Brussels, 14 May 2018
Ares(2018)2492481

SECEM

NOTE FOR THE ATTENTION OF Clara MARTINEZ ALBEROLA
CHEF DE CABINET OF THE PRESIDENT

Subject: Follow-up to the hearing on the dispute between Slovenia and Croatia

Ref.: *- Complaint of 16 March 2018 by Slovenia against Croatia under Article 259 TFEU (Ares (2018)1489697) and Reaction of Croatia of 17 April 2018 (Ares(2018)2087058)*
- Hearing of 2 May 2018

1. INTRODUCTION

Following the complaint from Slovenia of 16 March 2018, the written submission from Croatia of 17 April 2018 and the hearing of 2 May 2018, this note outlines the assessment of the Legal Service concerning Slovenia's allegations that Croatia is in breach of its obligations under EU law.

On 4 November 2009 the Governments of Slovenia and Croatia signed an Arbitration Agreement[1] to set up an Arbitral Tribunal whose tasks included the determination of the course of the maritime and land boundary between the two States. On 29 June 2017 the Tribunal rendered its Final Award[2] determining the land and maritime boundary between them, and establishing a "junction area" for Slovenia's access to the high sea.

Slovenia's complaint is, in essence, that Croatia by refusing to recognize the Final Award prevents Slovenia from fulfilling its obligations and enjoying its rights under EU law as described further below.

The note will first address the issue of admissibility stemming from Croatia's arguments that the EU institutions lack competence to address a border dispute,

[1] At: https://pcacases.com/web/sendAttach/2165

[2] At: https://pcacases.com/web/sendAttach/2172

which it considers a bilateral issue and a matter of international law only, and that the Complaint lacks legal connection with EU law. It will then examine the substantive issues of EU primary and secondary EU law.

2. ADMISSIBILITY OF THE COMPLAINT

The argument that the dispute is essentially a matter of international law

At the outset, it should be stated that the Complaint is not about "determination" or "decision" of the border between the two Member States as explained below, but about taking into account the outcome of an international arbitration between those two Member States.

Under international law, the States can settle their borders by different means. In case of dispute between neighbouring States, the settlement can be effected in particular by negotiation or by other means of peaceful settlement of disputes, such as international arbitration. International arbitration, as in the present case, is essentially a particular method for determining the border between adjacent States.

By their choice of arbitration and conclusion of the Arbitration Agreement to that effect, the Parties have exercised their sovereignty and thereby conferred legal power on the Arbitral Tribunal to determine in a legally binding manner their common land and sea borders.

Given that the Arbitral Tribunal has rendered its Final Award, the issue is no longer a matter of determining or deciding on the borders, unless the Parties together should agree otherwise. Therefore, the issue of the determination of the border by the EU does not arise and consequently there is no question of EU competence over such determination.

In addition, it should be noted that the competence of the EU does not extend to a legal review of an award rendered by an international tribunal. In theory, such decision could only be taken, under certain conditions, by the International Court of Justice.

It should moreover be underlined that the dispute on the validity of the Arbitration Agreement and on the absence of sufficient grounds for unilateral termination for material breach was already addressed by the Tribunal in the Partial Award of 2016.[3] It held, after being recomposed, that while Slovenia had violated the Arbitration Agreement, by engaging in *ex parte* contacts with the arbitrator originally appointed by it, the violations were not of such a nature as to entitle Croatia to terminate the Arbitration Agreement and it was confirmed that the Agreement remained in force. In this respect, the Tribunal relied, inter alia, on Article 65(4) of the Vienna Convention on the Law of Treaties (VCLT) which provides that *"[n]othing in the foregoing paragraphs [concerning the procedure to be followed by a party seeking to terminate or withdraw from a treaty] shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes"*. Consequently, the Tribunal's

[3] Partial Award of 30 June 2016: https://pcacases.com/web/sendAttach/1787

ability, pursuant to its own mandate, was preserved and it could resolve the dispute within its jurisdiction.[4]

In the light of the above, the relevant question for the purposes of EU law is not about the EU competence to determine the borders or to assess grounds for termination of the Arbitration Agreement, but is simply whether the EU should respect such international Award and take it into account in the application and interpretation of questions of EU law.

