REPUBLIKA SLOVENIJA
USTAVNO SODIŠČE

Rm-1/00-29
19 April 2001

O P I N I O N

At a session held on 19 April 2001 in the proceedings to review the constitutionality of a treaty on the proposal of a third of the deputies of the National Assembly, the Constitutional Court

i s s u e d a n o p i n i o n:

1. Art. 1 of the Agreement between the Republic of Slovenia and the Republic of Croatia on Border Traffic and Cooperation is not inconsistent with Sect. II of the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia.

2. Art. 1 of the Agreement cited in the previous paragraph is not inconsistent with Art. 2 of the Constitution.

R e a s o n i n g

A.

I. The Proposal of a Third of the Deputies

1. On 27 January 2000, a third of the deputies of the National Assembly filed in the Constitutional Court a proposal for the issuance of an opinion on the constitutionality of the Agreement between the Republic of Slovenia and the Republic of Croatia on Border Traffic and Cooperation (hereinafter the Agreement or BHROPS). The proposers supplemented their proposal on 3 March 2000 and 5 April 2000.

2. They suggested that the Constitutional Court issue an opinion on the conformity of BHROPS with the Constitution. In the opinion of certain deputies, Art. 1 of BHROPS was contrary to Sect. II of the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia (hereinafter TUL).

The disputed article allegedly prejudiced the determination of the course of the State border between Slovenia and Croatia. The proposers, who otherwise did not question the constitutionality of the mentioned Agreement, suggested the review of its constitutionality in order to settle all issues concerning its constitutionality, and refute the claim that they supported an unconstitutional agreement.

II. The Reply of the Government

3. The Government asserted that the purpose of entering into the Agreement was already clearly defined in the Initiative for Entering into the Agreement, which was, according to Art. 59 of the Foreign Affairs Act (Official Gazette RS, No. 1/91 - hereinafter ZZZ), on 27 July 1993 submitted to the National Assembly International Relations Committee. It read as follows: "The Agreement on Border Traffic and Cooperation is intended for the people (the owners of property on both sides of the border, the daily and weekly commuting of workers and school-children from one State to the other, the harmonizing of the living conditions of the Italian minority on both sides of the border, the traffic connections of certain areas with areas in the other State) who live on the Slovenian and Croatian border and who face everyday living problems due to the border" (Subsection 1.3 of the Initiative).

4. The Government explicitly emphasized the lack of connection between BHROPS' provisions and the questions of the final determination and marking of the border between the Republic of Slovenia

and the Republic of Croatia. It stated that the Governments of both States on 30 July 1993 concluded the Agreement on the Constituting and Competencies of Joint Bodies for the Establishment and Marking of the State Border (Official Gazette RS, No. 55 - IT, No. 16/93). On the basis of this Agreement a mixed diplomatic commission was constituted (hereinafter the diplomatic commission) with the task of establishing and marking the State border through negotiation.

Furthermore, the Agreement's preamble, which determines the aims and the purpose of the Agreement, and in particular its Art. 59, disallow the possibility that BHROPS would prejudice the course of the State border.

5. The Government also stated possible negative consequences that the non-ratification of the Agreement could have for the border system with Croatia once Slovenia joins the Schengen acquis. It stated that the Protocol on the Incorporation of the Schengen Acquis into the Framework of the European Union (hereinafter the EU), which is a constituent part of the Amsterdam Treaty, determines in Art. 8 that all candidate States for EU membership must fully assume the so-called Schengen acquis. The Government asserted that the reaching of agreements on border traffic would, after accession to the "Schengen circle," require the explicit consent of all member States, since the matter would then concern the crossing of external borders, at which border control is carried out for all the member States. Reaching border agreements was allegedly made even more difficult after the entry into force of Chapter IV of the Treaty Establishing the European Community (Visas, asylum, immigration and other policies related to free movement of persons), which belongs to the so-called first pillar of the EU and will be regulated by Community legal instruments. The Government stated that the practice of admitting the neighboring States of Italy and Austria to the "Schengen circle" demonstrated that other member States had accepted their agreements on border cooperation with Slovenia as the state of affairs these two States brought with them. Thus, these two systems were with no difficulties accepted into the Schengen acquis as appendices to the Joint Manual.

6. The Government also enclosed a partial report on a meeting of legal experts concerning the questions that hinder the continuing process of ratifying BHROPS, which was held on 15 July 1998.

Among other participants in the meeting there were also the international-law experts Prof. Dr. Borut Bohte and Doc. Dr. Miha Pogačnik, of the Ljubljana University Law Faculty. From their discussion it follows that they stated the existence of the land border between Slovenia and Croatia was based on TUL, which will have to be established and marked in the field. They referred to Opinion No. 3 of the Arbitration Commission for Yugoslavia.

Regarding the sea border between the States, they were in favor of the position that it would need to be determined, since it has not yet been determined between the two States. From their discussion it follows that given the explicit safeguard in Art. 59, the Agreement does not prejudice the course of the future State border with Croatia.[1]

B. - I.

III. The Purpose of the Entering Into, Substance and Legal Character of the Agreement

7. The basic reason for reaching the Agreement was the fact that by gaining independence, the former republic border between Slovenia and Croatia became their State border. This undoubtedly made the life and work of the people on the border territory more difficult. The purpose of the Agreement was to make easier the everyday life and work of the people living on that territory.

