



**REPUBLIKA SLOVENIJA
USTAVNO SODIŠČE**

The Concurring Opinion of Judge Dr. Ude

1. I have voted for the opinion that 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, and with Art. 2 of the Constitution. I opine that it is also necessary to point out certain aspects of reviewing this Agreement, in particular the starting-point that, irrespective of an opinion of the Constitutional Court, the legislature is the body which must review whether the Agreement contains provisions which might be important, together with other legal facts and activities of both the States and their bodies, for the final determination or, more precisely, establishment of the border between the States.

2. In Paragraph 29 of the reasoning of this Opinion, the Constitutional Court held that in reviewing the Agreement it considered also the condition that for the ratification of a (future) treaty on the State border the same procedure is prescribed as for the ratification of the disputed Agreement. It also held that the challenged Agreement is a treaty entered into by two States and could, as such, also contain provisions on the State border. It furthermore held that this would not in itself be contrary to the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia and the Constitution, provided that it remains within the framework of Art. 4 of the Constitution and is entered into and ratified in conformity with the Foreign Affairs Act. That position, with which I agree, should be, in my opinion, further explained. The essence of the position is that the Agreement could also contain the determination of the border, since it is ratified by the National Assembly. If that be the case, the issue is raised why the Constitutional Court dealt at all with the question of whether the disputed Agreement contains provisions prejudicing the border. It dealt with this question because it had to review whether the Agreement was in conformity with Art. 4 of the Constitution, which also prohibits the National Assembly from encroaching on the territorial integrity and indivisibility of the State in the determination of the border. The question whether the disputed Agreement is contrary to the Constitution and the Basic Constitutional Charter cannot be isolated from the question of whether individual Agreement provisions prejudice the future determination of the border.

3. Concerning the position I have explained in Paragraph 2 of this separate opinion, I must emphasize that the Constitutional Court's decision on the conformity of the disputed Agreement with the Constitution and the Basic Constitutional Charter has binding effects, while the reasoning concerning whether in a certain manner the individual provisions of the disputed Agreement "prejudice the border" do not have such effects. For the ratification of the Agreement, the National Assembly will still have to evaluate whether the Agreement contains provisions which may be subsequently used as proof for asserting that either of the two States has exercised sovereignty over part of the disputed territory (in particular on the sea). There is no doubt that the future determination of the border, if not determined or established by the consent of both the States, will depend also on the positions of both the States, as contained in their agreements, and their activities and the activities of their bodies that could be perceived as exercising sovereignty in a certain territory.

4. One of the questions the Constitutional Court addressed during the discussion was whether Art. 54 of the Agreement, envisaging the establishment of a Permanent Mixed Commission with the intention to develop traffic and correctly apply the Agreement, was inconsistent with the Constitution and the Basic Constitutional Charter. I opine that it follows from the definition of the powers of the Permanent Mixed Commission that it has been granted only implementing powers. Such powers are certainly reasonable and even necessary for the implementation of the Agreement. However, I believe that it is unacceptable to derive from the position that such commission could exceed its powers and that the Government of the Republic of Slovenia could approve such excessive resolutions. The Constitutional Court often deals with the question of whether certain State bodies exceed their powers and authority. Numerous Constitutional Court decisions discuss the question of legality or the binding effect of the Constitution and statutes on public administration bodies. On finding that a certain public administration body has exceeded its authority, it would certainly not be required that such body be

dissolved. All bodies must act within the framework of their powers; in the area of issuing general regulations it is the Constitutional Court that establishes whether all other bodies remain within their constitutional and statutory powers.

The danger exists in the field of international law that by exceeding their authority State bodies would bind the State despite internal regulations. For this particular reason, the work of State representatives in interstate commissions is very responsible, although such commissions have no authority to issue decisions and thereby bind the States. Thus, Art. 54 of the Agreement contains, in Section VI, the provision that Permanent Mixed Commission resolutions take effect when approved by the Governments of the contracting Parties. Accordingly, I opine that the mere definition of the Permanent Mixed Commission and its powers cannot be contrary to the Constitution.

5. Finally, I would like to emphasize that the opinion of the Constitutional Court on the conformity of the Agreement with the Constitution and the Basic Constitutional Charter does not relieve the legislature of the obligation to review the disputed Agreement from the political point of view, i.e. from the view whether, and to which extent, it could be detrimental to our State in subsequent determination or establishment of the disputed border.

Dr. Lojze Ude