According to the settled case-law relating to the Union's position towards international law in general, the Court of Justice stated in Case C-286/90 Poulsen, para 9, as follows:

"As a preliminary point, it must be observed, first, that the European Community must respect international law in the exercise of its powers and that, consequently, [the relevant provision of EU law] must be interpreted, and its scope limited, in the light of the relevant rules of the international law of the sea" (emphasis added).

The Court's point of departure is of general application, and led it in the case at hand to the examination of the state of relevant customary international law of the sea binding the Union and thus influencing the interpretation of EU legislation.

It is only in particular cases where the protection of EU fundamental rights are affected that the Court has considered that *"international agreements cannot have the effect of prejudicing the constitutional principles of the EC"* and that thus the EU judiciary might review the lawfulness of Union acts intended to give effect to an international agreement[5].

The obligation to respect international law must include respect for legal principles such as *pacta sunt servanda* and *res judicata* and therefore international agreements such as the Arbitration Agreement as well as the Final Award. It should be recalled that Article 7(3) of the Arbitration Agreement provides that *"[t]he Parties shall take all necessary steps to implement the award, including by revising national legislation, as necessary, within six months after the adoption of the award".*

In this respect, the fact that implementing measures may still have to be taken, as argued by Croatia, cannot mean that it would be possible to disregard the Final Award and the provisions of the Arbitration Agreement. The possible implementation would therefore only concern arrangements on the material demarcation of the border where this is needed (mainly on land), and the adjustment of internal legislation and regulation. In the marine areas the lines have been precisely determined by the Award, and this aspect would normally not even require any further arrangements on demarcation.

In the light of the above, and without making any judgments of its own, the Commission must just observe that there is an Arbitration Agreement which has not been validly terminated and that there has been final determination of the borders between Slovenia and Croatia. Therefore the outcome of the arbitration procedure

[4] Ibid. para.165.

[5] Cases C-402/05 P and C-415/05 P, Kadi-I, ECLI:EU:C:2008:461, para 285-286.

must be respected by the EU, and provisions of EU law must be interpreted in the light of it.

3. SUBSTANCE OF THE COMPLAINT

3.1. Slovenian claims

Slovenia claims infringements of the following legal obligations:

(I) the general duty of loyal cooperation under Article 4(3) TEU, including the promotion of peace and stability and the effectiveness of the objectives of territorially based secondary EU law (here Slovenia mentions certain environmental directives and some fisheries regulations where Croatia prevents Slovenia from implementing its obligations on all its land and maritime territory);

(II) specific duties under the Common Fisheries Policy (CFP), and in particular (A) the access regime of Regulation 1380/2013 (1°) for Slovenian vessels in Croatian waters (and acknowledgment of a right of access of Croatian vessels in Slovenian waters) under Article 5 and Annex I of Regulation 1380/2013, and (2°) the access of Slovenian vessels to waters recognized as Slovenian in the Arbitral Award of 29 June 2017, (B) the control rules of Regulation 1224/2009 by (1°) preventing Slovenia from enforcing the CFP in Slovenian waters, (2°) exercising coastal State prerogatives itself in Slovenian waters (by escorting Croatian vessels in Slovenian waters, preventing Slovenian inspections, imposing sanctions on Slovenian vessels in Slovenian waters, and refusing to transmit the access regime information and data on Croatian vessels fishing in Slovenian waters), and (C) (at the hearing) the Regulation on illegal, unreported and unregulated fishing (IUU Regulation) 1005/2008 by encouraging illegal fishing in Slovenian waters;

(III) specific duties under the Schengen Code and in particular: (A) the determination of the border in accordance with international law (Article 4) and (B) the obligation to cooperate on surveillance (Articles 17 and 13);

(IV) specific duties under Maritime Spatial Planning Directive 2014/89 by not accepting delineation in accordance with the United Nations Convention on the Law of the Sea (UNCLOS) (Article 2(4)), by including in the Croatian plan maps including Slovenian waters, and by a failure to cooperate (Article 11).