The Government stated this in the Initiative for Entering Into the Agreement. For this purpose, already in the years 1991 and 1992, the Ministries of the Interior of both States had agreed upon and noted the practice of providing certain facilities to the border population.

8. The purpose of entering into the Agreement derives from its preamble, which reads as follows: "... in the wish (of the contracting Parties) to make possible and regulate the traffic of persons between the border areas and to improve the living conditions of the border population, ... to enable as free business cooperation as possible...," and thereby aware of the fact "... that border local communities

are the basis of fruitful cooperation between the neighboring States". The Agreement is divided into ten chapters and has eight appendices (A, B, C, D, E, F, G, H), which are its constitutive parts (Art. 60.4).

9. The titles of the individual chapters are:

I. The Territory of the Application of the Agreement (Art. 1);

II. Border Crossing in the Framework of Border Traffic and Documents for Border Crossing (Arts. 2 to 10);

III. Farming and Forestry Activities, the Owners of Property on Both Sides and Border Crossing (Arts. 11 to 19);

IV. Border Crossing Outside Official Border Crossings (Arts. 20 and 21);

V. Foreign Exchange and Custom Relief (Arts. 22 to 24); VI. Sea and Land Traffic on the Border Territory (Arts. 25 to 40);

VII. Cross-Border Economic Cooperation (Arts. 41 to 53); VIII. The Authorities to Implement the Agreement (Arts. 54 and 55);

IX. The Issuance, Rejection or Seizure of Visas or Documents and the Receiving of Denied Persons (Arts. 56 and 57); X. General Provisions (Arts. 58 to 60).

10. In accordance with its legal character, the Agreement belongs to the so-called territorial[2] treaties. These are not border treaties but agreements on the cooperation of States on certain, mostly border, territories. Their subject of regulation can be the local border traffic of persons, goods or services, the protection, regulation and use of water channels and the sea on the border territory, the protection of border territories against pollution, different types of border cooperation by authorities and international servitudes. Although border agreements reached either bilaterally or multilaterally are frequent in the practice of States, doctrine or interstate case law on their legal character is rare.[3] The basic difference between border agreements and treaties on the determination (and/or marking) of the State border is that the latter concern so-called permanent contractual systems or contracts made for an indefinite time, and in their case it is not permitted by international law to claim essentially changed circumstances (the rebus sic stantibus clause) as a reason for the cessation of the validity or the rescission of contract.[4] Regarding this question, border agreements, which can be made for a limited or unlimited time, have the character of general treaties. BHROPS is concluded for three years and tacitly extended for another year if no contracting Party rescinds it in writing through diplomatic channels within six months prior to the expiry of its validity (Art. 60.2). The Vienna Convention on the Succession of States provides with regard to treaties[5] that in the case of both border treaties (Border Systems, Art. 11) as well as other territorial treaties (Other Territorial Systems, Art. 12), the latter including the Agreement at issue, State succession has no effect on their continuing validity[6] due to their close connection with a specific territory. Military servitudes are exceptions (Art. 12.3). However, this question is not relevant in the case at issue, except to highlight the legal character of the Agreement as a territorial treaty. This case does not concern a question of the constitutional conformity of the border agreement, which is part of the States' succession, but a question of the constitutionality of a new agreement between the Republic of Slovenia and the Republic of Croatia, as successor States to the former SFRY that have not yet agreed on their State border.

IV. The Disputed Provision

11. Art. 1 of the Agreement reads as follows:

"1. According to this Agreement, the border area on land encompasses: in the Republic of Slovenia the settlements determined in Appendix A, in the Republic of Croatia the settlements determined in Appendix B.

2. The changes in the areas of settlements and other administrative territorial divisions do not affect the extent of the border areas referred to in this Agreement.

3. According to this Agreement, the border area on the sea is the sea territory under the sovereignty of each contracting Party, lying north of the 45-degree parallel and the 10-minute northern latitude along the western coast of Istria measured from the external edge of the territorial sea of the Republic of Croatia, up to the point where this parallel touches the land of the western coast of Istria (Funtana Cape of Grgat).

4. The border area on the sea is for the area of border sea fishing limited to the territorial seas of each contracting Party in the framework of the border area on the sea determined in Para. 3 of this article."

V. The Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia

12. TUL is a constitutional-level regulation, on the basis of which the sovereignty and independence of the Republic of Slovenia was established. Section II of TUL reads as follows: "The State borders of the Republic of Slovenia are the internationally recognized State borders of the former SFRY with the Republic of Austria, the Republic of Italy, the Republic of Hungary, in the part in which these States border the Republic of Slovenia, and the border between the Republic of Slovenia and the Republic of Croatia in the framework of the former SFRY." B. - II.

