 34 et seq.

4. For a detailed account of these events, see ibid., paras. 84 et seq.

by the Member States, and customary international law.[5] From that list the Advocate General excluded agreements concluded by Member States in fields falling within their competence.

The Advocate General went on to note that the applicant State, Slovenia, had not qualified the breach of the arbitral award as a direct infringement of EU law under Article 259 TFEU. The breach of EU law was instead an indirect consequence of actions and omissions of Croatia primarily aimed at disregarding international law. In particular, the Advocate General noted that all the Slovenian claims were dependent on the assumption that the boundary between the respective territories of the two States had been determined by the arbitral award and that, therefore, each of them were obliged, under international law, to respect the government authority of the other State in its recognized territorial sphere.[6] Compliance by Croatia with this international obligation would have prevented the alleged breach of EU law from occurring. Conversely, a breach of this international obligation automatically generated a breach of these EU rules.[7]

In this logic, the existence of the infringements of EU law, allegedly committed by Croatia, depended on the interpretation and implementation of the arbitration agreement and of the arbitral award, two instruments governed entirely by international law and outside the reach of EU law.[8] This chain of argument ultimately led the Advocate General to propose that the Court decline jurisdiction: "(s)ince 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".[9]

4. Judgment of the Court

The Court proceeded first to determine its own jurisdiction under Article 260 TFEU. On that point, of crucial importance, the parties expressed divergent views, preliminarily summarized by the Court.[10] Croatia submitted that the alleged infringements of EU law adduced by Slovenia were merely ancillary to the alleged breach of the arbitral award; that the real subject matter of the

5. See Opinion of A.G. Pikamäe in Case C-457/18, *Slovenia* v. *Croatia*, EU:C:2019:1067, para 104.
6. Ibid., para 119.
7. Ibid., paras. 121 et seq.
8. Ibid., paras. 142 et seq.
9. Ibid., para 164.
10. Judgment, paras. 74–88.

dispute related to the validity and effect of that award, which was not part of the EU legal order; that, therefore, the Court lacked jurisdiction to adjudge a dispute which was essentially governed by international law. In response, Slovenia submitted that the arbitral award was regarded as a mere factual reference to determine the territorial scope of the duty to implement EU law. Therefore, according to the Slovenian argument, the Court was not asked to settle a dispute under international law, but to determine whether Croatia, by disregarding the boundaries established under international law, had prevented it from fulfilling its duties flowing from EU law. Since the international dispute with Croatia was definitively settled by the arbitral award, what remained to be determined, in Slovenia's view, was only the recognition by Croatia of its right to duly implement EU law on its territory.

At the outset, the Court restated its previous case law whereby it lacks jurisdiction on disputes on the interpretation and application of international law not binding for the Union and, specifically, on inter-Member State agreements falling outside the scope of EU law.[11] In consequence of this premise, infringements of EU law, which prove to be merely ancillary to an alleged breach of international rules falling outside the scope of EU law, in turn fall outside its jurisdiction under Articles 259 and 260 TFEU.[12] In setting out this doctrine and in articulating its effect, the Court ~~relied heavily~~ on Case C-132/09, *Commission* v. *Belgium*, the *European Schools* case,[13] ~~which the Court~~ accepted as a precedent for its decision.

In *European Schools*, the Court declined its jurisdiction to decide an infringement action started by the Commission against Belgium for its alleged failure to cover certain costs of the European schools located on its territory, in breach of the establishment agreement concluded by Belgium and the Council of Governors of the European Schools, an entity set up by two international agreements concluded by the six founding Member States.[14] The Commission's complaint was based on the assumption that the establishment agreement, although concluded by the Member States and not by the Community was, nonetheless, by virtue of certain substantial links with the EC institutions, an integral part of Community law. The different view of the Court was based on a formal element, namely that neither the establishment agreement nor the 1957 and the 1962 agreements setting up the European Schools had been concluded by the Community. Starting from this premise, and on the basis of a threefold argument, the Court found that the alleged

11. Ibid., para 91.
12. Ibid., para 92.
13. Case C-132/09, *Commission* v. *Belgium*, EU:C:2010:562.
14. The Statute of the European School, signed in Luxembourg on 12 April 1957, and the Protocol on the setting-up of European Schools with reference to the Statute of the European School, signed in Luxembourg on 13 April 1962.

failure of Croatia to comply with its international obligations *vis-à-vis* Slovenia could not entail an infringement of EU law.

