

# A MATTER OF (A)POLITICAL INTERPRETATION: SOME REFLECTIONS ON CASE C-457/18 *SLOVENIA V CROATIA*

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*This contribution reflects on the EU law side of the story of Slovenia and Croatia's border dispute. It discusses some of the key parts of the Advocate General's opinion and the Court of Justice's judgment in this case, including the issue of the scope of EU law, the status of international law in EU law, the interpretation of international law for the purposes of EU law adjudication, and the rule of law dimensions of the border dispute between the two neighbouring Member States. It also offers some general remarks on the nature of legal scholarship that can be read as a response to some of the academic commentary of this case.*

## 1 INTRODUCTION

On the day the European Union (EU) was bidding adieu to its 47-years long Member, the Court of Justice of the EU (CJEU, the Court) delivered a ruling that somewhat flew under the radar of the EU legal and political audience save for the two neighbouring Member States of the Union's southeast.<sup>1</sup> The dispute involved Slovenia alleging Croatia's violation of EU law, the violation stemming from the latter's refusal to accept the Arbitral Award settling the longstanding border dispute between the two.<sup>2</sup> It is one of the extremely rare 'Member State versus Member State' infringement actions, unique moreover for having strong elements of territoriality – borders and territorial application of law – at its heart. As such, it might have 'some substantial precedent-setting characteristics'.<sup>3</sup> The Court eventually rejected the jurisdiction to decide on this matter. Thirty years old quarrel between the two neighbours thereby failed to reach its conclusion, thus prolonging what some may see as the 'Balkanization' of the Union's political scene.<sup>4</sup>

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<sup>1</sup> Case C-457/18 *Slovenia v Croatia* EU:C:2020:65.

<sup>2</sup> The Permanent Court of Arbitration, Final Award of 29 June 2017, *PCA Case No. 2012-04 in the Matter of an Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009*, available at <[www.acerislaw.com/wp-content/uploads/2017/07/PCA-Arbitration-Between-Slovenia-and-Croatia.pdf](http://www.acerislaw.com/wp-content/uploads/2017/07/PCA-Arbitration-Between-Slovenia-and-Croatia.pdf)>.

<sup>3</sup> Thomas Bickl, 'CJEU judgement on Slovenia v Croatia: What role for international law in EU-accession dispute settlement?' (*The NCLOS Blog*, 18 February 2020), available at <[site.uit.no/nclos/2020/02/18/cjeu-judgement-on-slovenia-v-croatia-what-role-for-international-law-in-eu-accession-dispute-settlement/](http://site.uit.no/nclos/2020/02/18/cjeu-judgement-on-slovenia-v-croatia-what-role-for-international-law-in-eu-accession-dispute-settlement/)>.

<sup>4</sup> With 'Balkanization', I do not mean what is usually taken under this term, that is, a breakup (often aggressive, even violent) of a whole into smaller (conflicting) pieces. See Robert W. Pringle, 'Balkanization', *Encyclopaedia Britannica*, available at <[www.britannica.com/topic/Balkanization](http://www.britannica.com/topic/Balkanization)>. Rather, with this term I simply refer to the 'tainting' of the EU affairs with what is seen as a parochial, primitive, senseless, irrational quarrel between those of the Balkan Other, 'down under' from the peaceful, progressive, civilised democracies of *Mitteleuropa* (or Western Europe). cf Slavoj Žižek, *The Fragile Absolute* (Verso 2000) 3-5.

This contribution comments on the Court's judgment and the Advocate General's (AG) opinion in this case, as well as the academic responses to these two. Following the introductory remarks and historical overview (section 2), its central part (section 3) covers some of the most important points that appear throughout these sources; namely, the scope of EU law (subsection 3.a); the nature of international law and its status in EU law (subsections 3.b and 3.c); the interpretation of international law for the purposes of EU law (subsection 3.d); the 'political' interpretations of law by different institutional actors in the EU legal community (subsection 3.e); and the rule of law dimensions of the dispute between Slovenia and Croatia (subsection 3.f). On all these counts, my assessment of the outcome of the case is favourable. Finally, going beyond what would be a mere commentary of the present case, this contribution concludes with several remarks on the nature of (EU) legal scholarship in general (sections 4 and 5). Through them, I try to present a dialectical and politically engaged approach to discussing contemporary legal problems, which at times ends up in reasonable interpretive disagreements, as nothing scandalous, notwithstanding how dreadful it may sound for the mainstream view.

But before all this, for those uninvolved or uninterested in Slovenia and Croatia's border affair, it might be worth reminding briefly in the following section: where did it all come from?

## 2 BACKGROUND

After the breakup of ex-Yugoslavia, newly independent countries found themselves with some of their borders undefined. During the socialist regime, after all, this was not seen as an issue since 'It [was] all Yugoslavia'. Efforts by Slovenia and Croatia in trying to resolve their border dispute roughly split into three decade-long periods following their independence. During the first decade (1990s), two countries tried with diplomacy and attempted to negotiate a bilateral agreement, but to no avail.<sup>5</sup>

The second decade (2000s) was marked by Slovenia's entry into the EU and Croatia's protracted accession negotiations. During this period, bargaining positions regarding the means of settling the dispute solidified: whereas Croatia proposed the UN Tribunal for the Law of the Sea or the International Court of Justice (ICJ) as its preferred adjudication forum, Slovenia insisted on ad hoc arbitration. Both sides were perfectly logical in their position when applicable law comes to mind. Croatian choice of international tribunals that would first and foremost apply *international law*, which at first glance favoured its arguments; Slovenian choice of arbitration tribunal that would apply *law and principles agreed upon by the parties* (such as equity and good neighbourliness), which left more room for a decision in its favour. When the agreement on the adjudication forum proved to be evasive, being the EU Member State Slovenia played its strongest card: it kept blocking Croatia's progress in the EU accession negotiations and pulled

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<sup>5</sup> For a detailed overview of the history and the present of the border dispute between the two, see Thomas Bickl, *The Border Dispute between Croatia and Slovenia. The Stages of a Protracted Conflict and its Implications for EU Enlargement* (PhD Thesis, University of Duisburg-Essen), available at <[duepublico2.uni-due.de/servlets/MCRFileNodeServlet/duepublico\\_derivate\\_00070268/Diss\\_Bickl.pdf](http://duepublico2.uni-due.de/servlets/MCRFileNodeServlet/duepublico_derivate_00070268/Diss_Bickl.pdf)>.

back only after Croatia gave in and signed the Arbitration Agreement.<sup>6</sup> This historically unprecedented move of using the EU membership status to force the settlement of a bilateral issue vis-à-vis a candidate country found little understanding or support on the part of other EU countries and institutions.<sup>7</sup>

In the third decade (2010s), Croatia finally acceded to the EU. The Arbitration Tribunal started its proceedings. The proceedings were disrupted after the 2015 ‘Arbitration-gate’, in which the media leaked ex parte communications between Slovenian arbiter and Slovenian government’s agent. Croatia immediately announced its withdrawal from any further proceedings before the Tribunal. It claimed that Slovenia committed a grave procedural misconduct that resulted in a material breach of the Arbitration Agreement, which allowed it to terminate and withdraw from the ongoing arbitration. However, the Tribunal disagreed. It ‘reconstituted’ itself with the Partial Award,<sup>8</sup> and decided to continue and complete the proceedings. It rendered the Final Award in 2017, which Croatia to this day refuses to accept.

### 3 ENTER EU LAW

Hence, nowadays Slovenia and Croatia, both being EU Member States, still dispute their border limitations despite repeated attempts to resolve them through diplomacy and arbitration, and despite ‘It is now all EU’.<sup>9</sup> But, precisely since ‘it is now all EU’, Slovenia decided to pursue legal path opened to it within the framework of EU law. Based on Article 259 of the Treaty on the Functioning of the EU (TFEU),<sup>10</sup> Slovenia launched an infringement action against Croatia for alleged breaches of EU law that stem from the violations of international law, that is, Croatia’s rejection of the final arbitral award. In this procedure, as a first step the suing Member State has to alert the European Commission to hear its position on the alleged breaches of EU law by the sued Member State. Since Commission remained silent during the three months period left to it to respond to Slovenia’s arguments and brought no action before the CJEU against Croatia –

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<sup>6</sup> Text of the Arbitration Agreement is available in Vladimir Ibler, ‘Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia’ (2012) 49 Rad Hrvatske akademije znanosti i umjetnosti. Razred za društvene znanosti 168-172. Vladimir Ibler, Croatian academic and international law doyen, strongly criticized the Agreement for what in his view was, inter alia, a clear deviation from the norms of international law and an unequal treatment of one of the contractual parties.

