The Dissenting Opinion of Judge Dr. Čebulj Joined by Judge Janko

1. Why I have voted against?

1. I have voted against the majority decision in this case as the grounds for the opinion, which stated that Art. 1 of the Agreement between the Republic of Croatia and the Republic of Slovenia on Border Traffic and Cooperation (hereinafter the Agreement) was in conformity with the Constitution, did not persuade me. Neither did they persuade me with the substance or the method of the review. I am aware of the fact that the purpose of the Agreement is to improve the life and work of the people in the border territory. However, in my opinion, the Agreement will not contribute to that in the areas where there is no consent regarding the course of the border. Moreover, in the part relating to the sea, where the border has never been determined, the usefulness of entering into it can be very questionable from the view of the national interests of the Republic of Slovenia (if we seriously deal with an exit to the open sea). Neither the first nor the second can be in itself a basis for constitutional review. My vote "against" is thus based on the conviction (I will state the reasons thereof in the continuation, where I try to elaborate "my own" constitutional review) that such consequences might develop in particular due to the unconstitutional norms contained in the Agreement.

2. Let me immediately emphasize that, from the constitutional point of view, I do not raise the question of the possible so- called prejudicing of the course of the border, which is stated to be the most fundamental constitutional "sin" of the Agreement. I do not, however, completely understand the relation between Art. 59 of the Agreement, pursuant to which its provisions in no manner prejudice the determination and marking of the border, and the list of the settlements constituting the border area in the territories of the Republic of Slovenia and the Republic of Croatia, which is, as an appendix, a constitutive part of the Agreement. These settlements join together somewhere. And it is important to know where - along the entire land border| But even if this prejudices the border, it is an agreement reached (ratified) by the National Assembly. And this may determine the border, even prejudice it. To emphasize it: this may only be done by the National Assembly| It cannot be done by anyone else, and the National Assembly cannot grant this power to anyone. Not even the mixed commission, although its decisions must be confirmed by the Government. Precisely this is determined by the Agreement| Not only in the case of the land border, but also the sea border. And this is no longer a political issue or an issue of trust in the Permanent Mixed Commission and the Government.

It is a constitutional issue - the issue of the conformity of the Agreement with the principles of a State governed by the rule of law (Art. 2 of the Constitution) and, in particular, with the principle of the separation of powers (Art. 3 of the Constitution).

3. Therefore, I insisted throughout the proceedings before the Constitutional Court that the Constitutional Court must not consider Art. 1 of the Agreement apart from the other provisions, as this article would never be capable of living on its own. It will not be implemented independently of the other Agreement provisions. The connected consideration of Art. 1 and Art. 54 of the Agreement appears to be particularly

important. In search of an answer to the question of the constitutionality of the first, in connection with Art. 54 of the Agreement I raised the issue of its conformity with Art. 2 and Art. 3.2 of the Constitution.

Furthermore, I suggested studying and answering the question whether and why Art. 59 of the Agreement will have the effect as ascribed if the sea border is decided (e.g. following the several years of implementation of the Agreement) by an international arbitrage or another institution.

4. Thus, I opine that the Constitutional Court should have (methodologically) applied, in the constitutional review of this case, the same criteria as it had applied in an opinion on the conformity of a treaty with the Constitution on the basis of the interpretation of the Constitutional Court Act provisions (hereinafter ZUstS), i.e. in case No. Rm-1/97 (the Opinion on the "Accession Agreement," dated 5 June 1997, Official Gazette RS, No. 40/97 and DecCC VI, 86). A preventive review of the constitutionality of treaties in the process of ratification (Art. 160.2 of the Constitution) has a preventive intention. Its purpose is to prevent the State from entering into a treaty whose implementation would insert unconstitutional norms[1] into the domestic law, or result in adopting unconstitutional legal acts. An obligation incurred by a treaty obligates the State to fulfill it. According to the Vienna Convention on the Law of Treaties (Official Gazette SFRY, No. 30/72 - hereinafter MDKPP), every effective treaty binds the member States, which must fulfill such in good faith (bona fide). The pacta sunt servanda principle is one of the basic principles of international treaty law.[2] Pursuant to Art. 27 of this Convention, an individual member cannot refer to their domestic law to justify its non- compliance with the treaty except when allowed in accordance with Art. 46 of this Convention. In this respect, in terms of constitutional law, the question of the fate of the Agreement on Slovenia joining the European Union is extraordinarily important.