VI. The Power and Legal Character of an Opinion of the Constitutional Court

13. Art. 160.2 of the Constitution reads as follows: "In the process of ratifying a treaty, the Constitutional Court, on the proposal of the President of the Republic, the Government or a third of the deputies of the National Assembly, issues an opinion on the conformity of such treaty with the Constitution. The National Assembly is bound by the opinion of the Constitutional Court." With the mentioned regulation the Constitutional Court was, in addition to the powers determined in Para. 1 of Art. 160, vested with the special power of the preventive (a priori) constitutional review of treaties.[7] In Opinion No. Rm-1/97 dated 5 June 1997 (Official Gazette RS, No. 40/97 and DecCC VI, 86), in Paragraph 12, the Constitutional Court wrote inter alia the following: "In our constitutional system, treaties rank above statutory provisions in the hierarchy of legal acts. According to Art. 8 of the Constitution, laws and regulations must comply with treaties that are binding on Slovenia. According to Art. 153.2 of the Constitution, laws must be in conformity with valid treaties ratified by the National Assembly, whereas regulations and other general acts must also be in conformity with other ratified treaties. To actually ensure such conformity, the constitution- framer established in Art. 160.1.2 of the Constitution the jurisdiction of the Constitutional Court to decide upon the conformity of laws and other regulations with ratified treaties. Thus, in the hierarchy of legal acts in Slovenia, treaties rank above statutory provisions. Our legal system, however, does not recognize the primacy of international law over constitutional provisions." The purpose of the preventive constitutional review of treaties is thus to prevent the State from assuming in the process of ratifying a treaty an international-law obligation that is not in conformity with the Constitution.

14. The subject of review may only be the provisions of a treaty which is in the process of ratification, i.e. only of a treaty which has not yet been ratified. Concerning the subject or review, the Constitutional Court issues an opinion on its conformity with the Constitution. An opinion of the Constitutional Court, issued on the basis of Art. 160.2 of the Constitution, is not a consultative opinion. Despite having a different name, such opinion is a decision of the Constitutional Court, which has essentially the same effects as other decisions of the Constitutional Court. Compared with other decisions, it is different in that the Constitutional Court may not interfere by means of it with the reviewed treaty, while it may interfere with reviewed domestic legal acts by annulling or annulling ab inito such if it finds such to be unconstitutional or unlawful.

Also reviewing the conformity of a treaty with the Constitution, the Constitutional Court acts as a State body of domestic law.

For this reason, the Constitutional Court reviews a treaty in terms of its conformity with the Constitution, and not in terms of its conformity with international law.

15. What can be grasped from the part of Art. 160 of the Constitution, which determines the binding character on the legislature of an opinion issued by the Constitutional Court, are the legal effects of such opinion. When the Constitutional Court issues an opinion on the inconsistency of certain treaty provisions with the Constitution, the effects of such opinion are the following: (1) if the treaty can be ratified with reservations, the National Assembly may ratify it provided that they pronounce their reservations concerning those provisions which were found unconstitutional; (2) if the treaty does not permit any reservations, or if such is not permitted according to the Vienna Convention on the Law of Treaties (hereinafter DKPMP), given the applicable constitutional system the National Assembly must not ratify such treaty or may ratify it if the Constitution is first amended. Furthermore, the purpose of the preventive review of the constitutionality of a treaty affirms such interpretation of the mentioned part of Art. 160 of the Constitution, which is to prevent the State from assuming international obligations contrary to the Constitution. In any case such opinion of the Constitutional Court has only domestic effects. It is binding on the National Assembly, however, it bears no international-law effects. If no appropriate constitutional amendments are adopted, the National Assembly must not ratify the treaty. When the Constitutional Court issues an opinion holding that the treaty is not inconsistent with the Constitution, it is up to the National Assembly's political judgment whether to pass a ratification act.

VII. Two Procedural Questions and the Scope of Review

16. A proposal for the review of constitutionality can only be made by three different proposers determined by the Constitution: the President of the Republic, the Government or a third of the deputies of the National Assembly. The Constitutional Court also issued an opinion concerning the special position of the proposers in this case. The proposers who proposed that the Constitutional Court issue an opinion on the conformity of the Agreement with the Constitution were those deputies who opined that the Agreement was in conformity with the Constitution, not those who opined that it was unconstitutional. The Constitutional Court held that Art. 160.2 of the Constitution determines as a condition for exercising the proposer's right to make such a proposal only a certain number of deputies (one third). Thus, the proposers' position concerning the constitutionality of the Agreement to be reviewed is irrelevant as regards their position as proposers. The Constitutional Court took the same position in Case No. Rm-1/97, where it issued an opinion on the conformity of the Europe Agreement Establishing an Association between the Republic of Slovenia, on one side, and the European Communities and their Member States, Acting within the Framework of the European Union, on the other side[8] (hereinafter the Europe Agreement), with the Constitution, on the proposal of the Government, although it opined that the Agreement was not contrary to the Constitution (Paragraph 3 of the reasoning). Although, pursuant to Art. 160.2 of the Constitution, the application concerns a proposal, the Constitutional Court applied, as regards a proposal from a third of the deputies, Art. 23 of the Constitutional Court Act (Official Gazette RS, No. 15/94; hereinafter ZUstS). It acted the same in Case No. Rm- 1/97, when the proposer was the Government. Therefore, it continued with the proceedings notwithstanding the fact that the term of office of the National Assembly had expired.

17. The Constitutional Court only reviewed the explicitly asserted inconsistency of Art. 1 of the Agreement with Sect. II of TUL. It also reviewed Art. 1 of the Agreement with Art. 2 of the Constitution. Only this article was, in addition to Sect. II of TUL, explicitly mentioned in the materials the proposers had submitted or referred to in their applications (the record of the working meeting with the President of the National Assembly on 13 January 2000).