<sup>7</sup> Bickl (n 5) 147.

<sup>8</sup> The Permanent Court of Arbitration, Partial Award of 30 June 2016, *PCA 166428 in the Matter of an Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009*, available at <[pcacases.com/web/sendAttach/1787](http://pcacases.com/web/sendAttach/1787)>.

<sup>9</sup> Klemen Slakonja, ‘Sad je tu sve EU’, available at <[www.youtube.com/watch?v=8Zf8z9-vouE](http://www.youtube.com/watch?v=8Zf8z9-vouE)>.

<sup>10</sup> Article 259 TFEU: ‘1. A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union. 2. Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission. 3. The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party’s case both orally and in writing. 4. If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.’

despite its Legal Service opined, in another leaked document, that Croatia indeed violated EU law<sup>11</sup> – Slovenia itself finally brought the matter before the Court.

The Slovenian lawsuit alleged Croatia's violations of EU primary law: more specifically, the duty of loyal cooperation from Article 4(3) of the Treaty on the EU (TEU), and the principle of rule of law from Article 2 TEU; as well as EU secondary law with territorial application: several regulations and directives in the area of common fisheries policy and cooperation on border control.<sup>12</sup> In Slovenia's view, all these violations of EU law stemmed from Croatia's refusal to accept and implement the final arbitral award that claims to settle the border between the two.

In his Opinion published in December 2019, AG Pikamäe advised the Court not to assume the jurisdiction to decide the dispute between the two Member States. In his view, the violations of EU law were merely 'ancillary' to the dispute the two are having under public international law, which the Court does not have jurisdiction to resolve authoritatively in the framework of the TFEU infringement procedure.<sup>13</sup> In January 2020, the CJEU followed with a ruling that essentially mirrors the AG's position.

Interestingly, and perhaps somewhat surprisingly, 'Slo-Cro saga' barely received any coverage in the EU legal commentary. It received a more vivid treatment from international law scholars, at least for the time being. A thoughtful response worth mentioning that argued (predominantly) from the position of EU law was published following the AG's Opinion and few weeks before the judgment.<sup>14</sup> It essentially follows the arguments of Slovenian government, which were eventually rejected by the Court, as proposed by its AG. Six points of law identified in this contribution represent the most relevant and contentious parts of the AG's Opinion, which were afterwards in essence endorsed in the CJEU's judgment. In this respect, it seems fair to assume that AG Pikamäe's treatment of the legal issues at stake informed the CJEU's analysis, even where the Court stopped short of explicitly referring to the Opinion. These six points, all interrelated in fact, I now take up in turn.

### 3.1 WHAT IS WITHIN THE SCOPE OF EU LAW?

In order to bring in the CJEU to decide on the merits of the matter before them, Slovenia had to successfully establish that the Arbitral Award, from which spring all Croatia's alleged violations of EU primary and secondary law, is within the scope of EU law. To substantiate this claim, one could point to the EU's special role in negotiating and signing the Arbitration Agreement, as well as the reference in the Accession Treaty between the EU and Croatia.

<sup>11</sup> European Commission Legal Service, *Note for the Attention of Clara Martínez Alberola, Chef de Cabinet of the President. Follow up to the hearing on the dispute between Slovenia and Croatia*, Ares(2018)2492481 SECEM (Brussels, 14 May 2018).

<sup>12</sup> Summary of Slovenia's six grounds for suit are provided in Opinion of AG Pikamäe in Case C-457/18 *Slovenia v Croatia* EU:C:2019:1067, paras 53-61.

<sup>13</sup> The Court might have jurisdiction to deal even with this issue, as some have suggested, under the TFEU Article 273 that reads 'The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties.'

<sup>14</sup> Jakob Gašperin, 'When Violations of International and EU Law Overlap: On the Lack of Jurisdiction of the ECJ in the Advocate General's Opinion in *Slovenia v. Croatia*' (*Verfassungsblog*, 6 January 2020), available at <verfassungsblog.de/when-violations-of-international-and-eu-law-overlap/>.

The claim that '[t]he EU was monitoring [the negotiation] process and co-signed the Arbitration Agreement as a witness', supporting the assertion that '[t]he Arbitral Award therefore at least indirectly entered the EU legal system'<sup>15</sup> had to be rejected for the following reason. 'To co-sign' something in this context sounds more powerful than it was. The EU, however, did not co-sign the Arbitration Agreement so that it became an EU agreement, which would obviously become part of EU law and would be subjected to different TFEU procedures regulating EU's foreign policies. The EU did not take upon any international obligation under that Agreement. Notwithstanding some engagement, the EU institutions have not acted in the capacity required by the Treaties. The then-Presidency of the Council merely signed it as a 'witness'. This cannot be equated to 'the EU co-signed it'.

Neither can the EU's 'formal involvement', albeit short of being a party to the treaty, put it in 'a special *sui generis* position' and make the Arbitral Award 'uniquely related with the EU', thus triggering the application of EU law, and consequently the CJEU's jurisdiction.<sup>16</sup> To hold otherwise would be devoid of any explanatory value. Here, one can only be reminded how, in lack of a positive argument that would successfully support a claim, resorting to vague characterizations reveals the vacuum behind the proposition in question. When it cannot be proven that X *exists* or what X *is*, shortcut to evading this effort is to claim that X is special, unique, *sui generis*. However, from these characterizations, it is left unclear what X really is.<sup>17</sup>

Furthermore, AG Pikamäe recalled the Court's case law that clarifies the narrow situations in which the Union can be considered as bound by international law. First are international agreements signed by the Union in accordance with the Treaty procedures that become an integral part of the EU's legal order.<sup>18</sup> Second are international agreements signed by the Member States in the areas of competences subsequently taken over by the Union.<sup>19</sup> Third are norms of customary international law that the Union must respect in the exercise of its competences.<sup>20</sup> Everything that falls outside of these three categories, concluded the AG, cannot be considered EU law or binding the Union; hence, the CJEU has no jurisdiction to interpret it or rule on its validity. And such is the case with the Arbitration Agreement between Slovenia and Croatia.<sup>21</sup>

Nevertheless, the follow-up claim bears somewhat greater weight: '[T]he Accession Treaty between the EU and Croatia, which is EU law, expressly refers to the Arbitration Agreement and the anticipated Arbitral Award with regard to (secondary) EU law [...]'.<sup>22</sup> This certainly is

<sup>15</sup> Gašperin (n 14). Similar claim appeared in Thomas Bickl, 'The Advocate General's Opinion on Slovenia v Croatia: A proper reflection of international law and the EU's role in the Arbitration Agreement?' (*The NCLoS Blog*, 7 January 2020), available at <site.uit.no/nclos/2020/01/07/the-advocate-generals-opinion-on-slovenia-v-croatia-a-proper-reflection-of-international-law-and-the-eus-role-in-the-arbitration-agreement/>.

<sup>16</sup> Gašperin (n 14); Bickl (n 15).

<sup>17</sup> cf Robert Schütze's criticism of the explanatory value of the 'sui generis' theory of the EU's (federal) nature, in Robert Schütze, *European Constitutional Law* (CUP 2015) 63-65.

<sup>18</sup> Opinion of AG Pikamäe (n 12), para. 104, referencing Case C-266/16 *Western Sahara Campaign UK* EU:C:2018:118, paras 45-46.

<sup>19</sup> *ibid*, referencing Case C-301/08 *Bogiatzji* EU:C:2009:649, para 33 and Case C-366/10 *Air Transport Association of America and Others* EU:C:2011:864, para 63.

<sup>20</sup> *ibid*, referencing Case C-286/90 *Poulsen* EU:C:1992:453, paras 9-10; Case C-104/16 P *Council v Front Polisario* EU:C:2016:973, para 88; Case C-15/17 *Bosphorus Queen Shipping* EU:C:2018:557, para 45.

<sup>21</sup> Opinion of AG Pikamäe (n 12) paras 122-127; *Slovenia v Croatia* (n 1) para 102. For a critique, see Bickl (n 15).

<sup>22</sup> Gašperin (n 14).

true. However, the AG characterized the Accession Treaty's requirement to end the border dispute with Slovenia as a political condition of Croatia's accession to the EU, not a legally binding obligation imposed on it.<sup>23</sup> This interpretation was supported by the Commission in the proceedings before the Court,<sup>24</sup> and subsequently endorsed by the latter.