5. When I address the application of the "same criteria" of review, I mean that part of the reasoning in Case No. Rm-1/97, which reads as follows (Paragraph 22 of the reasoning of the Opinion):
"22. According to Art. 162.1 of the Constitution, proceedings before the Constitutional Court are regulated by statute. Art. 70 of ZUstS repeats the first part of Art. 160.2 of the Constitution, which defines the jurisdiction of the Constitutional Court, and adds a rule according to which the Constitutional Court forms its opinion in camera. ZUstS does not contain any other explicit procedural provisions concerning the pronouncement of an opinion. This is why it is necessary, according to Art. 49 of ZUstS, concerning the procedure for pronouncing opinions, to apply on mutatis mutandis basis the provisions of Section IV of this Act, which regulates the proceedings and the reaching of decisions by the Constitutional Court regarding the review of the constitutionality and legality of laws, regulations and general acts issued for the exercising of public authority. In proceedings to review the constitutionality of a law or regulation, the Constitutional Court reviews the conformity of those provisions of the law or regulation which are claimed to be inconsistent with the Constitution by a petitioner under Art. 24 of ZUstS or a proposer under Art. 23 of ZUstS. In this connection, the Constitutional Court may not ex officio extend its review of constitutionality to provisions which are not being disputed, unless allowed to do so by Art. 30 of ZUstS. This empowers the Constitutional Court also to review the constitutionality and legality of other provisions of the same or some other law, regulation or general act issued for the exercising of public authority, whose

constitutionality or legality have not been challenged, if such provisions are mutually connected or if this is absolutely necessary to resolve the case. In the case of pronouncing opinions, no reasons exist for holding another view.[3] The Constitutional Court reviews only those treaty provisions which are claimed by the petitioner to be controversial, and reviews other provisions provided the fulfillment of the conditions determined in Art. 30, in conjunction with Art. 49, of ZUstS."

6. The majority of the judges who voted for the opinion, from which I here dissent (i.e. in case No. Rm-1/00), did not entirely avoid these criteria. In the disposition of the opinion, they limited themselves only to finding the conformity of Art. 1 of the Agreement with Sect. II of TUL and Art. 2 of the Constitution, however, they did not limit themselves to the same in the reasoning. In the framework of the part of the reasoning entitled "IX. The Review of the Conformity of Art. 1 of the Agreement with Art. 2 of the Constitution," they wrote the following (Paragraph 33 of the reasoning):
"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."

7. I could not vote for such review of 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". Irrespective of the fact that I am aware of the subject and purpose of the Agreement. The argument on which this finding is based for all the Agreement provisions is in the following sentence: "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." All of them are thus allegedly clear, understandable and unambiguous, and can be applied without a special interpretation by the bodies competent for their implementation. Is this true? In the continuation of this decision, I am going to present my opposing arguments, which I introduced at the Constitutional Court sessions on this case. I was not given any answers to my arguments, except in the above cited sentence. The fact that I was not provided an answer is not important. Much more important is that the answer was not given to those for whom this opinion was intended.

II. Can a Constitutional Review Be Decided with a Positive Opinion?

8. Of course, in my opinion| At the beginning of this separate opinion, I wrote that I was going to elaborate my "own" constitutional review to substantiate my vote against the

majority opinion. Such is a constitutional review based on my arguments, and applies the criteria (methods) the Constitutional Court had applied in Case No. Rm-1/97.

9. 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."

10. Art. 54 of the Agreement envisages the establishment of a Permanent Mixed Commission intended to develop traffic and the correct application of the Agreement. According to Art. 54.3, the Permanent Mixed Commission deals with questions connected with the interpretation and application of the Agreement.

Pursuant to Para. 5, the resolutions of the Permanent Mixed Commission are adopted by the consent of both the delegations.

In accordance with Art. 54.6 of the Agreement, the resolutions of the Permanent Mixed Commission take effect when approved by the Governments of the contracting Parties. This, however, does not apply to proposals for amending the Agreement.

11. At sessions held on 10 and 11 January 1992 the Arbitration Commission of the Conference on Yugoslavia issued several opinions in connection with the right to self-determination and a change in the borders. Particularly important for this discussion are Opinions Nos. 3 and 7 (Međunarodna politika [International Politics], Nos. 995/91 and 1001/92).

12. In Opinion No. 3 the Arbitration Commission stated the principles according to which the problem of the borders was to be resolved in the creation of new States. It set three principles:

1. External borders will have to be respected in every case, etc.
2. The demarcation between Croatia and Serbia, or between the latter and BiH, or eventually between other independent neighboring States, may be changed only by mutual and free agreement.