First, the Court determined that the alleged breaches of EU law invoked by Slovenia automatically followed from the alleged failure by Croatia to comply with the arbitral award. As explained above, Slovenia submitted three complaints: the violation of the principle of sincere cooperation, under Article 4(3) TEU; the violation of the values of the Union, under Article 2 TEU and, in particular, the principle of the rule of law; the violation of secondary rules whose implementation was made impossible in the portion of territory assigned to Slovenia by the award.[15] In the view of the Court, the alleged breaches of primary law, namely the principle of sincere cooperation and the values of the Union under Article 2 TEU, would have been a sort of second level breach, automatically flowing from the alleged breach of the arbitral award. In analogous terms, the Court noted that also the breaches of secondary EU law which Slovenia complained of automatically followed from the lack of control by Slovenia of a portion of its territory, as determined by the arbitral award.[16]

Second, and inevitably, in order to determine a breach of the EU law provisions invoked by Slovenia, the Court should have preliminarily assessed whether Croatia had duly implemented its international law obligations *vis-à-vis* Slovenia. This consequential link was expressed by the Court in the following terms:

> "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

15. Art. 5(2) of Regulation 1380/2013, read in conjunction with Annex I to that Regulation; the system of control, of inspection and of implementation of the rules as provided for by Regulation 1224/2009 and by Implementing Regulation 404/2011; Arts. 4 and 17 of the Schengen Borders Code, read in conjunction with Art. 13 of that code; Arts. 2(4) and 11(1) of Directive 2014/89.

16. Judgment, para 101 states: "It follows from the foregoing that the alleged infringements of primary EU law that are covered by the first and second complaints result . . . 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, . . . 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".

> party and whose subject matter falls outside the areas of EU competence".[17]

Third, on the basis of these assumptions, the Court concluded that:

> "(s)ince 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 . . . 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".[18]

This conclusion, however, did not prevent the Court from offering its legal services to the two contenders. In its last paragraph,[19] the judgment contains a clear bid to consider the Court as a viable instrument to arbitrate their dispute; an arbitration based, however, on Article 273 TFEU; one of the most mysterious competences assigned to the Court of Justice by the founding Treaties. The Court said:

> "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."

5. Comment

5.1. *The logic of the decision*

Over time, the territorial dispute between Slovenia and Croatia, which has lasted for decades after the countries gained their independence, has offered an inexhaustible series of interesting legal issues. Case C-457/18 adds a further issue to that compilation; namely whether the EU system of judicial remedies – quite effective indeed – can be used to enforce arbitral awards settling international disputes between Member States and, thereby, to significantly enhance their relatively low effectiveness. In Case C-457/18, the

17. Ibid., para 104.
18. Ibid.
19. Ibid., para 109.

Court found that the answer depends on the intensity of the link between the dispute and the EU legal order. Having assessed the tenuousness of that link, the Court felt confident to reject the Slovenian claims.

The conclusion is in itself not controversial. First, regarding Article 2 TEU, one can hardly contend that the obligation for the Member State to respect the rule of law has attributed to the EU the role of guardian of the respect of every single rule of international law by the Member States; the more so if such a rule clearly falls outside the scope of the material competence conferred on the EU by the Treaties.

Even more tenuous appears to be the link between the international dispute between Slovenia and Croatia and the principle of sincere cooperation enshrined in Article 4(3) TEU. This principle does not have an autonomous material scope but appears to be instrumental to the exercise of the EU competences. According to the express terms of Article 4(3) TEU, the obligation to cooperate only concerns tasks "which flow from the Treaties". The implementation of an agreement on the border between two Member States can hardly be defined as a task flowing from the Treaties.[20]

