

The border dispute between Croatia and Slovenia

Infringement procedure Article 259 TFEU

A. Introduction

The border dispute between Croatia and Slovenia emerged after the independence of both countries in the context of the dissolution of Yugoslavia in 1991/92. After several bilateral efforts, the border dispute was to be finally settled through an arbitration procedure. Its [Final Award](#) was issued on 29 June 2017.¹ The implementation period of the decision as foreseen in art. 7(3) of the [Arbitration Agreement](#) (concluded on 4 November 2009 during Croatia's EU accession negotiations) is six months. It expired on 29 December 2017.

Croatia has refrained from the implementation as it does not recognise the award due to the [occurrence of illegal communication](#) between the agent of Slovenia and the arbitrator appointed by Slovenia during the proceedings in 2014/2015. The Arbitral Tribunal had subsequently looked into the legality of the Croatian termination request.² In its [Partial Award](#) from 30 June 2016, it found that, despite a violation of the Arbitration Agreement on the part of Slovenia, the reconstituted Tribunal would resume the proceedings on the subject matter *de novo*.³ Legally, therefore, the Final Award constitutes a binding settlement of the dispute.

1. Arbitration

The parties to a dispute define the mandate of the arbitral tribunal, i.e. the questions the parties want the tribunal to answer, and the criteria to be used. Thus, the mandate for the judicial body establishes both the *scope* of the arbitrators' jurisdiction and the *applicable law*. An arbitral body usually consists of three members jointly appointed by the parties plus one party-appointed arbitrator each. The idea is to have a tribunal that commands the parties' trust. The decisions of arbitral tribunals are legally binding. Unlike awards in commercial arbitration, however, awards on State-to-State matters cannot be enforced, whilst decisions of the International Court of Justice (ICJ) or of the EU Court of Justice (CJEU) can.⁴

2. Infringement procedure

There are two types of infringement procedures in the EU institutional set-up: proceedings (i) initiated by the European Commission against a Member State mostly on the grounds of insufficient or non-implementation of existing EU legislation (article [258](#) TFEU), or (ii) launched by one Member State against another Member State for not respecting norms in EU legislation or the Treaties (article [259](#) TFEU).

¹ For a more detailed history of the border dispute, its bilateral resolution efforts including the negotiations of the Arbitration Agreement, and the arbitration proceedings as such, see [Bickl \(2017\), The Croatia-Slovenia border dispute and its implications for EU enlargement](#), in: Croatian Political Science Review 04/2017, 7-33.

² It is a well-established principle that an International Tribunal can decide by itself in matters of jurisdiction (*competence de la competence* or *Kompetenz-Kompetenz*), see e.g. the ICJ *Nottebohm Case* (ICJ Reports 1953: 111, para 119) or the ICTY *Tadić Case* (No. IT-94-1-AR72, Appeals Chamber, 02-10-1995, para 18).

³ For a critical view see [Ilić \(2017\)](#) who argues that the principles of arbitrator impartiality and procedural fairness have not been given enough weight in the deliberations of the Tribunal's Partial Award.

⁴ ICJ decisions may, as a possibility, be actively enforced by the UN Security Council; see Scott (2014), Litigation versus dispute resolution through political processes, in: Klein (ed), *Litigating International Law Disputes*, 27-8. The CJEU can, in the event of non-compliance and as a last resort, order an EU Member State to pay fines.

Whilst the Commission, as Guardian of the Treaties, has launched hundreds of infringement procedures against Member States, legal proceedings of one Member State against another one are very rare. So far, there have only been five judgements in the history of the EC/EU.⁵

2.1 Article 259 TFEU

Art. 259 provides that an EU Member State must bring the complaint against another EU Member State before the Commission first. The Commission may or may not, within three months after the submission of the complaint, and after each of the Member States concerned have submitted their position (a hearing is held on 2 May at 14h30), issue an opinion and bring the matter before the CJEU. If the Commission does not produce an opinion, the Member State lodging the complaint may bring the matter before the Court directly after the expiry of the deadline.

2.2 Slovenia's infringement complaint

The Slovenian complaint is classified, so a detailed account of the legal reasoning is impossible for now. What is clear, however, is that Slovenia aims at proving violations of EU legislation or the Treaties on the part of Croatia. One major issue (in the complaint of one hundred-or-so pages including supporting documents and media documentation) is a reference to implementation of the Final Award on the (sea) border between Croatia and Slovenia for the purposes of the EU Fisheries Regulation [1380/2013](#) as to the access to territorial waters (points 8 and 10 of Annex I of the Regulation). Further items include the Schengen border (the Slovenia-Croatian boundary is a Schengen border), flood-management measures along the cross-border rivers (Mura, Drava, Sotla, Dragonja) with Croatia, and, more generally, a lack of "sincere cooperation" enshrined in article 4(3) TEU.⁶ Generally, Slovenia may claim economic, financial, environmental or other implications at their detriment due to non-implementation of the Arbitration Award as far as EU norms and EU legislation are concerned.

The European Commission, for tactical-political reasons, refrained from issuing an opinion on the Slovenian complaint in order to stay neutral.⁷ In the event of proceedings before the CJEU at a later stage, the Commission may well present an opinion. Any Member State interested in making a submission to a CJEU file can do so, too.

2.3 Timeline of proceedings at the Court

A case brought before the CJEU means a full judicial procedure with submissions, both in writing and through a public hearing, followed by the deliberations of the Court. Proceedings usually take 12-18 months as from the date the case is brought before the Court. Slovenia's complaint was sent to the Commission on 16 March 2018, and the deadline for a Commission opinion expired on 17 June 2018. The Slovenian caretaker government⁸ subsequently launched the art. 259 lawsuit directly before the Court on 13 July 2018. The CJEU's judgement may thus be expected in the second half of 2019.

⁵ France v United Kingdom (on the designation of protection zones in fisheries, judgement 04 October 1979 [C-141/78](#)), Belgium v Spain (on the labelling of the designation of origin on bottled wines, judgement 16 May 2000 [C-388/95](#)), Spain v United Kingdom (on the right to vote for Commonwealth citizens in Gibraltar, judgement 12 September 2006 [C-145/04](#)), Hungary v Slovakia (on the prohibition of the President of Hungary from entering Slovakia, judgement 16 October 2012 [C-364/10](#)), and Austria v Germany (on the upcoming road-toll scheme for car holders non-resident in Germany, pending).

⁶ According to diplomats who have seen the file. See also ["Delo" 26-04-2018](#) and ["Večernji List" 22-03-2018](#).

⁷ As confirmed to the author by several Commissioners' Cabinet members. An early view of the Commission on the merits, however, can be found in 7.3 of the [minutes](#) of the College meeting on 04-07-2017.

⁸ The (early) general election in Slovenia took place on 03-06-2018.