3. If not agreed otherwise, the previous borders will be given the status of borders protected by international law. Such a conclusion is required by the principle respecting the territorial "status quo" and in particular the "uti possidetis iuris" principle. Although originally recognized in resolving the decolonization problem in America and Africa, these principles are today generally recognized by international courts (see the border dispute between Burkina Faso and Mali[4]). This principle can more easily be applied in the case of the former Yugoslav Republics, as Paras. 2 and 4 of Art. 5. of the SFRY Constitution determine that the scope of the territory and the borders of the Republics cannot be changed without their consent.

13. Opinion No. 7 contains an analysis and opinion on the fulfillment of the conditions for the international recognition of the Republic of Slovenia. Concerning the border with Croatia, the Arbitration Commission only stated that, following Slovenia's assertions, there existed no territorial dispute with Croatia.

14. The uti possidetis principle establishes the succession of borders which have been administratively determined. Regarding such borders, new States may agree differently and unanimously introduce territorial changes. In both cases, new demarcations are protected by international law (the Universal Charter of the United Nations, Chapter I, Art. 2/4 and the Declaration of the Principles of International Law on Friendly Relations, included in Resolution 2625 of the XXV UN General Assembly session, on 24 October 1970). The uti possidetis principle is interpreted as a principle which preserves the demarcations that existed in the colonial regimes and which refer to each colonial unit that was formed as a State. This principle contains the presumption that States created after decolonization will inherit the administrative borders existing at the time of the proclamation of independence. Uti possidetis decreases the probability of an armed conflict, however, this is not an ius cogens norm. It enables newly established States to change the borders, yet as per agreement. The uti possidetis iuris principle was established during the demarcation of sea borders in 1992 in connection with the determination of the sea border between Salvador and Honduras following Nicaragua's intervention.[5]

15. The fact is that the border between the Republic of Slovenia and the Republic of Croatia was determined by Sect. II of TUL.

Also, the fact is that, as regards the determined land border, the States must establish its course and mark it on the ground.

However, concerning the sea border, which had never been determined between the Republics within the former SFRY, this still has to be determined. And, if Slovenia wants to have an exit to the open sea, it must in determining the sea border insist on having jurisdiction and sovereignty over the whole Bay of Piran.

16. The basic reason for entering into the Agreement was allegedly the fact that, on the gaining of independence by Slovenia and Croatia, the former Republic border changed into a State border. This undoubtedly aggravated the life and work of the people living in the border territory. The purpose of the Agreement is to alleviate the every-day life and work of the people in the border territory, which the Government explicitly stated in the Initiative for Entering into the Agreement (Subsection 3.1). Thus, the Ministries of the Interior of both States in the years 1991 and 1992 agreed upon

and noted certain types of benefits for the border population. Such benefits are also being provided for them. From a report on the meeting of the representatives of the Ministries of the Interior of Slovenia and Croatia, held on 4 October 1991 at Mokrice Castle, what follows is certain data on the problems of the people in the border territory and the scope of such problems. Thus, it was stated that approximately 15,000 citizens of both States daily cross the border (in particular those persons who commute to work and for reason of their having property on both sides of the border). According to the then data, the category of daily migrants (daily employment migration) contained approximately 7,200 Croatian citizens and approximately 840 Slovenian citizens. Approximately 5,000 Croatian citizens owned lands in Slovenian territory, and approximately 330 Slovenian citizens owned lands in Croatian territory.

17. Every agreement on border traffic and cooperation in any case presupposes the existence of a certain border. Also the Government in its reply (Appendix 5) states that it is usual that a treaty on border cooperation presupposes the existence of the border. Therefore, it states that the sequence of agreements is such that, first, an agreement on the State border is entered into, and, second, an agreement on border cooperation. However, this is allegedly not necessary. Despite the established effective control of a certain territory, the legal status of the territory can be disputed. As an example of this the Government states the Udine Agreement. Concerning this example, it is necessary to emphasize that the Udine Agreement was entered into on 20 August 1995, which is slightly less than twenty-two years after the coming into force of the final treaty on the regulation of the State border between SFRY and the Republic of Italy (i.e. on 2 April 1977), however, what was decisive for the determination of the Yugoslav-Italian border was the London Memorandum of 5 October 1954. This had been entered into prior to the Udine Agreement.