Finally, the linking of the dispute and the secondary law provisions invoked by Slovenia is particularly tenuous. Their common denominator consists in the qualification of the States' territory as the essential spatial environment where a Member State must implement EU law. The failure of Croatia to give effect to the arbitral award, so the argument goes, turned into an insurmountable obstacle for Slovenia to implement EU law correctly in the areas apportioned to Slovenia by the arbitral tribunal. While acknowledging the existence of backlashes on EU law of possible breaches of the arbitration agreement, the Court was correct to abstain from qualifying these repercussions as infringements under Articles 258 and 259 TFEU, which only concern failures "to fulfil an obligation under the Treaties". Acting otherwise, the Court would have accepted the use of the infringement action as a means to enforce international law in fields falling within the exclusive competence of the Member States.[21]

20. Paradoxically, a more intense obligation to cooperate was incumbent on Croatia in the pre-accession period. Art. 4 and Art. 7 of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part, O.J. 2005, L 26/3, establish obligations to foster cooperation and good neighbourly relations with other States of the region of the Balkans as a "key factor in the development of the relations and cooperation between the Parties", and to use the political dialogue as the main instrument to attain this aim. Albeit characterized by a certain vagueness, these obligations could have provided for a more solid legal basis to prevent unilateral steps in the implementation of the arbitration agreement.

21. A different opinion was expressed by the arbitral tribunal which, in its partial award of 2015, cited *supra*, note 2, para 220, held that "(t)he Agreement was negotiated with the full support of the European Union, and the Presidency of the Council of the European Union

However, in spite of their intuitiveness, the logical line of the arguments employed by the Court and the persuasiveness of its outcome, appear to be questionable. They seem to reveal the fragility, and perhaps also the incoherence, of the legal regime of international law of the Member States under EU law.

5.2. *Inter-Member State agreements: The model of irrelevance*

Case C-457/18 is based on the classic doctrine of the effect of international law within the EU legal order. International law binding the EU is an integral part of EU law and, therefore, also binding on the Member States when they act within the scope of EU law. Outside that scope, however, States remain sovereign entities and their relations are governed exclusively by international law.

It follows that a breach of international law that occurred outside the scope of EU law is irrelevant in that order. In other words, international law binding the EU is part of EU law; international law binding the Member States is merely irrelevant for the EU legal order. In Case C-457/18, the Court seems to admit that breaches of inter-Member State international law might prompt an infringement of EU law. However, insofar as an alleged infringement of EU law is a mere side effect of a breach of inter-Member State international law, it remains within the realm of legal irrelevance.[22] These side effects are qualified, in the phraseology of the Court, as "ancillary". To exceed this threshold, and therefore become relevant, these links must reach a certain level of intensity, which the Court carefully abstained from determining.

The logic of this two-edged argument seems to mirror the dual dimensions of the case, whereby the deep political involvement of the EU in the dispute between Slovenia and Croatia was hidden behind a legal solution exclusively based on international law, which the two States pursued in their capacity as full-fledged subjects of international law.[23] Perhaps by virtue of the heavy political implication of a ruling on the merits of the case, the Court did not hesitate to obscure the evident political connection between the conclusion of the arbitration agreement and the Treaty of Accession of Croatia.[24] Yet, from a

witnessed the signature of the Agreement. Thus, a nexus was established between the settlement of the territorial and maritime dispute and the accession of Croatia to the European Union". However, the nexus referred to by the tribunal was a political link, not a legal one.

22. Judgment, paras. 92, 102–104.

23. See Kassoti, "Between a rock and a hard place: The Court of Justice's judgment in Case *Slovenia* v. *Croatia*", (2020) *European Papers*, 1061–1070, available at <www.europeanpapers.eu/en/system/files/pdf_version/EP_EF_2020_I_039_Eva_Kassoti_00397.pdf>.

24. In para 103 of the judgment, the ECJ said: "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

purely international law perspective, such a link could have acquired legal relevance under the technique of contextual interpretation set out by Article 31(2)(b) of the Vienna Convention on the law of treaties, or under the technique of global interpretation, reflected in Article 31(3)(c) of the same Convention.[25]

5.3. *Analogies and dissimilarities in the case law related to territorial disputes*

In spite of some suggestive analogies, Case C-457/18 differs from recent cases related to internationally disputed territories in which the Court accepted jurisdiction to rule on the scope of international agreements of the EU. *Front Polisario*[26] and *Psagot*[27] are the most recent and notable examples. The obvious difference is that in these two cases the Court used international law binding on the EU to determine the territorial scope of an EU agreement with third States. In contrast, in Case C-457/18 the Court was asked to determine a breach of international law obligations binding on two Member States to assess the existence of an infringement of EU law automatically flowing from that breach.