B. - III.

VIII. The Review of the Conformity of the Disputed Provision with TUL

18. The following questions are the two fundamental questions of this review: (1) whether the Agreement prejudiced the border with the Republic of Croatia and (2) whether this was contrary to TUL.

19. An international agreement on border traffic and cooperation presupposes as a rule that the State border between the two States has already been determined. Furthermore, the Government stated this in its reply (Appendix 5). According to the Government, the usual order of reaching agreements is

as follows: the States first enter into a treaty on the State border and then reach an agreement on border cooperation. However, such order is not a rule. The Government cited as an example of an exception the Udine Agreement between FLRY and the Republic of Italy on the Regulation of Personal Transportation and Land and Sea Traffic between the Border Areas (hereinafter the Udine Agreement).[9] But this Government's statement is not quite true. The land border between the former Yugoslavia and Italy was in the border area of this Agreement determined by the Peace Treaty with Italy[10] of 1947 and with the Memorandum of Concordance[11] initialed on 5 October 1954 in London. However, the sea border between the States was still not determined with entry into the Udine Agreement in 1962.

20. On 30 July 1993 the Governments of both States entered into the Agreement on the Foundation and Powers of Joint Bodies for the Establishment and Marking of the State border. On the basis of this Agreement, a diplomatic commission was founded with the task of establishing and determining the State border through negotiations.

21. The challenged Agreement does not have direct provisions on the border but cites the settlements, which belong to the border area on land (Art. 1.1 and Appendices A and B). Such approach to determining the border area was already contained in the Udine Agreement.[12] Where in the case of the so-determined border area its "external" border is depends on the regulations of each contracting Party, which determine the scope of the areas of individual settlements. The same applies to the "internal" border of the border area, which is at the same time, considering Sect. II of TUL, the State border between the contracting Parties. Regarding the so-presumed border, overlapping might occur if the areas of settlements are not harmonized and the precise establishment and determination of the State border is not yet agreed upon and carried out in the field. Therefore, the Agreement does not resolve the questions concerning the disputed parts of the land border and leaves open the question of the existence and the determination of the sea border. Furthermore, it does not directly answer the question of which State performs "effective control" (authority) in the possibly disputed areas.

However, this is not a subject of constitutional review. As so far applied, each contracting Party carries out authority on its presumed State territory in the framework of the border area in accordance with BHROPS. Art. 58.1 namely provides that, together with the Agreement provisions, all effective legal regulations of the contracting Parties are applied.

22. Furthermore, the description of the border area on the sea does not contain provisions on the sea border. Compared to the land border area, it is special in that it defines in Art. 1.3 the border area on the sea as the uniform sea space under the sovereignty of each contracting Party, lying north of the 45- degree parallel and the 10-minute northern latitude along the western coast of Istria measured from the external edge of the territorial sea of the Republic of Croatia, up to the point where this parallel touches the land of the western coast of Istria (Funtana Cape of Grgat). The Agreement thus encompasses the whole sea territory north of the mentioned parallel, which lies along the western coast of Istria somewhat above Vrsar, in its entirety, excluding in this part of the sea the open sea and the territorial sea of the Republic of Italy. The thus defined border area on the sea inter alia encompasses the whole sea space under the sovereignty of Slovenia in view of the fact that its area on the other (northern) side is not determined. For the area of border sea fishing (that is, for the economic exploitation of living sea beings), Art. 1.4 limits the border area on the sea to the territorial seas of both contracting Parties. The essential difference between the sea border and the land border between the States is in that the sea area falling within the sovereignty of one or the other State has never been determined between the States in a manner such as the land border.

23. The purpose of the Agreement is not the determination of the border. However, the Agreement as a treaty on the border system directly touches upon the question of enforcing authority in the border area. Therefore, the Constitutional Court must review the Agreement regarding the meaning of Sect. II of TUL concerning its provision that the border between Slovenia and Croatia is in the "framework of the former SFRY", and thus presumably known, however, not yet concretized in a treaty and determined in the field. By means of the interpretation of the Agreement, in particular concerning its purpose, it is necessary to establish whether the Agreement provisions interfere with the border on land between the States and its course in the field, and whether the border area on the sea prejudices the sea border that Slovenia and Croatia still have to agree upon and determine.