18. Art. 1 of the Agreement avoids a direct determination of the border in that it states the settlements which on land belong to the border territory (Art. 1). Where is the "external" border of the border territory depends on the regulations of each contracting Party, which determine the scope (territory) of individual settlements. The same applies to the "internal" border of the territory, which is the State border between the contracting Parties. This border may entail an overlapping insofar as the settlements' areas are not harmonized and a precise determination and marking of the border has been not agreed upon and carried out on the ground. Such a manner of describing the contracting Parties' border territories leaves open questions on the disputed parts of the border and the existence and determination of the sea border. It does not directly answer the question of who was carrying out and who is now carrying out "effective control" (power) in the disputed area. Furthermore, it does not determine who will exercise effective authority in the disputed territory, in accordance with the Agreement. This is left to the implementation, and in particular, to interpretation, and subsequent agreements that are to be made within the framework of the Permanent Mixed Commission. It is determined that each contracting Party exercises authority in its own territory. In its own area on land and its own area on the sea|

19. Also the description of the sea border area avoids the determination (definition, identification) of the border. An essential difference between the sea and land border is in that the sea area, which falls under the sovereignty of one or the other State, has never been determined in a manner such as in the case of the land border. Therefore, in Art. 1.3 of the Agreement, the sea border area is firstly defined in its entirety. Art. 1.4

limits the sea border area, for the area of border fishing (i.e. for economic exploitation), to the territorial seas of each contracting Party. This provision may be implemented provided that the territorial sea areas of one or the other contracting Parties are known or, in other words, that the sea borderline is known to the contracting Parties.

20. It is true that the purpose of the Agreement is not the determination of the border. The preamble of the Agreement explicitly determines its purpose, which is in particular the improvement of the living conditions of the people in the border area, in the spirit of good cooperation between the contracting Parties. Furthermore, it is explicitly determined in Art. 59 that the Agreement in no manner prejudices the determination and marking of the border between the contracting Parties.

Irrespective of the fact which is and which is not its purpose, the Agreement cannot avoid the determination of who carries out the authority in the border territory. It also defines that in a manner such that it avoids the determination of the border, or leaves the disputed areas open. Therefore, a starting-point for carrying out sovereignty should be the status quo principle or the uti possidetis principle which is also imposed by the Opinion of the Arbitration Commission of the Conference on Yugoslavia.

This should not be disputable if, in such a disputed area, authority has already been carried out by one contracting Party. However, a problem might develop if this right is claimed by both the contracting Parties.

21. Art. 54 of the Agreement is connected with and also intended for the "correct application", which means for the implementation of the Agreement. An analysis of the Agreement demonstrates that the questions of the manner of the implementation of the Agreement might be raised when it is not clear which contracting Party exercizes authority (sovereignty) in a certain area where one or the other side exercizes its own sovereignty which the other side opposes.

22. As a starting-point for a practical example, I am taking Art. 3.1 of the Agreement. This provides the following: "A border permit may be issued to the citizens of the contracting Parties who permanently reside in their border territories. Art. 2.4 of the Agreement determines that: "On the application of an entitled person, a border permit is issued by the body competent in accordance with such person's permanent residence, in a form determined in Appendix D."

23. Concerning the mentioned provisions, the question is raised of who will issue permits in the area of the Bužini, Škodelin and Škrile settlements, which are located in a disputed area.

According to the Government, these settlements are "hidden" both in Appendix A (in the Sečovlje settlement) as well as in Appendix B (in the Plovanija settlement). Thus, we can conceive (as an example) the following manner of the implementation of the Agreement in this area: An applicant can apply for a permit from the competent Slovenian body, which will presumably issue such.

Such a permit will be, in accordance with Art. 56 of the Agreement, sent to the other contracting Party for approval. If the other contracting Party finds that it is within its jurisdiction to issue such a document, it will not approve it.

The same will probably occur if the applicant takes the opposite direction. The case will probably be submitted for resolution to the Permanent Mixed Commission (Art. 54 of the Agreement), which deals with all questions connected with the interpretation and application of this Agreement. The Permanent Mixed Commission adopts unanimous resolutions, which take effect when approved by the Governments of the contracting Parties. Concerning the mentioned case, there will probably be no consensus reached by the Commission, and the life and work of the inhabitants will in no manner be thus facilitated.

24. In the above-mentioned case, it is not possible to implement the Agreement if the contracting Parties do not agree which of them will exercise authority in this (disputed) area, although only for the purpose of this Agreement. One or the other contracting Party will have to yield to the other the authoritative implementation of the Agreement in the part of the territory for which both of them opine that it falls within the framework of their State borders. It will have to yield jurisdiction and sovereignty to the other| It is true, which the Government emphasized (Paragraph 17 of this separate opinion), that "despite the established effective control of a certain part of the territory, the legal status of the territory might be disputable," however, provided that the carrying out of "effective control" in the mentioned case will be done in such a manner that the implementation of the Agreement unanimously is agreed upon. And, as follows from the Government's reply mentioned in the following paragraph of this separate opinion: "The manner of the implementation of the Agreement provisions is one of the methods for their interpretation."