3.2. Analysis of Slovenian claims

3.2.1. Sincere cooperation

3.2.1.1. Territorial application of EU law

The common ground of the Parties' arguments in relation to both primary and secondary EU law is that they depend on a particular approach to the proper territorial application of EU law. Concretely, the argument in this case is focused on the maritime area which, according to the Final Award, falls within Slovenian territorial waters.

Article 52 TEU, concerning the scope of application of the Treaties, does not include a specific geographic description of that scope (unlike Article 355 TFEU in relation to some areas of the Members States), but the geographic scope is assumed implicitly through the reference to the Member States (implying their territory). This reflects the fundamental principle of international law of the territorial sovereignty of the Member States, who are responsible for application of EU law in their territories. This approach to the scope of the Treaties is built on the premise that the borders of the Member States are settled and stable, which is essential for the application of the EU Treaties.

In the light of the values of the Union, in particular its aim of promoting peace and the common values, as provided in Articles 2 and 3(1) TEU, the Treaties clearly reflect a view that, in case of territorial disputes, the disputes should be settled by peaceful means and in accordance with international law. The Arbitration Agreement makes the same point as it recalls the peaceful settlement of disputes in its preamble.

3.2.1.2. Article 4(3) TEU

Article 4(3) TEU expresses the principle of sincere cooperation, pursuant to which the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall also take any appropriate measures, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of its institutions, and they shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives.

In Case C-284/16 Achmea, the Court of Justice stated that "the Member States are obliged, by reason inter alia of the principle of sincere cooperation ...to ensure in their respective territories the application of and respect for EU law..."[6]. This territorial aspect related to the principle of sincere cooperation is essential in this case since the issue of "disputed" maritime areas underpins all the claims by Slovenia as well as the arguments by Croatia.

[6] C-284/16 Achmea, ECLI:EU:C:2018:158, para 34.

Therefore Slovenia is entitled and bound to implement EU law, in particular EU legislation with territorial application, in the areas and within the limits established by the Arbitral Tribunal.

As a consequence of this, under the duty of sincere cooperation, Croatia is obliged towards the EU and towards Slovenia to facilitate the implementation by Slovenia of EU law in these areas.

It follows from the uncontested facts of the case (see below for certain areas examined in more detail) that Croatia's contestation of the outcome of the arbitration is preventing Slovenia from exercising is duties in the relevant areas. Therefore such refusal by itself constitutes a breach of the duty of sincere cooperation with Slovenia and with the EU.

3.2.2. The CFP access regime

Based on the territorial applicability of EU law on the access of fishing vessels to the territorial waters of other Member States, the delimitation of which must respect international law, including the Award between Slovenia and Croatia, the access regime of Article 5(2) and Annex I of Regulation 1380/2013 applies respectively to Croatia and Slovenia on the basis of the delineation made in the Final Award. This regime includes the duty to respect the reserved access of Slovenian vessels in their own territorial waters and the duty to accept Slovenian vessels in certain Croatian waters (and vice versa), as well as the obligation to limit the Croatian vessels in Slovenian waters to 25 (and 5 trawl net fishers) and to 100 tonnes.

According to footnote (1) of Annex 1 to the Regulation, this access regime was to apply "from the full implementation of the arbitration award resulting from the Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia, signed in Stockholm on 4 November 2009". Croatia's argument that this regime is not yet in place, because the "full implementation" to which the footnote refers has not yet been achieved in practice cannot be accepted.