24. The provision of Sect. II of TUL, in the part dealing with the border between Slovenia and Croatia, must be interpreted from the view that both States are successor States to the former SFRY as a federal State that has disintegrated and ceased to exist as an international-law entity. The cessation and creation of States and the legal consequences concerning their territories and borders, which follow thereof, are questions in the domain of international law. The legal basis for such finding is in Art. 8 of the Constitution, which provides that "laws and regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia". In terms of international law, at the moment of the creation of the independent and sovereign Slovenia, its former Republican border with Croatia "in the framework of the former SFRY" became its State border, on the basis of the uti possidetis principle. This principle of international law which had developed during the gaining of the independence of former American[13] and African[14] colonies, is a generally recognized principle of international law and is, as such, also binding on Slovenia. The International Court of Justice in the Hague had ascribed it such character in the case of Mali v. Burkina Faso,[15] and has also confirmed it in numerous subsequent cases concerning sea borders.[16] In the case of the process of the disintegration of the former SFRY, also the Arbitration Commission of the Conference on the former Yugoslavia (hereinafter the Arbitration Commission) based on this principle the creation of new States in the framework of the former Republican borders, in Opinion No. 3 dated 11 January 1992.[17] In the case of the disintegration of the former SFRY, it viewed the uti possidetis principle as particularly important given the fact that Paras. 2 and 4 of Art. 5 of the SFRY Constitution had provided that the scope of the territories and borders of the former Republics could only be changed by their consent.[18] The essence of the uti possidetis principle is in its basic purpose, which is the respect for the preservation of the existing territorial borders at the moment of gaining independence. The application of the uti possidetis principle results in the fact that former administrative borders, in the Slovenian/Croatian case the former Republican border, become internationally protected borders.[19] International law and thereby also the uti possidetis principle have direct, no retroactive, effects on the new State.[20] It is applied for the State as it is at the moment of establishment. The uti possidetis principle "freezes" the territorial title; the clock stops, given that the hands are not turned back.[21] In the process of its recognition by the European Community and its member States, Slovenia had internationally pledged to follow the uti possidetis principle.[22] The uti possidetis principle does not have the character of a cogent (ius cogens) norm of international law and the affected States may always regulate by agreement the course of their State border in conformity with international and domestic law. If there is no such agreement, which is the case for Slovenia and Croatia, who have not yet agreed upon their State border, the principle of respect for the territorial status quo at the time of their gaining independence should be applied, which is reflected in the uti possidetis principle.[23] Considering such interpretation of TUL, the Constitutional Court will review the conformity of Art. 1 of the Agreement.

25. Since the Agreement is a treaty that has not yet become part of the domestic legal system of the Republic of Slovenia, the Constitutional Court applied the interpretative provisions of DKPMP.[24] This in Art. 31.1 determines that a treaty must be interpreted in good faith and that the expressions used in the treaty must be considered according to their usual meaning, in connection with the substance of the treaty and in the light of the subject and purpose of the treaty.[25] For the purpose of interpretation, in addition to the basic text, also the preamble, appendices, agreements and instruments made in connection with the entering into the treaty, whose interpretation is at issue, belong to the contents of the treaty (Art. 31.2). In conformity with the substance of the treaty, the subsequent agreement between the Parties must also be considered, which refers to the interpretation of the treaty or its application, including the relevant practice of the States and the relevant rules of international law that apply between the contracting States (Art. 31.3).

26. The disputed Art. 1 of the Agreement must be interpreted in the context of the preamble, from which follows the purpose of entering into the Agreement, and giving consideration to its substance as a whole. As already established, the purpose of the Agreement is in that the States enable and regulate the traffic of persons in the border area and improve the living conditions of the inhabitants at the border, including the fostering of economic cooperation in that area, which also the Government mentioned. Different from a treaty on the State border, which is permanently in the practice of States, Slovenia and Croatia are entering into this Agreement for a limited period of time. In reviewing the constitutionality of Art. 1 of the Agreement, what also must be considered is its Art. 59, which, as lex

specialis, determines that Agreement provisions in no manner prejudice the determination and marking of the State border between the contracting Parties.[26] Considering the fact that it is included in Chapter X among the General Provisions, it refers to the Agreement as a whole, including the Appendices, and is legally relevant also for the subsequent practice of the contracting Parties in the framework of the Bodies That Are to Implement the Agreement (Arts. 54 and 55). An additional "safeguard" contained in the Agreement is the possibility of its temporary partial or whole suspension,[27] which may be implemented by each contracting Party and regarding which one contracting Party does not need the consent of the other Party.

It is enough that it informs the other of such through diplomatic channels (Art. 60.3).

27. The border area on land, according to the Agreement, which encompasses the settlements in Slovenia and Croatia included in Appendices A and B (Art. 1.1 of the Agreement), in fact is in accordance with TUL and, considering its interpretation as determined by the Constitutional Court, is not contrary to it.

28. The difference between the border area on land and the sea is in that the latter is, for the purpose of the Agreement, defined as a whole (Art. 1.3). The further particularity of the border area on the sea, in accordance with BHROPS, is in that it does not completely correspond in terms of space to the border area on land, but exceeds it south of it. This fact can serve as the basis for the assertion that Art. 1 of the Agreement does not prejudice the State border contrary to TUL. The Constitutional Court hereby establishes that the contracting Parties acted in such a manner concerning the sea area, pursuant to the Agreement, that it is used as a functional whole, which also follows from its substance and the intention of the contracting Parties.

Apart from the direct control on the sea,[28] which the States have already controlled in the framework of mutual relations, the contracting Parties are to perform and carry out the control of the arrivals and departures of persons, and of other activities necessary to implement the Agreement, from the areas under their jurisdiction in the (border) area on land or through the bodies that are to implement the Agreement (a tourist permit may be issued for crossing the border outside tourist zones, also for the border area on the sea - Art. 5.5; the Sea and Land Traffic in the Border Area - Arts. 25 to 40, in particular Art. 26 and the Border Economic Cooperation - Arts. 35 to 41). Such a manner of treaty practice, which concerns Slovenia and Croatia as successors to the former SFRY, is not the only example. The border sea traffic, which implicitly encompasses also the border area on the sea, had been regulated by the Udine Agreement of 1962, i.e. still prior to entering into the Treaty of Osim (Official Gazette SFRY, IT, No. 1/77; the Act on the Notification of the Succession to the Agreements of the Former Yugoslavia with the Republic of Italy, Official Gazette RS, No. 40/92, IT, No. 11/92), which determined the sea border between Italy and the former SFRY. Art. 2 of this Agreement provided for all the persons permanently residing in those border areas determined in it the right to the facilities envisaged by the Agreement, concerning sea and land traffic. Reviewing the question whether the border area as a whole on the sea prejudices the sea border between Slovenia and Croatia, the Constitutional Court has also considered Slovenia's practice after the signing of the Agreement. Pursuant to the Ratification Act, Slovenia became a contracting Party to the trilateral Memorandum of Understanding between the Government of the Republic of Slovenia, the Government of the Republic of Croatia and the Government of the Italian Republic on the Establishment of a Common Routing System and Traffic Separation Scheme in the North Part of the North Adriatic (Official Gazette RS, No. 96/2000, IT, No. 27/2000).