Even more feeble are the analogies with the case law concerning the limits imposed on the sovereign acts of the Member States in fields of their exclusive competences by virtue of the impact produced on EU law by their exercise. Citizenship constitutes the most striking example. Although undoubtedly falling within the ~~exclusive~~ competences of the Member States, the ECJ did

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". However, to be relevant for the purposes of interpretation of the Treaty of Accession, it was not necessary for the arbitration agreement to be "incorporated into EU law", but only, pursuant Art. 31(2)(b) of the Vienna Convention, to be "made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty".

25. See McGarry, "Republic of Slovenia v. Republic of Croatia", 115 AJIL 2021, 101–107. The fact that the Act of Accession was concluded after the entry into force of the arbitration agreement could not necessarily prevent its consideration for the purposes of Art. 31(2) and (3) of the Vienna Convention. However, the effect of this consideration may be two-fold. On the one hand, it may be argued that respect for the findings of the arbitration did constitute a legal condition for the conclusion of the Act of Accession. On the other hand, and precisely because of that link, the submission of the bilateral dispute to arbitration could run counter to the terms of Art. 344 TFEU (see *infra* section 5.4.).

26. Case C-104/16, *Council of the European Union* v. *Front Polisario*, EU:C:2016:973.

27. Case C-363/18, *Organisation juive européenne and Vignoble Psagot*, EU:C:2019:954.

not hesitate to curtail the unfettered discretion of the Member States to determine the acquisition and the loss of national citizenship where it could impinge on the effectiveness of Union citizenship.[28] Precisely the effectiveness argument, which justifies the intrusion of EU law into areas of competence reserved to the Member States, can hardly be used in the present case where there is no evidence that the allocation of the disputed territory to one or to the other party would have altered the effectiveness of EU law.[29] In the absence of a detrimental impact on the effectiveness of EU law, the Court may have felt confident to conclude that the dispute between Slovenia and Croatia fell outside the reach of EU law.

5.4. *The status of inter-Member State agreements: Article 344 TFEU*

The coherence of the approach adopted in Case C-457/18 can instead be tested in light of the legal regime of inter-Member State agreements laid down by the Treaties. Indeed, inter-Member State agreements, even if concluded in fields of exclusive Member State competence, can threaten the coherence of the European legal order. No less than agreements between Member States and third States, such inter se agreements can create international obligations that are inconsistent with EU law or whose implementation produces factual situations that condition or even distort the implementation of EU law. Yet, the attention devoted by legal scholarship and case law to the latter has been incomparably lower than that reserved to the former.

In *Achmea,*[30] the Court found that Member States were precluded from entering into a bilateral agreement designed to facilitate investments by investors having the nationality of one of the parties in the territory of the other and, for this purpose, from conferring jurisdiction to settle investor-State disputes on an arbitral tribunal. This preclusion was grounded on Article 344 TFEU, which Member States are ~~not allowed~~ "to submit a dispute concerning

28. See Case C-135/08, *Rottmann*, EU:C:2010:104, and, more controversially, Case C-221/17, *Tjebbes*, EU:C:2019:189.

29. In areas where the EU has no competence, one could reasonably presume that effectiveness of EU law does not legally depend on the identification of the Member State entitled to exercise jurisdiction on a given territory. For the purposes of EU law, this appears to be a mere fact, deprived of legal relevance. In principle, this remains true also in situations where the jurisdiction of a Member State is relevant under EU law to determine the contents of its rules such as, e.g., the consideration of the populace living on a disputed portion of territory for the purposes of Art. 238(3). However, in spite of the legal irrelevance of this determination under EU law, the mere existence of a dispute between Member States on the entitlement, under international law, to rule on a certain territory creates uncertainty and may affect the proper functioning of EU rules. For a brief discussion of the legal instruments available under EU law to handle this difficult situation, see sections 5.4. and 5.5. *infra.*

30. Case C-284/16, *Achmea*, EU:C:2018:158.

the interpretation or application of the Treaties to any method of settlement other than those provided for therein". In the view of the Court, and in spite of its unclear phraseology, Article 344 TFEU not only prohibits the Member State from submitting a dispute concerning the interpretation or application of EU law to methods of settlement not set up by the Treaties; it also formulates a preclusion from concluding agreements to this effect. Article 344 TFEU seems, thus, to be capable of bringing within the scope of EU law inter-Member State disputes – as well as inter-Member State agreements – concerning the interpretation or application of the Treaties.