Accepting Croatia's argument, AG Pikamäe brought in another element of the CJEU's jurisprudence on the status of international law in the EU legal order. The Court has no jurisdiction to decide on the alleged infringements of obligations under the Treaties if those obligations are merely ancillary to another dispute (say, under international law) for which the Court also has no jurisdiction.<sup>25</sup> Such is the case with Croatia's alleged violations of EU primary and secondary law that are merely ancillary to the dispute under international law.<sup>26</sup>

The crucial point here is whether, at the moment of the Court's assessment of the matter, there existed a dispute between Slovenia and Croatia under international law to which alleged violations of EU primary and secondary law would be ancillary. To this issue I turn in the following part.

### 3.2 WHAT IS PENDING?

It should be noted at the outset that Slovenia's assertions are sound under the assumptions made about the finality and binding-ness of international law in question (that is, the Arbitral Award). Therefore, if one departs from this position and accepts without questioning these assumptions, the positive argument for the Court's jurisdiction to decide on alleged violations of EU law, even if they are ancillary to public international law, makes more sense. However, this is not so if one acknowledges that the issue *as a matter of international law* is not settled, the argument Croatia advanced and the CJEU and its AG seemingly accepted. Then, all arguments about the existence of a question (even ancillary) of EU law hinge on the previous settlement of international law and, absent this settlement, fail. Which raises the question whether the thing is settled or not?

Albeit there is no formal dispute pending before an international tribunal, there is a 'pending' dispute in the sense of divergent interpretations of international law. Croatia, at least, claims there exists *no* Arbitral Award that could possibly trigger any EU law obligations, or directly or indirectly, actually or potentially enter the EU legal system. Hence, the question of its alleged EU law violations is moot or hypothetical. This was one of Croatia's arguments against

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<sup>23</sup> Opinion of AG Pikamäe (n 12) para 126; *Slovenia v Croatia* (n 1) para 103.

<sup>24</sup> Opinion of AG Pikamäe (n 12) para 126, footnote 58. Commission concurred that 'the text of the notes 8 and 10 of the Annex I to the Regulation 1380/2013, which reflects the content of the Act of Accession, envisages that the regime of access to coastal waters of [Croatia and Slovenia] will be applied only after the Arbitral Award [...] is fully implemented'. In Commission's view, the *text* of this provision can be understood as expressing the authors' *intent* 'not to apply the access regimes with immediate effect or with automatic effect from a specified date'.

<sup>25</sup> Case C-132/09 *Commission v Belgium* EU:C:2010:562, referenced in Opinion of AG Pikamäe (n 12) paras 105-107; and the Court's judgment in *Slovenia v Croatia* (n 1) paras 91-92.

<sup>26</sup> *Slovenia v Croatia* (n 1) para 104. For some remarks on this point, see Eduardo Stoppioni, 'CJEU finds it has no jurisdiction in the Slovenia/Croatia border case' (*EU Law Live*, 3 February 2020), available at <eulawlive.com/op-ed-cjeu-finds-it-has-no-jurisdiction-in-the-slovenia-croatia-border-case-by-edoardo-stoppioni/>.

the CJEU's jurisdiction.<sup>27</sup> This calls for a further elaboration of international law position, to which – it should be stressed as well – I claim no particular expertise.

Slovenian government (some commentators too) repeatedly claimed that, under public international law, the Arbitral Award is final and binding.<sup>28</sup> In their view, there seems to be no dilemma that this is the *only* and *correct* interpretation of international law; others are dismissed as invalid or political. Well, it is still just *one possible* interpretation of international law at issue. Perhaps it is *better* or *more convincing* than the counter interpretations offered by the others, but as a matter of international law it is in no way automatically supreme to them. What do I mean by this? Public international law, although for some legal philosophers like H.L.A. Hart 'imperfect' (due to its lack of 'secondary norms'),<sup>29</sup> is *a legal system*. The law it is made of is created, applied and interpreted in a decentralised manner.<sup>30</sup> More specifically, international law is interpreted by its legal 'officials': not only by adjudicators sitting in international tribunals or representatives and public servants in international organizations, but also by state institutions – governments, national parliaments, domestic courts.

Now, the problem often associated with international law is that it is frequently subject to 'auto-interpretation'.<sup>31</sup> States themselves, via their organs – and in the absence of an international judicial juggernaut-umpire – interpret freely what their international legal obligations mean and are. In doing so, they are obviously led by considerations other than purely 'legal', be it political or strategic. However, that does not make their interpretations *prima facie* illegitimate or invalid – rather, this is a structural feature of international law and as such inevitable. True, one can argue how convincing or coherent or logically sound and consistent one or the other interpretation is. But they all equally *exist* and – unlike in municipal legal systems – international law, given its under-institutionalisation, does not know supreme judicial institutions to authoritatively rule on these interpretive disagreements or police force to enforce domestically a given decision.

The Croatian government and parliament ('one-sidedly', obviously) decided unanimously that their view of international law – their interpretation of the Vienna Convention on the Law of Treaties (VCLT) and the Arbitration Agreement – is that 'arbitral proceedings were irrevocably finished' and that it is indeed 'possible to terminate or withdraw from ongoing arbitration proceedings'.<sup>32</sup> This was the purest expression of the sovereign will of one nation-state. And the same international law, like any law, is not decisive but *indeterminate*. Hence, it admits of different possible interpretations.

Slovenia, on the other hand, came with its own understanding of international law, different from Croatia's. Reconstituted Arbitral Tribunal too. However, that does not mean that

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<sup>27</sup> Opinion of AG Pikamäe (n 12) para 67.

<sup>28</sup> See Slovenia's arguments stated in *Slovenia v Croatia* (n 1) paras 81, 84, 86-87. cf Gašperin (n 14), who similarly clings to the 'facticity' of the final and binding Arbitral Award.

<sup>29</sup> H.L.A. Hart, *The Concept of Law* (OUP 1994), Chapter X. AG Pikamäe in his Opinion (n 12) para 147 likewise notes 'the imperfect nature of international law'.

<sup>30</sup> Odile Ammann, 'How Do and Should Domestic Courts Interpret International Law? Insights From the Jurisprudence of H.L.A. Hart and Duncan Kennedy' (2019) 10 TLT 391.

<sup>31</sup> *ibid* 391-392; Odile Ammann, *Domestic Courts and the Interpretation of International Law* (Brill 2019).

<sup>32</sup> Gašperin (n 14).

their view is the *right* view. Even though, intuitively, it may sound right that the Arbitral Tribunal's interpretation of international law (of, for example, the notions of 'grave procedural misconduct' or 'material breach of bilateral treaty') is indeed the correct one. Hence, the other (Croatian) side does not even need to be heard. After all, the well-established principles of (international) law like *Kompetenz-Kompetenz*, *res iudicata*, and *pacta sunt servanda* would speak in its favour,<sup>33</sup> putting premium on whatever the international tribunal asserts and the value of legal certainty, while rejecting one party's 'auto-interpretation'.

Therefore, on the one hand, in the view of the Tribunal the Arbitral Award is binding and final – hence, it must be accepted and abided by Croatia. On the other hand, however, Croatia's position is diametrically opposed. On the side of their interpretation is, most importantly, the principle of state sovereignty. (Un)fortunately, the Westphalian concept of nation-state as absolute sovereign in international relations is still there. It is a (or *the*) structural, meta-principle in international affairs, the one that presupposes the existence of international law itself.

And again, I see no reasons – other than narrow legal formalist – why the Arbitral Tribunal interpretations would be, as a matter of international law, *automatically* supreme to Croatia's. Like any state, the Tribunal is *index in causa sua* too – and a lavishly paid one for that matter. Policy or strategic interests, and not merely 'legal' considerations, might likewise influence its interpretations. At the same time, its interpretations might have been qualified by the majority of legal commentators as better or more convincing than the concurrent ones; hence, superior and more authoritative. However, the acceptance by the interpretive community is never unanimous. There are always solid and feasible counter arguments. For instance, some contented that – what would in their view be the 'cleaner' solution to the dispute in question – the Tribunal ought to have '*itself* terminate[d] the proceedings, citing grave procedural misconduct', lest it would deliver 'an unenforced and discredited award'.<sup>34</sup> Others remarked that no one could have 'sensibly assume[d] that the case can continue in any way before that arbitral tribunal'; hence, 'to set aside the whole thing and start again in order to protect the system as a whole [...] was plainly the right thing to do in order to protect the integrity of the judicial process'.<sup>35</sup> In anticipation of the Partial Award, Savarian further noted that 'the Tribunal [was] empowered to decide procedural matters of the *arbitration*' but 'not empowered to decide the validity of termination of the *Arbitration Agreement*'.<sup>36</sup> In his view, regarding the former, 'it [was] legally and politically untenable for the arbitration to carry on [...] PCA arbitration depend[s] on the continuous consent of the parties'.<sup>37</sup> Afterwards, Ilić remarked that the Arbitral Tribunal erred when in its Partial Award it nevertheless decided to carry on with the proceedings; for him, Croatia's view

<sup>33</sup> See Bickl (n 15); and another Croatian international law doyen, Vladimir-Đuro Degan, 'The Border Dispute between Croatia and Slovenia' (2019) 58 *Poredbeno pomorsko pravo* 11.