This agreement concerns a special type of agreement which, according to its character as the Agreement at issue, belongs to territorial systems[29] and which, due to the safety concerns of routing, introduces a traffic separation scheme in the areas under the sovereignty of all three contracting Parties, also irrespective of the fact that the sea border between Slovenia and Croatia has not yet been determined. The international-law basis for introducing the schemata of separate traffic is found in Art. 22 of the UN Convention on the International Law of the Sea (the Act on the Ratification of the UN Convention on the International Law of the Sea, Official Gazette SFRY, IT, No. 1/86; the Act on the Succession to the UN Convention on the International Law of the Sea, Official Gazette RS, No. 79/94, IT, No. 22/94 - MKZNPMP), i.e. in the provision relating to the system of the territorial sea (Second Part, the Territorial Sea and the Outer Zone). The Constitutional Court opines that also Art.

1.4 of the Agreement, which, for reason of sea fishing, limits the border area on the sea to the territorial seas of each contracting Party, must be understood in a manner such that the term "territorial sea" is used in a generic way. What follows from it is the intention of the contracting Parties to exclude fishing in domestic sea waters from the fishing area on the sea, and not to delineate by such Agreement or to enforce a system of the territorial sea of each of them. Furthermore, BHRMR leads to such a conclusion, in which, in Art. 1, Croatia limited the Slovenian fishermen's right to fish to certain parts of its territorial sea.

29. In reviewing the Agreement, the Constitutional Court takes into consideration also the circumstance that for the ratification of a (future) treaty on the State border, the same procedure is prescribed as for the ratification of BHROPS (Art. 86 of the Constitution). TUL and the Constitution do not prohibit the conclusion of treaties that would regulate border issues. The challenged Agreement is a treaty entered into by States and as such could also contain provisions on the State borders. Such would not be contrary to TUL and the Constitution provided that it remains within the framework of Art. 4 of the Constitution[30] and is entered into and ratified in conformity with ZZZ.

30. The question whether the implementation of the Agreement will in practice in fact result in the determination of the borderline in certain parts of the land border, although only for the purpose of implementing the Agreement,[31] or whether such enforcement of actual authority might worsen the position of Slovenia in possible subsequent negotiations, is not a constitutional but a political matter that must be answered by the National Assembly when deciding on the ratification of the Agreement.

31. Accordingly, the Constitutional Court hereby finds that Art. 1 of the Agreement does not prejudice the State border with Croatia, and is not contrary to Sect. II of TUL.

B. - IV.

IX. The Review of the Conformity of Art. 1 of the Agreement with Art. 2 of the Constitution

32. The question of the conformity of Art. 1 of the Agreement with Art. 2 of the Constitution, i.e. with the principles of a State governed by the rule of law, has also been raised. It concerns the question whether its provisions are precise, clear and unambiguous enough so that they may be directly applied, in particular in that part referring to the bodies competent for the implementation of the individual Agreement provisions and referring to the legal position (rights and obligations) of the population living near the border. These questions refer in particular to the implementation of the Agreement in those areas where the course of the border is disputed, since the border has not been established or determined in the field. This question is also connected with Art. 8 of the Constitution, according to which ratified and published treaties are applied directly. By ratification and publication a treaty becomes part of the domestic law. Thus, the Constitutional Court in Opinion No. Rm- 1/97, in Section VII, stated that: "A competent State body may not approve any such commitment of the Republic of Slovenia under international law as would be in disagreement with the Constitution. A commitment under international law would be in disagreement with the Constitution if, by the coming into force of the international agreement, it created directly applied unconstitutional norms in domestic law, or if it bound the State to adopt any such instrument of domestic law as would be in disagreement with the Constitution."

33. In a similar manner, the review of the conformity of Art. 1 of the Agreement with Art. 2 of the Constitution cannot be carried out in isolation, but only in connection with other provisions and the Agreement's preamble. Thus, it is necessary to answer the question whether the Agreement provisions are, with regard to the subject and purpose of the Agreement, clear, understandable and unambiguous, and whether they can be applied without any special interpretation by the bodies competent for their implementation. The Agreement is not an agreement on the determination of the State border, but an agreement on border cooperation. Therefore, it cannot regulate such questions as may remain open between the States, which thus cannot be the subject of this Agreement. Its purpose is also not the regulation of such questions. The analysis of the Agreement demonstrates that its provisions correspond to the said criteria that, giving consideration to its purpose and subject, they are in conformity with Art. 2 of the Constitution.