This effect bears some analogy to that of the *ERTA* doctrine, under which Member States are precluded from entering into an agreement with third States insofar as its conclusion may affect common rules or alter their scope.[31] In this perspective, it would not seem unreasonable to maintain that an arbitration agreement aiming to settle a territorial dispute between Member States could alter the territorial scope of EU law and possibly also its scope *ratione personae*.[32]

It is controversial whether the application of Article 344 TFEU is based on an either/or approach. In *MOX Plant*, Advocate General Poiares Maduro suggested that this provision applies to disputes concerning even in a small part the interpretation or application of the Treaties.[33] In consequence of this interpretation, not expressly adopted by the Court, the Court of Justice would have exclusive competence to settle disputes even if they are only marginally connected with EU law.[34] This test seems to invert the logic of the intensity test employed by the Court in the present case, and to admit that disputes on agreements only weakly concerning the interpretation of the application of the Treaties may nonetheless come within the scope of Article 344 TFEU. Yet, the legal connections between the territorial disputes between Slovenia and Croatia and the scope of EU law was qualitatively and quantitatively quite

31. While explicitly extending the *ERTA* doctrine to inter-Member State agreements, the ECJ, in Case C-370/12, *Pringle,* EU:C:2012:756, added, not particularly perspicuously, that no provision of the Treaties empowers the Union to establish a permanent stability mechanism and that, consequently, the Member States were not precluded from concluding the Treaty on the European Stability Mechanism.

32. In addition, the fact that the agreement was concluded prior to the accession by Croatia makes it an agreement concluded between a Member State, Slovenia, and a third State~~; Case C-370/12, *Pringle*, EU:C:2012:756, paras. 101–107.~~

33. Opinion in Case C-459/03, *MOX Plant*, EU:C:2006:42, para 13.

34. Ibid., para 14: "(t)his is not to say that the Court's jurisdiction extends to the entire dispute, merely because part of the dispute is covered by Community law . . . Whenever Community law is concerned, Member States must settle their differences within the Community". However, this entails that disputes between Member States, which fall in a small part only within the scope of EU law, will not have a judicial settlement, unless the parties have recourse to Art. 273 TFEU.

faint. It remains to be seen whether the Treaties establish other legal regimes under which situations like this could be more properly accommodated.

5.5. *The status of inter-Member State agreements: Article 273 TFEU*

In the last point of the judgment, the Court of Justice invited, more or less explicitly, the parties to submit their dispute to it on the basis of Article 273 TFEU.[35] This invitation seems to reflect two convictions of the Court: first, that the dispute between Slovenia and Croatia did not concern, maybe even not by a negligible part, the interpretation or the application of EU law under Article 344 TFEU; second, that it is related to the subject matter of the Treaties in the sense of Article 273 TFEU. This latter provision bestows on the Court of Justice the power to settle disputes between Member States related to the subject matter of the Treaties on condition that the parties, through a special agreement, confer jurisdiction on the Court.

The two rules, Article 344 and Article 273 TFEU, have different purposes and set up very different legal regimes. Whereas the former prevents Member States from submitting to other means of settlement disputes falling within the scope of competences assigned to the Court of Justice, the latter is based on the tacit but clear premise that the parties, albeit having the power to submit this class of dispute to means of dispute settlement provided for by international law, could choose to submit it to the Court of Justice. An equally tacit but clear premise is that for the purposes of Article 344 TFEU the Court applies EU law, whereas for the purposes of Article 273 it applies international law. Unequivocally, thus, Article 273 lays down a distinct legal regime for inter-Member State disputes which do not concern the interpretation or the application of EU law, and, for this reason, fall outside the reach of Article 344 TFEU, but which ~~are~~, nonetheless, ~~materially~~ relate~~d~~ to the subject matter of the Treaties. Although this relation is not capable of diverting the dispute away from international law, it may still fall within the jurisdiction of the Court of Justice if the parties agree to this.