<sup>34</sup> Arman Sarvarian and Rudy Baker, 'Arbitration between Croatia and Slovenia: Leaks, Wiretaps, Scandal (Part 2)' (*EJIL: Talk!*, 7 August 2015), available at <[www.ejiltalk.org/arbitration-between-croatia-and-slovenia-leaks-wiretaps-scandal-part-2/](http://www.ejiltalk.org/arbitration-between-croatia-and-slovenia-leaks-wiretaps-scandal-part-2/)>.

<sup>35</sup> Philippe Sands, 'Reflections on International Judicialization' (2016) 27 *EJIL* 897.

<sup>36</sup> Arman Sarvarian, 'Arbitration between Croatia and Slovenia: Leaks, Wiretaps, Scandal (Part 4)' (*EJIL: Talk!*, 3 May 2016), available at [www.ejiltalk.org/arbitration-between-croatia-and-slovenia-leaks-wiretaps-scandal-part-4/](http://www.ejiltalk.org/arbitration-between-croatia-and-slovenia-leaks-wiretaps-scandal-part-4/), (emphasis added).

<sup>37</sup> *ibid.*



of what constitutes ‘a material breach’ under the VCLT was correct, entitling it to withdraw from the arbitration.<sup>38</sup>

From all this, it likewise does not follow that the Croatian interpretation of international law is *right* or *authoritative* either. One can surely criticize the Croatian government’s understanding of international law, of its obligations under it, and of procedural avenues open for it to pursue a desired outcome – all with good arguments for such a criticism. But, as a matter of international law, its interpretation is one possible, and legitimate. And it cannot be summarily dismissed. After all, Croatia is not merely refusing to accept the Arbitral Award on a whim, or violently undermining the international rule of law with no good cards to play but sheer force. Rather, it argues from *within international law*, articulates and advances some reasons and offers justification why they deem their interpretation to be *legally* warranted. This precisely is what international law – and the rule of law – require.

Where this leaves us is a conflict of rules and (meta)principles of international law – or differing interpretations of those sources of international law – with no *prima facie* reason why one ought to trump outright the other or vice versa. In this sense, there is a ‘pending’ interpretive dispute in international law between the two countries. This, much like everything else, is a matter of interpretation and juristic balancing. On my part, I admit the existing interpretive dilemma. However, I claim no interpretive supremacy for either side.

### 3.3 WHAT IS FACT?

Some clearly do claim supremacy to their preferred interpretation, based on its alleged ‘facticity’. For them, there can be no interpretive dilemma because their position is a ‘fact’. For instance, Gašperin holds that ‘a final and binding *res iudicata* Arbitral Award is not an open dispute in public international law but *a legal fact* which Member States and the EU have to respect’.<sup>39</sup>

This, to me, is a strange formulation. A *legal fact* – a ‘metaphysically suspicious’ fact – may be a *social fact*, certainly not a *natural fact*. As such, it is socially constructed. It is interpreted and reinterpreted, possibly even misinterpreted, and thus constructed by the ‘interpretive community’. Ronald Dworkin, for instance, famously saw ‘law as interpretation’.<sup>40</sup> He holds the interpretive practices to be central for every legal order.

From the international interpretive community, it seems, Gašperin would exclude Croatia’s view (and of others holding the same position). How should, then, the subject whose participation in the construction of this ‘legal fact’ is excluded be obliged to respect it? Insisting that something is a ‘legal fact’ and at the same time ignoring the social and political reality that puts that ‘fact’ into question seems frankly, in the words of a great American legal realist Felix Cohen, as just another ‘transcendental nonsense’.<sup>41</sup>

<sup>38</sup> Matko Ilić, ‘Croatia v. Slovenia: The Defiled Proceedings’ (2017) 9 *Arbitration Law Review* 347.

<sup>39</sup> Gašperin (n 14). cf text accompanied by note 28 above (emphasis added).

<sup>40</sup> Ronald Dworkin, ‘Law as Interpretation’ (1982) 60 *Tex. L. Rev.* 527.

<sup>41</sup> Felix Cohen, ‘Transcendental Nonsense and the Functional Approach’ (1935) 35 *Colum. L. Rev.* 809. Note that legal positivism, more specifically its contemporary reductionist strand that proposes that ‘suspicious’ legal facts ought to be collapsed into ‘non-suspicious’ (natural or social) facts in order to be properly placed within a domain of metaphysics, also rests on a ‘social facts thesis’. For a discussion, see Scott Shapiro, *Legality* (Harvard University

AG Pikamäe is less sanguine in this respect when he speaks of ‘objective predetermination’ that imposes itself on the EU and precedes territorial application of its law.<sup>42</sup> Viewing it through realist lenses, for AG the borders between Member States must not only be determined in the legal or political sense, but also implemented and operative.<sup>43</sup> ‘To deal with reality you must first recognize it as such’,<sup>44</sup> as if the AG was uttering.

On the other hand, for some AG’s argumentation at this point becomes circular: ‘The Arbitral Award would firstly have to be implemented, [AG] claims, and only then could the EU take it into account. *But the violation of EU law obviously only arises because the Arbitral Award is not implemented – otherwise there would be no EU law violation*’.<sup>45</sup> Unfortunately, this critique misses the point. It is not true that if the Arbitral Award were implemented, there could be no EU law violation. Obviously, the Award could be implemented *incorrectly*. Suppose that Croatia accepts ‘the final and binding Award’, and – misinterpreting or misunderstanding the content of its obligation under the Award – proceeds to act on its newly-established border towards Slovenia in a way that would for some reason be contrary to EU law. Then, arguably, the Award would be ‘implemented’ in the way the AG sees it, but EU law violations would still emerge.

### 3.4 WHAT IS INTERPRETATION?

However, there is even a bigger problem with such a reasoning of AG Pikamäe, we are told.<sup>46</sup> It is the AG’s ‘curious’ yet ‘deeply problematic’ *interpretation* of international law that he proposed when assessing whether the Arbitral Award is ‘implemented’ or not. Something that he, ironically, claims the CJEU has no jurisdiction to perform.

The learned AG is probably more versed in law than he is given credit in this respect. True, in principle the AGs or the CJEU cannot and should not interpret public international law. But, the very concept of ‘interpretation’ is ambiguous. There is some difference between the factual (*in concreto*) and textual (*in abstracto*) interpretation (although that difference might be exaggerated, since the two interpretive exercises often overlap in practice).<sup>47</sup> Usually, however,

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Press 2011) 269: ‘Legal facts are ultimately determined by social facts alone’; Andrei Marmor, ‘Farewell to Conceptual Analysis (in Jurisprudence)’ in Wil Waluchow and Stefan Sciaraffa (eds), *Philosophical Foundations of the Nature of Law* (OUP 2013) 216: ‘The idea of a metaphysical reduction is to show that a distinct type of phenomenon is actually constituted by, and fully reducible to, some other, more foundational type of phenomenon. In our case, the idea is to show that law is constituted by social practices that can be fully explained by the way people actually behave, the kind of beliefs they share about their behavior, and the attitudes and dispositions that they exhibit in the relevant contexts’.

<sup>42</sup> Opinion of AG Pikamäe (n 12) para 111.

<sup>43</sup> *ibid*, paras 143-144: ‘To be possible to apply EU law, state borders must not only be *determined* from the perspective of public international law but also *actually demarcated*’ (emphasis added; author’s translation). See the Court’s endorsement of the AG’s view in *Slovenia v Croatia* (n 1) paras 105-106. Both AG and the Court were, nevertheless, criticised by Bickl (n 3), (n 15) for a ‘mechanistic’ reading that fails to fully appreciate the character of the obligation of the parties under international law to execute the arbitral decision without questioning.