34. Since the State border between Slovenia and Croatia has not been established and determined by a treaty, in practice the question might be raised which contracting Party is competent for implementing the Agreement in the disputed area. As the Agreement does not regulate the question of the border between the contracting Parties, it is fully correct that it does not directly answer such question. If it did answer such, it would also regulate in this part the question of the State border, which is not the purpose and subject of its regulation. To resolve such questions, the Agreement envisages a special procedure determined in Art. 54. The contracting Parties will, in accordance with Art. 54 of the Agreement, submit all open questions (including also the question of the competence for implementing the Agreement in the disputed areas) to be resolved to the Permanent Mixed Commission, which is competent to consider and resolve questions connected with the interpretation and application of the Agreement. The Permanent Mixed Commission adopts resolutions unanimously. Such resolutions enter into force when approved by the Governments of the contracting Parties (Art. 54.6). The Agreement thus regulates the manner of resolving questions in connection with its implementation. In case of disagreement, the Permanent Mixed Commission and consequently the Governments of both contracting Parties determine, by consent, the competent body for the implementation of the Agreement. Such decisions do not interfere with the substance of the Agreement (Art. 59) and have legal validity only with regard to this Agreement.

35. Such a manner of determining the implementation of the Agreement might also lead to the question of whether the implementation of Art. 1 of the Agreement will worsen the possible position of Slovenia in the negotiations with Croatia.

However, in reviewing the conformity of Art. 1 of the Agreement with Art. 2 of the Constitution, it is not possible to conclude that in implementing the Agreement the Slovenian part of the Permanent Mixed Commission and the Government will make detrimental decisions for Slovenia. Such concerns certainly might exist, however, they do not present a question of constitutionality (conformity with Art. 2 of the Constitution).

They can only pose a question of trust in the executive branch of government and a political risk to be evaluated by the National Assembly as the legislature. Therefore, this question is not a question of constitutional review that falls within the jurisdiction of the Constitutional Court.

36. Accordingly, the Constitutional Court establishes that Art. 1 of the Agreement is not contrary to Art. 2 of the Constitution.

C.

37. The Constitutional Court issued this opinion on the basis of Art. 70 of ZUstS and Art. 52.6 of the Rules of Procedure of the Constitutional Court (Official Gazette RS, No. 49/98), composed of: Franc Testen, President, and Judges: Dr. Janez Čebulj, Dr. Zvonko Fišer, Lojze Janko, Milojka Modrijan, Dr. Ciril Ribičič, Dr. Mirjam Škrk, Dr. Lojze Ude and Dr. Dragica Wedam-Lukić. The decision was reached by six votes against three. Judges Čebulj, Janko and Testen voted against. Judges Škrk, Wedam-Lukić, Ribičič and Ude wrote their concurring opinions, and Judges Čebulj and Testen their dissenting opinions.

President
Franc Testen

Opombe:
[1] In the words of M. Pogačnik, it is impossible, also according to the rules of the interpretation of treaties, to conclude that the Agreement would prejudice the border and have detrimental consequences for Slovenia. About that see also G. Bohte, Mednarodnopravna razlaga sporazuma o obmejnem prometu in sodelovanju s Hrvaško (The International-Law Interpretation of the Agreement on Border Traffic and Cooperation with Croatia), Pravna praksa, No. 10/2000, pp. 4-7.