25. I did not take the above-mentioned example by chance. It represents an example and thereby connected questions, to which the Government also has no answer. From the Governments reply to the request for the issuance of an opinion on the constitutionality of the Agreement, I return to its reply to the deputies on the question of who was to issue permits in the disputed areas: "The settlements stated in the Appendix of the Agreement between the Republic of Slovenia and the Republic of Croatia on Border Traffic and Cooperation are undisputedly located in the State in whose border area they are mentioned.

Three settlements are disputed, which are not mentioned in the appendices and which, pursuant to the Agreement, can belong to a larger settlement in one or the other border area. In these cases, it is important that the Agreement is implemented in a manner such that, in accordance with the Agreement, the Republic of Slovenia issues documents to the inhabitants of the disputed settlements. The manner of the implementation of the Agreement provisions is one of the methods for their interpretation. This and the implementation of other acts of sovereignty can be ascribed a greater legal weight than the suggested interpretative declaration. It will be possible for the Permanent Commission established by this Agreement to resolve the question of the issuance of permits for the Škrile, Bužini and Škodelin settlements. The Slovenian side will thereby represent the interest that the matter concerns legal entitlements on the Slovenian side. The final resolution of this question depends on the border Agreement provisions. When the border is determined also in the disputed areas, each State will issue permits within its own territory and to its own inhabitants." We can imagine an answer of the Government of the Republic of Croatia to the same question| We can even easier imagine the answer to the question of whether there will

be a consensus reached within the Permanent Mixed Commission on who will issue permits to the people whose living will thus be facilitated. I hope that I am wrong as regards the answer|

26. Similar questions will appear in the implementation of Chapter III of the Agreement, i.e. "Farming and Forestry Activities, the Owners of Property on Both Sides and Border Crossing." The Agreement presupposes that the borderline is not only determined but also marked. Thus, e.g., Art. 11 of the Agreement deals with the owners of ... "real property divided by the borderline," while Art. 12 deals with the owners of ... "estates divided by the borderline". This applies to a major part of the border, but not to the entire border. In the disputed parts, there may be deviations up to 200 meters.

Hypothetically, knowing in which State the property or a part of it is located, and what the size of such property or estate is, might depend on the fact of where the borderline lies. If a real property or an estate is not intersected by the borderline the owner is not obliged to follow the Agreement's regime, however, if the real property or the estate is intersected by the borderline they must comply with the Agreement. Without the consent of both contracting Parties, such a question cannot be resolved. This issue can also become a subject of consideration in the Permanent Mixed Commission. Here again the same questions concerning the border might be raised, as those above-mentioned. The determination of the borderline appears to be more than necessary, at least for the purpose of this Agreement.

27. Nevertheless, I could agree with "sticking my head in the sand" concerning the implementation of the Agreement on land, I could not do the same in relation to the questions of the implementation of the Agreement on the sea. I opine that the Agreement leaves open similar questions also in the part relating to border sea fishing (Arts. 47 to 52 of the Agreement in conjunction with Art. 1.4). The Agreement presupposes the borderline also on the sea, which it does not define, nor give any basis (criteria) for the determination thereof. This undoubtedly follows from Art. 1.4, which for the purpose of sea fishing, limits the border sea area to the territorial seas of both the contracting Parties, without determining how this will be determined or what this territorial sea should mean for the purpose of implementing the Agreement. Also, Arts. 47 to 52 presuppose that the border area of both the contracting Parties is determined or at least determinable (The contracting Parties will ... mutually enable fishing in its border sea area ... The fishermen who fish in the neighboring border area (i.e. in the territorial sea of the other contracting Party), must respect the regulations of the contracting Party that refer to fishing in this area. Particularly important is Art. 49, which determines the number of fishing boats that may daily fish in the border area in the (territorial) sea of the other contracting Party.).

Whether the fishermen of one contracting Party stay in the border area of the other contracting Party depends on an imaginary borderline, which will obviously be determined by the Permanent Mixed Commission, and approved by the Governments of both the contracting Parties (thereby also the areas of territorial seas according to Art. 1.4 of the Agreement), when first incidents occur. Without that the Agreements will not be able to be implemented in this part. The Agreement does not establish any starting points for the determination of the sea border, which is also not its purpose. Thus, in implementing this part of the Agreement, each side will start from its notion

(more precisely interests) of where the sea border is located, or what belongs to the territorial sea of the individual contracting Party.

Moreover, as I have often mentioned, this applies because there has never been determined an administrative sea border between the Republics of the former SFRY. For it to be possible to implement this part of the Agreement, it will be necessary to determine the area of jurisdiction and sovereignty of Slovenia and Croatia in the parts of the sea that constitute the entire border area.