<sup>44</sup> Laurence Gonzales, *Deep Survival: Who Lives, Who Dies, and Why* (Norton 2004).

<sup>45</sup> Gašperin (n 14) (emphasis added).

<sup>46</sup> *ibid*.

<sup>47</sup> Riccardo Guastini, ‘Legal Interpretation. The Realistic View’ in Mortimer Sellers and Stephan Kirste (eds), *Encyclopedia of the Philosophy of Law and Social Philosophy* (Springer forthcoming in 2021).

factual interpretation precedes textual interpretation.<sup>48</sup> In many cases, even in EU law, the former is inevitable. So, the way I see what the AG is doing is more akin to factual interpretation: cognition of the social fact of whether there exist a valid and binding legal decision that both parties voluntarily accept. (Of course, here one has to presuppose some knowledge of public international law as to the importance of having both parties voluntarily accepting a decision for it to be ‘legally binding’.)

Therefore, the AG should not be seen as assuming the competence to authoritatively decide on the *meaning* of international law, that is the *content* of the Arbitral Award. Rather, as a preliminary matter on which depends the EU law question at his hand, he is engaging in factual interpretation of the situation: whether there *exists* international law that is *applicable* and under which the factual situation is subsumed. He tries to answer the *is*-questions: *Is* there an award that settles the border between the two? Where *is* the border? *Are* they both *agreeing* on it? With this, he is not interpreting *in abstracto* the Award in order to answer the *ought*-questions: *Should* there be an award that settles the border between the two? Where *should* the border between the two stand? *Should* one or the other *accept* that that is what the Award says and where the border stands? Likewise, he urges the Court not to do the same.<sup>49</sup> And in its judgment, the CJEU refrains from doing it.

Hence, I believe, AG Pikamäe is not inconsistent in what he is doing as he is being accused of. And again, this is not to say that the AG is *correct* in his interpretive approach either; he might as well be wrong, or unconvincing. But, the illegitimacy and logical fallacy of his argumentation is overstated.<sup>50</sup>

As a general matter, to me there is nothing controversial in either AGs or the Court *interpreting* international law, when having the abovementioned ambiguity of the concept of ‘interpretation’ in mind. The following might sound almost trivial, but is nevertheless worth mentioning. Consider, for example, this paragraph from *Poulsen*:

‘[T]he [EU] *must respect international law* in the exercise of its powers and [...], consequently, [the provision of EU law in question] *must be interpreted*, and its scope limited, *in the light of the relevant rules of the international law of the sea*’.<sup>51</sup>

In order to interpret EU law in *the light of* international law, the Court surely must know the *meaning* of that international law. How can it know the meaning of international law without

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<sup>48</sup> Riccardo Guastini, ‘Interpretive Statements’ in Ernesto Garzón Valdés, Werner Krawietz, George Henrik von Wright and Ruth Zimmerling (eds), *Normative Systems in Legal and Moral Theory. Festschrift for Carlos E. Alchourrón and Eugenio Buzygin* (Duncker & Humblot 1997) 291-292.

<sup>49</sup> cf Bickl (n 5) 204 and 210: ‘[I]t appears that the CJEU has jurisdiction and should be in a position to establish a violation of several of the above provisions of primary and secondary EU law on the part of Croatia, and therefore order Croatia to stop the infringements by implementing the arbitration award for the purposes of full implementation of EU law. [...] [The CJEU] cannot look into the substantive decision of the Arbitral Tribunal (which, in the view of this author, is a definite settlement of the case under international law), but will assess the Slovenian claims of failure to fulfil obligations of EU law on the part of Croatia’ (footnotes omitted).

<sup>50</sup> Gašperin (n 14). Bickl (n 15), albeit equally critical of the AG’s views, concludes in a more sober fashion that he simply ‘appears to be at one end of the spectrum of viewpoints on the issue’.

<sup>51</sup> *Poulsen* (n 20) para 9 (emphasis added).

interpreting relevant international legal acts? This has been widely acknowledged in international law scholarship. When interpreting international law, the CJEU is considered to act as a domestic court due to specificities and autonomy of the EU legal order.<sup>52</sup> Obviously, the Court's interpretations of international law apply only within the EU legal system and are not authoritative beyond that.

The same goes for the Court's AGs, as well as other EU institutions. Take, for instance, the Commission's Legal Service in the dispute between Slovenia and Croatia, who interpreted – contrary to Croatian government's interpretation – the notion of 'full implementation' from footnote of the Annex I to the Common Fisheries Policy Regulation<sup>53</sup> 'in the light of Article 7 of the Arbitration Agreement'.<sup>54</sup> For this claim to make any sense, the Commission's Legal Service first must have ascertained the meaning of that provision of the Arbitration Agreement before interpreting the EU law provision in its light.<sup>55</sup>

In this context, equally indicative are the things that get (selectively) omitted and undiscussed before the CJEU or in legal commentaries. Take, for instance, paragraph 1137 of the Arbitral Award regarding the 'Regime of the Junction Area' that says '*nothing* in this Award purports to address any rights or obligations of the Parties arising under EU law'.<sup>56</sup> Could this somehow have affected the analysis of violations of EU law that stem from the alleged violation of international law? What could have the arbiters possibly meant by this statement? Did they really mean what would be its *literal meaning* taken at face value? Is there any *context* that might clarify it? What was the arbiters' *intention*? Was it intended at all, or did it somehow mistakenly end up in the final version of the Award?

Now, this might not mean a lot (and given the outcome of the present case before the CJEU might even seem pointless). Perhaps there is a good explanation of the meaning of this paragraph (albeit I have not heard one as of yet). But note how – beautifully – this becomes the subject of interpretation itself! Both Slovenian and Croatian side could have understood this part differently for the purposes of the infringement dispute or any other future dispute (perhaps, a preliminary reference to Luxembourg from a Slovenian court) under EU law. The Award now, from being final and binding and (for one party) the undisputed 'fact' and interpretation (in the sense of the outcome of the interpretative process) of international law becomes *interpretandum* itself, the interpretive object subject to legitimate interpretations (in the sense of the interpretive process itself) by the EU 'legal officials'. And here, time and again, enters the possibility of interpretive disagreements that some seem to be blind towards.

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<sup>52</sup> Helmut Philipp Aust, Alejandro Rodiles and Peter Staubach, 'Unity or Uniformity? Domestic Courts and Treaty Interpretation' (2014) 27 LJIL 75; Ammann (n 31).

<sup>53</sup> 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 L 354, 28. 12. 2013, 22-61.

<sup>54</sup> European Commission Legal Service (n 11) 6.

<sup>55</sup> cf Opinion of AG Pikamäe (n 12) para 126, footnote 58, from which it is apparent that in the proceedings before the Court the Commission adopted a position different from what its Legal Service suggested regarding the interpretation of the said footnote. Eventually, the AG concluded that the Article 7 of the Arbitration Agreement was not 'self-executing' (see para 148).

<sup>56</sup> The Final Award (n 2) (emphasis added).

### 3.5 WHAT IS POLITICAL?

Besides these matters of interpretation, there is another leitmotif that permeates criticism of the AG's Opinion, and by extension the CJEU's judgment. AG Pikamäe's Opinion 'appear[ed] to be fuelled by *political rather than legal* considerations'. The CJEU was hence called upon to assume the jurisdiction to decide the EU law dispute between the two neighbouring Member States 'regardless of the *political sensibility* of the subject matter'. It was frequently lamented that '*the political* arguably play[ed] a considerable role' in this case.<sup>57</sup>

Well, is not it always the case in disputes like this? For everyone who understand *law* as another social 'artifact' or 'tool' for achieving certain *political* ends, this should come as no surprise.<sup>58</sup> Some interpretations of law might indeed appear as more *political* than *legal*. But what could possibly be wrong with that? *The political* is embedded in *the law*. *The law* gives expression to *the political*. There is no one without the other. There is no *apolitical law*. And in a way, the courts – especially the high courts – are inherently, institutionally predisposed to deal with the controversies thrown at them from the political arena. Put differently, they are *legal forums* for dealing, in a procedurally structured manner, with *the political*.

In the EU, the infringement procedure itself is envisaged as *political*, and the political dispute does not miraculously transform into *apolitical* once it reaches the judicial (or *legal-proper*) stage. Furthermore, the Commission is a *political* actor. This is what it is meant to be within the system of the Treaties. Its *political* decisions not to follow the *legal* advice of its Legal Service are probably not that infrequent. I cannot see why this would delegitimize it so badly in a case like this.