However, the notion of relatedness with the subject matter of the Treaties is highly controversial. Previous case law tends to define this notion as entailing a material connection between the dispute and the subject matter of the Treaties. In Case C-648/15, *Austria* v. *Germany*,[36] the ECJ determined that a dispute concerning the interpretation and application of a double taxation agreement between Austria and Germany fell within the scope of Article 273

35. Judgment, para 109.
36. Case C-648/15, *Republic of Austria* v. *Federal Republic of Germany*, EU:C:2017:664.

by virtue of the beneficial effect produced by the agreement on the fundamental freedoms protected by the Treaties.[37]

Case C-457/18 radically contradicts this interpretation. First, the ECJ, in paragraph 109, clearly admitted the existence of an obligation on the parties, *vis-à-vis* the European Union and the other Member States, to bring their dispute to an end by using means of their choice, including the submission of the dispute to the Court. This is quite a strange admission. If the dispute concerned only obligations flowing for the parties from international law, deprived of a material connection with the subject matter of the Treaties, neither the Union nor other Member States would have a legal interest in its settlement. In no case, therefore, would it fall within the scope of Article 273 TFEU – which, by the way, only establishes a faculty for the parties to submit their disputes to the Court of Justice and not an obligation.

Second, and even more surprisingly, the Court identified the source of this obligation in the principle of sincere cooperation laid down by Article 4(3) TEU. The existence of an obligation of the parties towards the Union and towards the other Member States flowing from Article 4(3) TEU would have required a clearly identifiable task of the Union whose fulfilment would require assistance from the parties. But what could such a task be in an area exclusively governed by international law? And, if this task existed, and Croatia had failed to assist the Union in this regard, why could Article 4(3) TEU not have been relied on by Slovenia as grounds for an action for infringement?

Third, the Court went as far as identifying the ultimate objective to be fulfilled by the obligations flowing from Article 4(3) TEU, namely to "ensure(s) the effective and unhindered application of EU law in the areas concerned". This is, to all appearances, a functional link; one, to be sure, which does not refer to the functioning of a specific rule of EU law. The general and vague phraseology employed by the Court to determine the existence of an obligation under Article 4(3) TEU may apply to an extremely vast class of situations in principle governed by international law. Taken at face value, this finding would have the effect of disrupting the clarity of the

37. Ibid., paras. 25 and 26. Notably, the A.G. clarified that the material relatedness test entailed by that provision cannot be fulfilled by territorial disputes, which have at most a functional link with the Treaties. See Opinion in Case C-648/15, *Austria* v. *Germany*, EU:C:2017:311, para 44: "Nonetheless, Article 273 TFEU cannot be used as a means of settling inter-State disputes which are entirely removed or excessively distant from the subject matter of the Treaties. It is for that reason that the decision by the two Member States to use that provision in order to settle a dispute relating to their respective territorial, maritime or island sovereignty would, in my view, come up against greater difficulties when it comes to fulfilling the condition of *connexité* with the subject matter of the Treaties".

principled distinction between international law of the Member State and European law, on which the entire conceptualization of this case was based.

In other words, with this statement the Court definitively and quite incoherently found that the dispute between Croatia and Slovenia was not only related to the subject matter of the Treaties, but also concerned the interpretation or the application of EU law. In other words, if one followed this line of reasoning of the Court, the most appropriate legal regime applicable to that dispute would not be that of Article 273 TFEU, but rather that set up by Article 344 TFEU.

All in all, the diverging broad logic of the two conceptual systems underlying these two provisions ~~respectively,~~ entails an incumbent risk of self-contradiction; a risk lingering in every area where EU and international law encounter each other and, often, collide.

5.6. *Some inconclusive conclusions on the regime of inter-Member State agreements*

Case C-457/18 is a living paradox. While clarifying that the infringement procedure under Article 259 TFEU is not the proper mechanism to enforce an arbitral award which decided a territorial dispute between two Member States, it left open many controversial issues surrounding this quite unique case.