28. It is clear that in the case of every border agreement questions concerning its implementation appear. However, something else derives from the mentioned examples. Namely, Art. 54 of the Agreement grants authority to the Permanent Mixed Commission and the Government to determine, by resolution (or by the Government approving such Commission resolution), whether, in a certain part of the land (or the sea), jurisdiction and sovereignty (i.e. authority) will be exercised either by the Republic of Slovenia or the Republic of Croatia. To prevent any misunderstandings, I do not assert that the Commission and the Government will do something contrary to the interests of the Republic of Slovenia. I am convinced that they will not.

However, trust in State bodies is not a constitutional issue to be addressed in the review of the Agreement. This is a political matter and, in this part, I agree with the finding of the majority contained in Paragraph 35 of this opinion. The constitutional issue is whether such an authorizing norm, as contained in the Agreement, is in conformity with the Constitution, or not, and whether it could result, regarding Art. 1 of the Agreement, if it were unconstitutional, in prejudicing the border, which would also be inconsistent with Art. 4 of the Constitution.

29. The authorizing norm contained in Art. 54 of the Agreement is, in my opinion, first, inconsistent with Art. 2 and, second, with Art. 3.2 of the Constitution.

30. Concerning the Agreement, the question of its conformity with Art. 2 of the Constitution is raised from two sides: (a) On one side, it concerns the question whether its provisions are generally enough precise, clear and unambiguous so that they can be directly implemented in the part relating to the legal position (rights and duties) of the border population. This question certainly refers in particular to the implementation of the Agreement in the areas in which the border is disputed, undetermined, or where it does not exist at all. 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 domestic law. Thus, Agreement provisions must, by their character and the purpose, be directly executable, which means that on the basis of the Agreement natural persons and legal entities may exercise their rights, and are aware of their obligations in advance. If the manner of exercising the rights and duties of the border population in certain parts of the border is to be determined subsequently (by the Permanent Mixed Commission resolutions approved by the Government), i.e. after the ratification of the Agreement and its becoming part of the legal system of the Republic of Slovenia, the question of its conformity with Art. 2 of the Constitution is still more important.[6]

31. (b) On the other hand, the question of the conformity of Art. 54 of the Agreement with Art. 2 of the Constitution is raised, since it transfers the power to reach decisions

from within the power of the National Assembly to the Permanent Mixed Commission and the Government. In my opinion, Art. 2 of the Constitution is violated since the mentioned article of the Agreement does not define a framework for the decision-making of the Permanent Mixed Commission and the Government. Furthermore, Art. 3 of the Constitution is violated since the same article of the Agreement interferes with the principle of the separation of powers. The Commission and the Government are not part of the legislative branch. In Decision No. U-I-73/94, dated 25 May 1995 (Official Gazette RS, No. 37/95 and DecCC IV, 51), the Constitutional Court took the following position, which it has often repeated: "Art. 120.2 of the Constitution provides that duties and offices associated with the public administration shall be carried out independently and at all times pursuant to and consistently with the Constitution and the law. The principle according to which the public administration shall be governed in its activities by the Constitution and statutory framework, and in particular by the constitutional and statutory basis (principle of legality), is one of the basic constitutional principles. The principle of legality as relating to the activities of the public administration is also linked with other constitutional principles and is based on them. The principle of democracy (Art. 1 of the Constitution) implies the requirement that members of Parliament elected in direct elections make the most important decisions, in particular those relating to the citizens. This results is that the executive branch (the Government and administrative agencies) can only operate legally if working in line with and within the framework of the law - not on the basis of their own regulations or even of their own function in the system of the separation of powers. In this respect, the priority of law and of the legislature also plays an important role in delimiting the powers of legislative and executive branches in line with the principle of the separation of powers (Art. 3 of the Constitution). The principle of a State governed by the rule of law (Art. 2 of the Constitution) requires that legal relations between the State and its citizens be regulated by statutes.

These not only determine the framework and basis for the activities of the executive branch under administrative law; the activities also become known, transparent and foreseeable for the citizens, thus increasing the legal certainty of the latter. The principle of the protection of human rights and fundamental freedoms (Art. 5.1 of the Constitution) demands that, in line with the principles of democracy and a State governed by the rule of law, these may only be limited by the legislature in the cases and to the extent allowed by the Constitution, and not by the executive branch. At the same time, this principle is also important for the effective protection of personal rights and legal entitlements, including the effective control of the constitutionality and legality of individual administrative acts."