Similarly, the 'auto-interpretations' of (international and EU) law by Slovenia and Croatia are inevitably self-interested and political. Even the critics recognize this, but only partially, when we are told that 'the rejection of the validity of the Award is solely *political* since Croatia has not initiated any *legal* proceedings e.g. before the ICJ trying to annul the Award, which might be a potential *legal* way to challenge the proceedings'.<sup>59</sup>

Such a statement begs the question – what has Slovenia 'legally' done in response to such a political (mis)interpretation of international law by the Croatian government? If the Slovenian side was so convinced in their righteous position *as a matter of international law*, international law surely has to offer it some legal remedies to vindicate that position. Why, then, not resort to countermeasures and retaliation under the VCLT, given that Croatia so blatantly rejects the 'legal fact' and hence keeps violating the international law? Because, mind you, the CJEU was never in the position to authoritatively resolve the dispute as a matter of international law and redraw the borders between the two countries. That *legal* problem remains for Slovenia and would likewise remain had the Court decided the dispute under EU law differently. How (a)political,

<sup>57</sup> Gašperin (n 14) (all emphases added).

<sup>58</sup> cf Luka Burazin, 'Legal Systems as Abstract Institutional Artifacts' in Luka Burazin, Kenneth Einar Himma and Corrado Rovarsi (eds), *Law as an Artifact* (OUP 2018) 112; Luka Burazin, 'Law as an Artifact' in Mortimer Sellers and Stephan Kirste (eds), *Encyclopedia of the Philosophy of Law and Social Philosophy* (Springer, forthcoming in 2021).

<sup>59</sup> Gašperin (n 14) (emphasis added).

then, was Slovenia's decision not to even bother with this and immediately run before the CJEU? Alas, we hear little word on this from the legal commentary.

Nevertheless, the point and the beauty of the 'interpretive pluralism'<sup>60</sup> remains precisely in this – different EU legal officials adopting different interpretations of the law: the Commission's Legal Service says one thing, Commission says the other, Slovenia comes up with the third, Croatia follows with the fourth, the AG offers the fifth. Luckily, for better or for worse, EU law knows its ultimate interpretive authority. The CJEU might have adopted the sixth interpretation – or side with any interpretation already entertained in the EU interpretive community, as it did – but one thing is certain: its interpretation is always the final one. However, there is a possibility that some disagreement between the judges sitting in the Luxembourg benches might occur. Although we do not have access to internal deliberations and the EU judiciary does not know dissenting opinions,<sup>61</sup> what we are presented with as collegiate unanimous decision might conceal the disagreement behind it.<sup>62</sup> The fact that the CJEU's judgments are often 'cryptic' and 'terse'<sup>63</sup> does not help with clarifying their meaning beyond reasonable doubt. Then, an interpretation given by the Court (the result of the process of interpretation) might become (and often does) the *interpretandum* – a given 'interpretation' becomes subject to different interpretations by the EU interpretive community (Member States, national courts, academia, EU political institutions).<sup>64</sup> Is there even a way for it not be *political* then?

Another thing was perhaps also predictable: there will always be at least one side in the dispute (if not both) that will characterize any decision of the Court – be it (i) to reject jurisdiction or (ii) to assume jurisdiction, or (iii) to assume jurisdiction but find no violation of EU law or (iv) the opposite of that – as 'political' and hence unjust and repugnant for them. Had, one the one hand, (ii) or (iv) materialized, Croatian side probably would have argued from the principle of conferral and claimed that the Court ruled on an issue lying outside the scope of EU law and thus overstepped the limits of its jurisdiction.<sup>65</sup> Or, that the Court sided in what is *in essence* a political dispute and acted against what would be a proper judicial role. Since, on the contrary,

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<sup>60</sup> cf of the treatment of the same concept of 'interpretive pluralism' by Gareth Davies, albeit in somewhat different context. Gareth Davies, 'Interpretative Pluralism within EU Law' in Matej Avbelj and Gareth Davies (eds), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar 2018) 323; Gareth Davies, 'Does the Court of Justice Own the Treaties? Interpretative Pluralism as a Solution to Over-constitutionalisation' (2018) 24 *ELJ* 358.

<sup>61</sup> Vlad Perju, 'Reason and Authority in the European Court of Justice' (2009) 49 *Va. J. Int'l L.* 307.

<sup>62</sup> Joseph H.H. Weiler, 'Epilogue: Judging the Judges – Apology and Critique' in Maurice Adams, Henri de Waele, Johan Meeusen and Gert Straetmans (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart 2013) 235.

<sup>63</sup> Perhaps the most famous example is the early landmark decision in *van Gend en Loos*, the founding stone of the entire EU constitutional edifice, passed by a split 4:3 majority in the Court, plus the Advocate General who opined contrary to the majority. For a full account, see Morten Rasmussen, 'Revolutionizing European Law: A History of the Van Gend en Loos Judgment' (2014) 12 *ICON* 136.

<sup>64</sup> Tamara Čapeta, 'Ideology and Legal Reasoning at the European Court of Justice' in Tamara Peišin and Siniša Rodin (eds), *The Transformation or Reconstitution of Europe. The Critical Legal Studies Perspective on the Role of the Courts in the European Union* (Hart 2018) 93-94.

<sup>65</sup> With this seems to agree leading Slovenian EU law expert Damjan Kukovec who, following the CJEU's judgment, further commented that Slovenia's lawsuit 'was doomed to fail' whereas criticism of AG Pikamäe was 'completely misplaced'. In his view, the Court 'had no realistic choice whatsoever'. See Damjan Kukovec, 'Zakaj Slovenija pred Sodiščem EU nikakor ni mogla zmagati?' (*Delo*, 15 February 2020), available at <[www.delo.si/mnenja/gostujoce-pero/zakaj-slovenija-pred-sodiscem-eu-nikakor-ni-mogla-zmagati-279362](http://www.delo.si/mnenja/gostujoce-pero/zakaj-slovenija-pred-sodiscem-eu-nikakor-ni-mogla-zmagati-279362)>.

in this case (i) materialized, the Slovenian side will probably argue the position it held in the proceedings before the CJEU, or something similar.<sup>66</sup>

Interestingly, moreover, the Slovenian side offered an interpretation of the CJEU's judgment that, while rejecting the Court's jurisdiction to decide the dispute under EU law, nevertheless acknowledged the Arbitral Award's as final and legally binding. Slovenian Prime Minister thus invoked the Court's press release, which in his reading contained a formulation, albeit absent from the judgment's final version, that 'Croatia and Slovenia must implement the Arbitral Award' and that 'the border between the two has been determined'.<sup>67</sup> This view was supported by the current Slovenian (apolitical) Commissioner.<sup>68</sup> Some renowned Slovenian EU law experts also noted the Court's 'indirect' endorsement of the Arbitral Award's validity as vindication of the Slovenia's arguments.<sup>69</sup> Furthermore, some other Slovenian scholars suggested that the judgment was 'tactically prudent', 'political' and 'diplomatic', expressing regret that Slovenia did not request the exclusion of the CJEU's President Lenaerts from the case due to his earlier extra-judicial remarks about the Court's lack of jurisdiction and invitation to submit the dispute before the Court under Article 273 TFEU.<sup>70</sup>

In any event, reasonable disagreements over the CJEU's pronouncements are 'the name of the game' in EU law. However, none of the Court's responses should ever be collapsed into a populist argument most recently advanced by the Brexiteers: 'Let's take our sovereignty back from the Luxembourg Court', when one side feels dissatisfied with the outcome of a case.

### 3.6 WHAT IS RULE OF LAW?

In the context of 'political' (in the sense previously explained) interpretive pluralism, it seems odd to frown upon the Court's 'political' decisions on the limits of its jurisdictions (or lack thereof). Granted, the CJEU is not among the high courts that explicitly subscribe to the

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<sup>66</sup> Gašperin (n 14); see text accompanied by note 57 above.

<sup>67</sup> Which is strange, given that the Court's press releases contain a default disclaimer that says 'Unofficial document for media use, not binding on the Court of Justice'. In any event, Croatian side immediately dismissed this interpretation as 'factually incorrect' and 'taken outside of context'. See 'Cerar: S Hrvatskom su mogući razgovori samo o tome kako provesti arbitražu' (*Index*, 2 February 2020), available at <[www.index.hr/vijesti/clanak/cerar-s-hrvatskom-su-moguci-razgovori-samo-o-tome-kako-provesti-arbitrazu/2153258.aspx](http://www.index.hr/vijesti/clanak/cerar-s-hrvatskom-su-moguci-razgovori-samo-o-tome-kako-provesti-arbitrazu/2153258.aspx)>.