This notion of "full implementation" has to be interpreted in the light of Article 7 of the Arbitration Agreement, which provides on the one hand that the award is final and binding on the Parties, and on the other hand that it shall be implemented by the Parties within six months after its adoption.

Therefore, the notion of "full implementation" simply refers to the expiration of the deadline laid down for the parties to implement the award in their legislation and possibly in demarcation arrangements, and should not be interpreted as leaving to Croatia the right to unilaterally postpone the application of the access regime respectively for its own vessels in Slovenian waters and for Slovenian vessels in Croatian waters.

The behaviour of the Croatian authorities alleged by Slovenia, and not contested by Croatia, includes a failure to amend Croatian law so as to permit the operation of the access regime, refusal to recognise the effects of Slovenian legislation adopted for this purpose, refusal to transmit to Slovenia the information concerning Croatian vessels fishing in Slovenian territorial waters which would allow Slovenia to exercise control over their use of the

access regime, and a failure to respect Slovenian exclusive competence as coastal State to control fishing activities in its territorial waters.

It is clear therefore that Croatia is depriving Slovenia of its right to benefit from the access regime in Croatian waters, and is failing to allow Slovenia to exercise its rights as coastal State to control fishing activities by Croatian vessels in its territorial waters.

3.2.3. CFP control and IUU

Pursuant to Article 5 of the Control Regulation (Regulation 1224/2009), a coastal State is obliged to carry out controls on fishing activities within its territory and in waters under its sovereignty or jurisdiction. It is clear from Article 80(1) and (2) that the subsidiary right of other Member States to carry out inspection activities does not apply within the territorial waters of a Member State.

It is not contested that Croatia continues to consider as its own a certain maritime area which, according to the Final Award, falls within Slovenian waters. In particular, in the concrete incidents complained of by Slovenia and not denied by Croatia, Croatian authorities inspected and fined a Slovenian vessel fishing in that area and prevented Slovenia from taking on this task, and furthermore, without the consent of Slovenia, arranged for police escorting of Croatian vessels fishing in the area.

Thereby Croatia precluded Slovenia from fulfilling its task as coastal State in its territorial waters, and it carried out itself control tasks in an area where it was not competent to do so, and thus violated (and is still violating) Regulation 1224/2013.

3.2.4. Maritime Spatial Planning

It is not contested that Croatia has adopted certain acts for the purpose of the implementation of Directive 2014/89 on Maritime Spatial Planning in which it has included as its own the area which, according to the Final Award, falls within Slovenian waters. Thus, it included in its maritime spatial planning an area which it would be for Slovenia to include in its own plan when this will be established. (The deadline for the establishment of maritime spatial plans has not yet expired).

Even if this action by Croatia would not necessarily prevent Slovenia from including that area in its own plan, the overlapping inclusion of the same area in two Member States' plans means that conflicting maritime planning measures can be taken for the same area. This involves a failure to comply with the duty of bordering Member States to cooperate on maritime spatial planning in order to ensure that maritime spatial plans are coherent and coordinated across the marine region concerned (Article 11).

Therefore, by including the area allocated to Slovenia in its planning Croatia violated (and is still violating) Directive 2014/89.

3.2.5. Schengen Border Code

It appears not to be contested that in one concrete incident Croatia sanctioned a Slovenian fisherman in the area allocated to Slovenia by the Final Award for having crossed the border outside border crossing points. However, given the isolated nature of this incident, and its incidental character in relation to fishing activities, it may not be worthwhile to pursue this aspect as a separate ground of infringement.

4. CONCLUSION

The Legal Service considers that most of the heads of claim put forward by Slovenia in order to establish a breach of EU law by Croatia are established, and that a Reasoned Opinion should therefore be adopted pursuant to Article 259 in relation to the matters set out above.

As the deadline for sending such a Reasoned Opinion is 18 June, and as the drafting and inter-service consultation involved will take some time, I should be grateful to have your agreement as soon as possible.

Signed
Karen BANKS