32. As the border is still not determined and precisely marked by a special agreement, according to the uti possidetis principle applied by the Arbitration Commission for Yugoslavia, the administrative border between the Republics of the former SFRY is considered the border between the new States, which can be changed only with the consent of both sides. The course of the border is disputable in certain land areas, and the administrative border has never been determined on the sea. In particular, due to emphasizing this principle as a criterion for the final decision and the marking of the border between Slovenia and Croatia, the question is raised whether the implementation of the Agreement will actually lead to determining (not only prejudicing|) the border between the contracting Parties. It will no longer concern the question whether in a certain territory one or the other side actually exercises authority,

since such questions will have to be resolved within the Permanent Mixed Commission provided that it has the consent of the Governments. The exercising of authority in a certain territory will be unanimously agreed upon (a Commission resolution approved by the Government); the basis for that will be in the Agreement. And, on the sea (I emphasize that again) there is no administrative border that existed on the day of gaining independence and which would be as such contained in Sect. II of TUL.

33. In connection with the question of the legal character of such resolutions (given the fact that they will be approved by the Government - even the Governments of both the contracting Parties) and the possible subsequent legal consequences of that for the determination of the border, let me emphasize Art. 31 of MDKPP. Art. 31.3 determines that in interpreting a treaty from the view of the treaty's context, it is necessary to be aware of every subsequent agreement between the member States concerning the interpretation of the treaty or the application of its provisions (Art. 31.3.a) and of all subsequent case law in the application of the treaty, by which the member States agreed on the interpretation of the treaty (Art. 31.3.b). And, in particular for this reason, I wanted the Constitutional Court to answer in its opinion the question of the relation between Art. 59 of the Agreement and the cited MDKPP provision.

34. It would be really difficult to define within our domestic law such a resolution as a type of treaty whose ratification falls, according to the Foreign Affairs Act, within the powers of the Government. However, pursuant to Art. 2.1.a of MDKPP, a treaty is considered to be an international agreement reached by States in writing, for which international law applies, and which is composed either in the form of only one instrument or in the form of two or several internationally connected instruments, irrespective of its special name. It is essential for a treaty, pursuant to the Vienna Convention, that the State appears as a subject of international law on entering into it. Thus, this concept does not embrace various commercial agreements reached by the Governments, and implemented through one or several national legal systems. However, "technical" or "operative" intergovernmental agreements do belong to such treaties.[7] Certainly, for such an agreement to become a valid treaty, the conditions determined in Arts. 7 and 46[8] of MDKPP must also be fulfilled.

35. Thus, it could have been unanimously determined, by resolutions of both Governments (more precisely the Permanent Mixed Commission and both Governments), on the basis of the authority provided in Art. 54 of the Agreement, which contracting Party is to effectively exercise authority in the disputed areas, and whose law is to be applied there. This is particularly important on the sea, where the controversy does not concern only the demarcation but in particular the determination of a border which has not been determined so far, which, in terms of constitutional law, does not exist between the States. Although, on the basis of the uti possidetis principle, the state of affairs on the day of the declaration of independence will be established, also the facts occurring thereafter will most probably be considered, in particular if they are a consequence of the unanimous decisions of both the Governments and if there was no administrative border at the time of gaining independence.

36. Therefore, I opine that, in the framework of the opinion on the conformity of the Agreement with the Constitution, the Constitutional Court should have answered the question whether the authority vested in the Permanent Mixed Commission and the Government violated Art. 3 of the Constitution, or it concerned only an implementation

of the Agreement (statute) that does not exceed the powers of the Government. Art. 3 and, thereby also, Art. 4 of the Constitution would be violated if the Constitutional Court found that the adoption of resolutions pursuant to Art. 54 of the Agreement could not only entail the actual but also legal (concerning the rules of the Vienna Convention on the Law of Treaties as regards the interpretation of treaties) determination of the border, which falls under the powers of the National Assembly.

37. Pursuant to Art. 160.2 of the Constitution, the National Assembly is bound by an opinion of the Constitutional Court on the conformity of a treaty with the Constitution. This is certain in the event the Constitutional Court establishes that the treaty or a certain part of it is not consistent with the Constitution. To simplify, in such a case, without a constitutional amendment the treaty simply cannot be ratified.

In the case of a "positive" opinion the deputies decide in conformity with Art. 82.1 of the Constitution, according to which they are not bound by any instructions. With an opinion that leaves so many questions open, as I have indicated in this dissenting opinion, the Constitutional Court most certainly did not alleviate the deputies' work. Accordingly, the Constitutional Court on the one hand decided, despite certain reservations, that the procedural requirements for the commencement (and after the National-Assembly elections, also for the continuation) of proceedings existed (concerning that, also with my vote "in favor") and to issue an opinion, however, on the other hand it decided to return back to the National Assembly such a "hot potato," as little spiced as possible.