<sup>68</sup> 'Vprašajmo Sodišče EU, ali je arbitražna rzsodba zavezujoča' (*Delo*, 3 February 2020), available at <[www.delo.si/novice/slovenija/vprasajmo-sodisce-eu-ali-je-arbitrazna-razsodba-zavezujoca-275604](http://www.delo.si/novice/slovenija/vprasajmo-sodisce-eu-ali-je-arbitrazna-razsodba-zavezujoca-275604)>.

<sup>69</sup> For statements of Professor Janja Hojnik and the CJEU's ex-AG Verica Trstenjak, see Larisa Daugul, 'Odločitev Sodišča EU-ja bi težko bila drugačna, a je vseeno razočaranje' (*RTV SLO*, 31 January 2020), available at <[www.rtvlo.si/slovenija/odlocitev-sodisca-eu-ja-bi-tezko-bila-drugacna-a-je-vseeno-razocaranje/513205](http://www.rtvlo.si/slovenija/odlocitev-sodisca-eu-ja-bi-tezko-bila-drugacna-a-je-vseeno-razocaranje/513205)>; 'EU court says Slovenia's lawsuit against Croatia inadmissible' (*The Slovenia Times*, 31 January 2020), available at <[www.sloveniatimes.com/eu-court-says-slovenia-s-lawsuit-against-croatia-inadmissible](http://www.sloveniatimes.com/eu-court-says-slovenia-s-lawsuit-against-croatia-inadmissible)>. What might be an argument for this claim seems to appear in paragraph 109 of the judgment. Whether or not the argument holds, observed in the overall structure of the judgment it comes out as a mere dictum, added after the judgment has already been 'sealed'. This insight I owe to Professor Tamara Čapeta. For a view characterising the paragraph 109 as 'puzzling', yet concurring with aforementioned Slovenian scholars on this point, see Bickl (n 3).

<sup>70</sup> Statement of Professor Marko Pavliha, in Daugul (n 69). Nota bene, in 2019 Pavliha was nominated as Slovenian judge for the General Court but eventually rejected by the 'Panel 255' (advisory panel on appointments to the CJEU established under Article 255 TFEU), citing inter alia his involvement in Slovenia's suit against Croatia.

‘political question doctrine’ when aiming to stay away from being drawn into a political controversy. However, a student of introductory course on EU law may instantly come up with a number of classic ‘political’ decisions of a sort some advocated against.<sup>71</sup> Both in which the CJEU declined jurisdiction to rule on an issue arguably within the scope of EU law yet sensitive from the perspective of national constitutional traditions, and in which it overstretched its jurisdiction – even where previously in identical situations the Court stubbornly rejected it<sup>72</sup> – to decide on a pressing political issue. For the former, think of *Grogan*.<sup>73</sup> For the latter, more recent *Associação Sindical dos Juizes Portugueses*.<sup>74</sup>

In neither situation, importantly, did the academia or public react with a fear for erosion of the rule of law or whatever. It is curious why one would propose such a scenario in *Slovenia v Croatia* case, regardless of a direction the Court’s decision eventually took. Perhaps critics could be trusted to have in mind a particular conception of the rule of law concept when talking about this.<sup>75</sup> But, under none – be it formal,<sup>76</sup> substantive<sup>77</sup> or procedural<sup>78</sup> – does it seem plausible that interpretive disagreement over a single issue would have catastrophic consequences for the entire EU legal order. It is also certainly far from obvious why and how would only the interpretation of law advocated by the losing party in this dispute save the rule of law in the EU.

Similarly, the argument that establishes connection between the present situation and the ongoing ‘rule of law backsliding’ in several Member States borders the ‘slippery slope’.<sup>79</sup> This understanding of the current political situation in Poland and Hungary does disservice to the gravity of the issue. In the present case, there is a one-time (legitimate, I submit) disagreement between the two Member States, followed by the (dis)agreement by other actors in the EU interpretive community (Commission’s Legal Service, Commission itself, academia, AG, CJEU), about the meaning of (international) law (and its repercussions for EU law). In the case of other two (or more) Member States, we have multiple instances of alleged systemic breaches of (EU) law, including the media capture, persecution of NGOs and academia, manipulations of the election law, and attacks on the independence of national judiciaries by illiberal political parties

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<sup>71</sup> Gašperin (n 14).

<sup>72</sup> Matteo Bonelli and Monica Claes, ‘Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary (ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juizes Portugueses)’ (2018) 14 *EuConst* 622.

<sup>73</sup> Case C-159/90 *SPUC v Stephen Grogan and Others* EU:C:1991:378.

<sup>74</sup> Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* EU:C:2018:117.

<sup>75</sup> Speaking of peculiar conceptions of the rule of law concept, Croatian Prime Minister argued it was actually Slovenia that undermined the rule of law with their ex parte communications with Slovenian arbiter. See PM Andrej Plenković, *Address at the 72<sup>nd</sup> Session of the UN General Assembly* (21 September 2017), as referenced in Bickl (n 5) 196.

<sup>76</sup> Lon Fuller, *The Morality of Law* (Yale University Press 1969).

<sup>77</sup> Ronald Dworkin, ‘Political Judges and the Rule of Law’ in *A Matter of Principle* (Harvard University Press 1985) 9.

<sup>78</sup> Jeremy Waldron, ‘The Rule of Law as a Theater of Debate’ in Justine Burley (ed), *Dworkin and His Critics* (Blackwell 2004) 319.

<sup>79</sup> Gašperin (n 14): ‘The rule of law should be the essence of the EU project and the EU institutions should demonstrate non-biased commitment to protect it equally among all Member States. How else could one *revert the rule of law backsliding in other Member States* – often claiming that the rule of law argument only serves as a political tool to put in line their political decisions – *if it is not taken seriously every time?*’ (emphasis added).



that seem to work towards establishing authoritarian regimes in their respective countries.<sup>80</sup> In such scenario, vital institutional actors are structurally prevented from legitimately disagreeing on *the meaning of any law*. There, *the only interpretation of the law* becomes the one held by the party in power. Any access to courts to advance a different interpretation thus becomes disabled. Then, the law indeed fails to rule. To even attempt a comparison of the two situations sounds... well, irresponsible, to say the least. Similarly, to suggest that by backing up Slovenia's claim in this dispute the EU would somehow be better equipped in reverting the rule of law backsliding in Poland and Hungary. This is simply off putting.

#### 4 THE ELEPHANT IN THE MOUSEHOLE OR 'NO VIEW FROM NOWHERE'<sup>81</sup>

Finally, few general remarks on the nature of legal scholarship, which came to me while reading and listening to some of the recent responses to *Slovenia v Croatia*. Some contributions, referenced here among others, were seemingly written with a tone of a genuine belief that everything proposed therein was 'fact', undisputed, neutral, objective, unbiased, and detached. Could this be an issue?

First, critical philosophers and political theorist like Fredric Jameson explained that 'neutrality and ideology-free objectivity can never obtain in the realm of social knowledge' and that 'every position (including the supposedly objective and ideologically neutral one) is ideological and implies the taking of a political stance and the making of social judgment'.<sup>82</sup> Contrary to what some might think, there can be no 'view from *nowhere*'. You always stand *somewhere*.

Second, interpretive operations that legal scholars pursue, as ascertained by Hans Kelsen<sup>83</sup> and more recently Riccardo Guastini,<sup>84</sup> are different. On the one hand is what we may call 'cognitive interpretation', where one identifies different possible meanings of a legal text, but refrains from opting in favour of any of those meanings.<sup>85</sup> Put simply, it would look something like this: 'Legal text T might have meanings M1, M2, M3, ...'. On the other hand is what we may call 'adjudicative interpretation', where one chooses one definite meaning of a legal text and rejects all other possible meanings.<sup>86</sup> Again, simplified, its formulation would be: 'Legal text T means M1'.

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<sup>80</sup> Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 C. Y. E. L. S. 3; Laurent Pech, Dimitry Kochenov, Barbara Grabowska-Moroz, Joelle Grogan, 'The Commission's Rule of Law Blueprint for Action: A Missed Opportunity to Fully Confront Legal Hooliganism' (*RECONNECT*, 4 September 2019), available at <[reconnect-europe.eu/blog/commission-rule-of-law-blueprint/](http://reconnect-europe.eu/blog/commission-rule-of-law-blueprint/)>.