[2] UN Conference on the Succession of States in Respect of Treaties, 1977 session and resumed session 1978, Vienna, 4 April - 6 May 1977 and 31 July - 23 August 1978, Official Records, Volume III, Documents of the Conference, UN, New York, 1979, pp. 31-36.
[3] The International Court of Justice in the Hague defined the 1997 Treaty between Hungary and the former Czechoslovakia on the Gabcikovo-Nagymaros Project on the Danube as a territorial treaty. Case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia), ICJ Reports, 1997.
[4] 62.2.a of the Vienna Convention on the Law of Treaties, Official Gazette SFRY, IT, 30/72, the Act on the Notification of Succession, Official Gazette RS, No. 35/92, IT, No. 9/92 - hereinafter DKPMP.
[5] Official Gazette RS, IT, No. 1/80, The Act on the Notification of Succession, Official Gazette RS, No. 35/92, IT, No. 9/92.
[6] The Interstate Court ascribed Art. 12 the character of a rule of international customary law. The Gabcikovo-Nagymaros Project, ICJ Reports, op. cit., p. 123.
[7] In the framework of western European legal systems, such powers exist also in France and Spain. For a more comprehensive comparative view, see Opinion No. Rm-1/97 and n. 6.
[8] The Europe Agreement was published in the Official Gazette RS, No. 44/97, IT, No. 13/97. It took effect on 1 February 1999. [9] Sporazum između FNRJ i Republike Italije za regulisanje prometa lica, kao i kopnenog in pomorskog prevoza i saobračaja između pograničnih područja (Official Gazette FLRY, Nos. 3/64 and No. 10/86, The Act on the Notification of Succession to the Agreements Entered Into by the Former Yugoslavia with the Republic of Italy, Official Gazette RS, No. 40/92, IT, No. 11/92).
[10] The Paris Peace Treaty, the Ministry of Foreign Affairs, Ljubljana, 1997.
[11] United Nations Treaty Series, Vol. 235 (1956).
[12] Art. 1 of the original Agreement (1962) combined the municipalities, stated in the Appendices, with the width of a 10 km-zone, whereas the amended Agreement of 1982 in determining the areas for which it was to be applied contained only the list of the municipalities stated in both Appendices (Art. 1 and Appendices A and B).
[13] The state of possession concerning the Spanish administrative divisions in South America in 1810 and in Central America in 1821. I Brownlie, The Rule of Law in International Affairs, 1998 Kluwer Law International, p. 55.
[14] Ibid., p. 58.
[15] This principle is not a special rule referring only to a specific system of international law. It is a general principle, which is logically connected with the phenomenon of gaining independence wherever it appears. Its clear purpose is to prevent the stability and independence of new States from being threatened by fratricidal combats triggered by the change of the borders after the withdrawal of the administrative authorities.
Case concerning the Frontier Dispute (Burkina Faso/Republic of Mali), Judgment of 22 December 1986, ICJ Reports, p. 20. [16] Case concerning the Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau, Decision of 14 February 1985, RIAA, Vol. XIX, UN 1990; Continental Shelf (Tunisia/Libyan Arab Jamahirya), Judgment, ICJ Reports 1982; Case concerning the Territorial Dispute (Libyan Arab Jamahirya/Chad), Judgment of 3 February 1994; Affaire de la delimitation de la frontiere maritime entre la Guinee-Bissau et le Senegal, Sentence du 31 Juillet 1989, RIAA, Vol. XX, UN, 1994; Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment of 12 November 1991, ICJ Reports 1991; Argentina-Chili: Beagle Channel Arbitration, International Legal Materials (ILM), Vol. XVII, No. 3, May 1978; Land, Island and Maritime Frontier Dispute (El Salvador, Honduras, Nicaragua intervening), Judgment of 11 September 1992, ICJ Reports 1992.
[17] ILM, No. 6, 1992, pp. 1499-1500.
[18] Ibid.
[19] Ibid., p. 1500.
[20] Frontier Dispute, op. cit., p. 30.
[21] Ibid. The matter concerns the "photograph" of the then territorial position.
[22] The Arbitration Commission of the Conference on Yugoslavia, Opinion No. 7 on the international recognition of the Republic of Slovenia by the European Community and its member States dated 11 January 1992, ILM, No. 6, 1992, op. cit., p. 1515. The Commission inter alia established that the borders defined in Art. 2 of TUL on 25 June 1991 were unchanged concerning the existing borders and that the Republic of Slovenia emphasized that it did no have territorial disputes with neighboring countries or with the neighboring Republic of Croatia.
[23] What is at issue here is the respect for the principle of the inviolability of borders encompassed in the Declaration of the Principles of International Law on the Friendly Relations and Cooperation between States in Conformity with the Charter of the United Nations/Resolution of the General

Assembly 2625 (XXV) 7 and the Helsinki concluding documents of CSCE (now OSCE) of 1975. Opinion No. 3, op. cit., p. 1500.

[24] Art. 31, the General Rule of Interpretation, Art. 32, The Auxiliary Methods of Interpretation, and Art. 33, the Interpretation of Treaties in Two or Several Authentic Texts.

[25] Paras. 1 and 2. The principle of good faith, grammatical, intention-based or teleological interpretations are equally important. Due to legal certainty and in order to avoid the too broad freedom of contracting Parties with intention-based interpretation, the international-law case law and the doctrine emphasize in particular the grammatical interpretation of treaties. UN Conference on the Law of Treaties, Vienna, 26 March - 24 May 1968 and 9 April - 22 May 1969, Official Records, Document of the Conference, pp. 38-42. In the case of grammatical interpretation, expressions must be interpreted according to their usual meaning, however, they are given special meaning if it is established that the contracting Parties have decided so (Art. 31.4).

[26] A similar provision is contained in Art. 14.4 of the Treaty between the Republic of Slovenia and the Republic of Croatia on Sea Fishing (Official Gazette RS, No. 9/96, IT, No. 3/96 - hereinafter BHRMR).

[27] The exception is Art. 57, which provides that the contracting Parties are always and without any formality obliged to accept a person who enters into the territory of the other contracting Party on the basis of the Agreement.

[28] Thus in Paras. 1 and 3 of Art. 47, which read as follows: "1. With the intention to ensure uninterrupted continuation of cooperation and development in the field of border sea fishing, the contracting Parties will mutually make possible fishing on the territory of its border area on the sea, in agreement with Art. 1.4, also for those fishermen who permanently reside or have their company's main office in the border area of the other contracting Party. 3. The fishermen who fish in the neighboring border area must comply with the regulations of the contracting Party that refer to fishing in that area." In a similar manner also Art. 49: "The contracting Parties shall determine the number of fishing boats according to the principle of reciprocity... Such number of boats may daily fish in the border area on the sea of the other contracting Party provided that they are registered in the ports in the border area of the contracting Party." In particular also Art. 58.1: "1. Given the provisions of this Agreement, all effective legal regulations of the contracting Parties are applied."

[29] Art. 12.2 of DK on the succession of States concerning treaties, which contains the so-called "objective systems". This deals with "territorial treaties" having effects on third States. The UN Conference on the Succession of States in Respect of Treaties, op. cit., pp. 34-37.

[30] Slovenia is a territorially unified and indivisible State.

[31] Art.1.1 provides that, in the framework of border traffic, by using border permits the border may be crossed through the border crossings intended for border traffic, which are determined in Appendix C, if the Agreement does not provide otherwise.