Dr. Janez Čebulj

Lojze Janko

Opombe:
[1] This might develop if the treaty contains provisions directly applicable in the domestic law. If this occurs, the Constitutional Court would, in proceedings to review constitutionality, annul the act on the ratification or the unconstitutional treaty provisions thereby incorporated into the domestic law. Such treaty provisions would cease to apply in domestic law, which would violate the international obligations of the Republic of Slovenia (an international delict).
[2] International law requires a system in which States must organize their authority in the area of foreign affairs in a manner such that they will be capable of cooperating in international transactions actively, stably, reliably, reasonably and responsibly (...). A State must implement all effective treaties. The pacta sunt servanda principle and the entire structure of international relations depend on this rule.
Treaties would be worthless if every State could avoid its international obligations by an excuse that these are contrary to its domestic law. See L. Wildhaber, Treaty-Making Power and Constitution, An Internal and Comparative Study, Hlebing & Lichtenhahn, Basel 1971, pp. 175 and 184.
[3] [See supra, the identical note 33].
[4] The court held in that case that, wherever it appears, the uti possidetis principle has a general character, as it is logically connected with decolonization (the establishment of new States). Thus, it was applied in the decolonization process in Latin America,

Asia and Africa. The principle is also accepted in the process of establishing new States in Europe, as a consequence of self-determination. - J. Brownlie, The Rule of Law in International Affairs, 1998, pp. 56-59.

[5] G. Lalić, Reševanje spora med Slovenijo in Hrvaško glede razmejitve morske meje v severnem delu Jadrana; v Zborniku:
Vprašanje oblikovanja slovenskega etničnega in državnega prostora s posebnim poudarkom na slovensko - hrvaški meji v Istri [The Resolution of a Dispute between Croatia and Slovenia Concerning the Demarcation of the Sea Border in the Northern Part of Adriatic; in the collection: The Issue of Forming the Slovenian Ethnic and State Territory with a Special Emphasis on the Slovenian - Croatian Border in Istria]; Portorož 1998. This principle is similarly described in J. Brownwhile, op. cit., str 55.

[6] "One of the basic principles of a State governed by the rule of law is that statutory norms must be clear, understandable and unambiguous. This in particular applies to regulations that directly regulate the rights and legal position of a wide range of citizens. A regulation from which an average citizen, who is not learned in law, cannot by themselves understand their legal position, but which could be, also in accordance with an opinion of the legislature - in contradistinction with its explicit text -, correctly applied only by an interpretation of the statutory provisions in the process of their implementation, i.e. by competent public administration bodies, creates legal uncertainty and thereby distrust in the law, and violates the principles of a law-governed State." The Constitutional Court wrote this in the reasoning of Decision No. U-I-64/97 (DecCC VI, 78). Furthermore, it has written the same previously and subsequently. As follows from the continuation, exactly in the cited part of the reasoning, all elements are included which appear also in connection with BHROPS: non-clarity, direct regulation of the rights and legal position of the border population and the application of provisions (application or a manner of application) to be determined by the Permanent Mixed Commission and indirectly the Government, which, at the moment of submitting BHROPS to the National Assembly for ratification, does not know yet how this will be implemented in practice concerning the disputed parts of the border.

[7] "It is not clear, in every respect, how broad the concept of "every treaty" is; it seems that it has a broad meaning.
Included are technical intergovernmental agreements, declarations by which an optional provision in the Charter of the International Court is recognized, agreements between organizations and States, agreements between organizations, and unilateral commitments of an international character." I. Brownlie, Principles of Public International Law (4th ed.), Oxford University Press Inc., New York 1990, pp. 612-13.
The competent working body of the General Assembly of the United Nations has established that, for the purpose of registration according to Art. 102 of the Universal Charter of the United Nations, treaties are considered to include also agreements of a financial, technical and economic character, in which no foreign ministries participate but appropriate expert departments. See in Wilhelm Karl Geck, Die Regiestrierung und Veroeffentlichung voelkerrechtlicher Vertraege, ZaoeRV, Bd. 22/1-2, p. 144.
Similarly also in B. Simma, The Charter of the United Nations, A commentary, Oxford University Press, 1995, pp. 1105-13.

[8]Art. 7 is included in the chapter on entering into a treaty, while Art. 46 is included in the chapter on the nullity of a treaty. The provisions read as follows:
Art. 7 (Full Powers):

"1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:
(a) he produces appropriate full powers; or
(b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.
2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:
(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;
(b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;
(c) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ."
Article 46 (Provisions of Internal Law Regarding Competence to Conclude Treaties)
"1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."