<sup>81</sup> This refers to the ideas of US legal philosopher Thomas Nagel from his classical work *The View from Nowhere* (OUP 1986), in which he writes about the human capacity to adopt passive or objective and active or subjective perspectives in their interactions with the world, the former being detached and independent – 'the view from nowhere'.

<sup>82</sup> Fredric Jameson, *The Geopolitical Aesthetic. Cinema and Space in the World System* (Indiana University Press 1995) 36-37.

<sup>83</sup> Hans Kelsen, *Pure Theory of Law* (University of California Press 1967).

<sup>84</sup> Riccardo Guastini, 'A Realistic View on Law and Legal Cognition' (2015) 27 *Revus* 45; Guastini (n 47).

<sup>85</sup> Guastini (n 84) 52-53; Guastini (n 47).

<sup>86</sup> Guastini (n 84) 52-53; Guastini (n 47).

The former is merely a cognitive operation with no practical effects or purposes. The latter is political. It implies taking sides. It is a scholarly equivalent of Justice Oliver Wendell Holmes's 'bad man',<sup>87</sup> whose attitude is not of a disinterested legal scientist in search for a 'true' meaning of the law, but of an interested agent 'working the law'<sup>88</sup> (in Duncan Kennedy's words) for its own (political) purposes.

By disregarding other possible interpretive options as invalid or even non-existent when commenting on a dispute before a court, these legal scholars seem to be performing adjudicative interpretation. They sound like they have a horse in the race. Recognizing the same phenomenon, one legal theoretician in a private conversation recently remarked that legal scholars nowadays essentially 'write like judges' (plus flamboyant vocabulary and stylistic freedom). They write one-sidedly and struggle to justify their preferred outcome, with a single (obvious) difference that their ruminations do not have the authority of judicial pronouncements.

Going back to *Slovenia v Croatia*: while advertising neutrality, objectivity and apolitical stance, some authors became precisely what they were accusing Croatia and AG Pikamäe of – and invited the CJEU to evade<sup>89</sup> – they became *political*. As they should! I find zero problem with scholarly accounts in which there is no perceived attempt to hide their *political* behind the façade of objectivity and neutrality.

This much one can learn from Slovenian – how conveniently! – contemporary critical philosopher Slavoj Žižek, who suggests that declaring a contestable issue as 'apolitical' and 'non-ideological' is the most effective *political act* performed by an advocate that one should immediately be suspicious of.<sup>90</sup> Therefore, the very declaratory negation of *political* in one's account is for a critical scholar a clear sign of its existence. In this, Žižek built upon Louis Althusser's proposition – another Marxist philosopher – that:

[W]hat seems to take place outside ideology, in reality takes place in ideology [...] One of the effects of ideology is *the practical denegation of the ideological character of ideology by ideology*: ideology never says, "I am ideological".<sup>91</sup>

Third, and final, to remain honest to my critique, I must acknowledge the existence of own 'priors', borrowing this term from Richard Posner:<sup>92</sup> my background, education, predispositions, attitudes, the reality I live in (which, hopefully, become obvious when checking this author's profile and bio). Some would say 'Check your privilege'<sup>93</sup> before making a statement about delicate political issues, so I too should 'check my priors' before concluding this assessment of *Slovenia v Croatia* judgment. To reference another famous line from Judge Alex Kozinski, it seems

<sup>87</sup> Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harv. L. Rev. 457.

<sup>88</sup> Duncan Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenology' (1986) 36 J. Leg. Ed. 518.

<sup>89</sup> Gašperin (n 14).

<sup>90</sup> Slavoj Žižek, *The Sublime Object of Ideology* (Verso 1989).

<sup>91</sup> Louis Althusser, *Lenin and Philosophy and Other Essays* (Monthly Review Press 2001) 118 (emphasis added).

<sup>92</sup> Richard A. Posner, *How Judges Think* (Harvard University Press 2008).

<sup>93</sup> Hadley Freeman, 'Check your privilege! Whatever that means' (*The Guardian*, 5 June 2013), available at <[www.theguardian.com/society/2013/jun/05/check-your-privilege-means](http://www.theguardian.com/society/2013/jun/05/check-your-privilege-means)>.

inevitable that ‘what I ate for breakfast’<sup>94</sup> will somehow find way into my beliefs, thoughts and writings. However, I see no problem in that. And after acknowledging it, we can proceed with arguing about the substantive points of law, in this or any other case.

All this being said, my sole intention in these concluding sections (and in the bigger part of this contribution, albeit indirectly) was to call for a recognition of the importance of interpretation and an acknowledgment of the legitimacy of reasonable interpretive disagreements. Also, to plead for a more dialectical approach in legal scholarship; and to demystify the ‘political’ in the ‘adjudicative’ approach to legal scholarship. I definitely do not consider myself an expert in the substantive matters of EU law in question and claim no superiority of own interpretations towards anyone else’s engaged in this debate. But I welcome diverse reactions and commentaries, on this and other judgments of the CJEU. To me that is the whole point of an informed and respectful legal – academic and political too – debate. The very last personal thought I share echoes what AG Pikamäe wrote in one of the final paragraphs of his Opinion:

‘I have to note with sadness that an agreement over the border dispute could not be reached [and still is not reached] between the two states, not even after the disputed Arbitral Award was rendered. However, I am convinced that solution of this dispute should be sought in the political arena’.<sup>95</sup>

From his lips to God’s ears.

## 5 POST SCRIPTUM

Shortly after hearing some of the arguments I raised here, a well-known legal scholar summarily dismissed them, accusing me of ‘[p]ouring the *thin acid of relativism* over [the legal issue in question] that won’t convince anyone, [he] suppose[d] (or certainly hope[d])’ and advising to ‘at least mak[e] a *legal* argument, applying norms of international and EU law to a concrete case’.<sup>96</sup>

<sup>94</sup> Alex Kozinski, ‘What I Ate for Breakfast and Other Mysteries of Judicial Decision Making’ (1993) 26 Loy. L.A. L. Rev. 993 (though Judge Kozinski is, unlike legal realists, more critical of attempts at explaining the judicial decision-making in this manner, urging ‘to doubt your own leanings, to be sceptical of your instincts [...] not to yield to these impulses with abandon, but to fight them’).

<sup>95</sup> Opinion of AG Pikamäe (n 12) para 165 (translation is mine and lax). Bickl (n 3) suggested that the solution might appear in the process of Croatia’s prospective entry into Eurozone and the Schengen Area, a decision which would require unanimity of all other participating Member States, including Slovenia. So, Slovenian side might use again this leverage against Croatia, similarly to what it did during the latter’s EU accession negotiations, when it kept blocking any progress until it successfully ‘bullied’ Croatia to sign the arbitration agreement. See text accompanied by note 6 above.

<sup>96</sup> Personal correspondence with one of the editors of a leading blog on EU and constitutional law (29 January 2020), to which an earlier short version of this note was initially submitted (emphasis added). Although some winds of change seem to be appearing in other parts of the blogosphere, where it was recently noted how ‘[c]onstitutional law can no longer be treated as if it were independent and insulated from politics. It never was. [T]he shockwaves that have rippled through the European political order have exposed the artificial character of the law vs politics distinction, forcing constitutional law scholars to adapt’. See Bart Caiepo and Frederico Benetti,

I understand one's uneasiness about any degree of relativism, constructivism or postmodernism in a field of 'hard science' such as law. But this is just a matter of perspective.<sup>97</sup> From their *absolutist* tradition of rigid legal formalism-bordering-*Begriffsjurisprudenz*, the law indeed appears as having fixed – objective and neutral – meaning. Nothing is outside the law, understood narrowly. But this is only as it *appears*, not as it *exists*. For someone standing outside their tradition, it appears differently. The same problem is *relative*. For me, theirs is a very limited and unfortunate understanding of the law and the legal. In my view, the law and legal science are something wider. Like other social sciences and humanities, law deals not only with transcendental concepts and legal fictions but also with giddy flesh-and-blood human beings, their interactions and power hierarchies, and the socio-political reality they thus create. From the *relativist* perspective, then, law can have multiple meanings. Over its meanings we may reasonably disagree. The difference is, they tend to delegitimize and reject as unworthy anything outside their tradition. On the other hand, I would prefer not to reciprocate but rather accept and welcome every of their narrow and formalist views. Even when they reject mine.

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<sup>97</sup> From here, I follow the central argument rehearsed by the CJEU judge Siniša Rodin in 'Telos of a Method' Paper prepared for the project *Beyond Method: Politics of Legal Research* (forthcoming in 2020).

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