For the limited purposes of this case note, the most important one is perhaps the difficulty, which clearly emerges from the judgement, with distinguishing the two alternative regimes shaped by Article 273 and Article 344 TFEU ~~respectively.~~ Whereas both are based on a test of proximity to EU law, the contents and the standard of such a test appear controversial. Yet, it is on that basis that inter-Member State disputes will be governed, procedurally and substantively, either by EU law or by international law.

Had the Court qualified the dispute between Croatia and Slovenia as one concerning the interpretation or application of the Treaties, not only would it not have been prevented from implementing the arbitral award through an infringement procedure; but rather it should have concluded that the arbitration agreement was in breach of Article 344 TFEU. Such an approach would have drawn within the realm of EU law, and within the exclusive jurisdiction of the Court of Justice, a number of disputes related to territory – which is a sovereign prerogative, jealously guarded by the Member States.

Also the qualification of the dispute as one related to the subject matter of the Treaty for the purposes of Article 273 TFEU is fraught with problematic issues. From a general perspective, territory can hardly be defined as a subject matter of the Treaties. Although the EU has a legal interest in a clear delimitation of the Member State territories, it has no competence in this

regard. The territories of the Member States simply constitute the environment where EU law applies: a functional notion – not a material one. Is that link solid enough to attract territorial disputes within the jurisdiction of the Court? And, if so, under which of its various competences? And which law should the Court apply?

Far from clarifying the legal status under the Treaties of ~~the~~ inter-Member State disputes and inter-Member State agreements, ~~therefore,~~ Case C-475/18 has rather muddled the issue through findings hardly consistent with each other. Yet, a determination of the status of inter-Member State disputes and inter-Member State agreements is not a trivial issue, since the story of the European integration is dotted with agreements concluded by Member States *inter se*, in fields more or less related to the actions of the EU under the Treaties.

6. Epilogue

Taking a different perspective, one might wonder whether the Court's conclusion in the case – namely that the proper remedy for the dispute between Croatia and Slovenia was not the infringement procedure under Article 259 TFEU, but rather the conferral of jurisdiction on the Court of Justice under Article 273 TFEU – can be justified by political considerations: viz. the interest of the EU to bring this long and thorny dispute to an end. After all, this option was the only one available to the Court of Justice in light of the confused state of EU law. Moreover, the Court of Justice uncontroversially possesses the moral authority and the political legitimacy to succeed where other means of dispute settlement failed.

Things, however, are not that easy. The solution advocated by the Court is prone to insidious fallouts and backlashes. Although occasionally the Court of Justice has applied international law – which is, notoriously, an integral part of the Union's law – the Court is certainly not an international tribunal. Its judges hardly possess the full panoply of legal techniques and political sensitivity proper to international judges. The authority of the Court would be severely tested in a dispute settlement procedure governed by international law concerning, moreover, one of the most revered prerogatives of Statehood, namely territory. In such matters, the risk of non-compliance is high and would disrupt the prestige that has been gained in decades of case law. In addition, the enforcement of the decision through the ordinary means provided for by the Treaties, including the infringement procedure, would appear politically hazardous and fraught with unknown implications. All in

all, in light of the thinness of the layer of ice on which this dance could be performed, the Court's suggested solution does not appear appropriate.

While attributing to the Court of Justice the power to settle international disputes among the Member States, Article 273 TFEU sets two conditions: the jurisdiction ought to be specifically attributed to the Court by the parties and the dispute must be related to the subject matter of the Treaties. This last condition has two aspects. In a positive sense, it allows the Court to rule only on matters related to the obligations imposed by the Treaties; in the negative, it prohibits the Court from ruling beyond these matters. This provision was drafted at a time when the subject matter of the Treaties was quite well defined and confined to clearly identifiable material areas. Even there, however, as mentioned above, its internal and external coherence are far from impeccable. The development of the process of integration has further blurred this situation. Nowadays, it is not easy to say what is related to the subject matter of the Treaties and what it is not. But, at the present time, one can say with certainty that territory is not a subject matter of the Treaties. And the Court of Justice would do well to keep out of this highly dangerous minefield.

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