**Concurring Opinion of Judge Jan Zobec,
Joined by Judge Mag. Marija Krisper Kramberger**

1. I did not decide to write a separate opinion because I object to any of the main standpoints of the majority. On the contrary, I was motivated only by my concurrence with the standpoint according to which "[t]he award of the Arbitral Tribunal regarding the land border will entail the concretisation of the border in international law, as it was known and determined within the former SFRY in national law, whereas regarding the maritime border such will entail a division of the former legally unilateral, although *de facto* divided, Yugoslav sea in the north Adriatic at the international level" (Para. 54 of the reasoning). I also agree with the finding that "[o]ne of the basic and decisive principles of international law for the deciding of the Arbitral Tribunal will undoubtedly be the principle of *uti possidetis*" (Para. 58 of the reasoning). However, unlike the majority I believe that a consistent derivation of these findings and observations entails nothing more than the exclusion of the possibility that the arbitral award would be inconsistent with Article 4 of the Constitution in conjunction with Section II of the BCC. Two premises led me to this realisation.

2. The first is the interpretation of Section II of the BCC and the comparison of this interpretation with the substantive provisions of the Agreement ("Applicable Law" – Article 4) which suggests that the criteria by which the borders with the Republic of Croatia are set out in the BCC are, in essence, no different from the criteria by which the border will be determined by the Arbitral Tribunal, i.e. the rules and principles of international law. If there is no inconsistency between these premises on the basis of which the course of the border in nature is concretised (between Section II of the BCC, on one side, and Article 4 of the Agreement, on the other), then it is logically impossible that the criteria that will be applied by the Arbitral Tribunal, not for determining the border (as such is already defined by the BCC and by the provisions of the Agreement, which are consistent with the BCC), but for its concretisation in nature, would be inconsistent with the Constitution. As there would be nothing wrong from the point of view of constitutional law if the Agreement entrusted the Arbitral Tribunal with the determination of the border in accordance with the BCC, there is nothing wrong if this international judicial body is charged with the task of determining the border pursuant to the substantive provisions of the Agreement, which are not inconsistent with the Constitution. In my opinion, the finding that by adopting the BCC the Republic of Slovenia "declared to the world that it had met the international law criteria for the existence of a state, which was important for recognition by other states" and that the aim of the BCC was "to constitute at the constitutional level and to declare at the international level a new sovereign state, which would be an equal subject in the international community" (both in Para. 32 of the reasoning) seems of outstanding importance to me. Our state thus gained independence and became a sovereign state in accordance with the rules and principles of international law. The

substantive provisions of the Agreement therefore cannot be inconsistent with Section II of the BCC understood in this manner. Especially not given the fact that there is a safeguard included in the Agreement against a certain degree of the unpredictability of the arbitral award of the Arbitral Tribunal ordering this international judicial body as a separate and independent duty (irrespective the applicable substantive law defined in Article 4 of the Agreement) to ensure Slovenia's junction to the High Sea (Article 3(1)(b) of the Agreement). Therefore, even if the "applicable law" as defined in Article 4 of the Agreement allowed for any possibility that the Republic of Slovenia (in spite of the principle of *uti possidetis de facto*) would not have a junction to the High Sea (e.g. on the basis of the principle of natural prolongation)[1], the final award would not deprive the state of a junction to the High Sea – this junction is namely protected as a duty of the Arbitral Tribunal particularly emphasised in Article 3(1)(b).

3. The second premise must answer the question of the competence and qualification of the Arbitral Tribunal, i.e. it must take into consideration the possibility that this Tribunal will determine a border which is inconsistent with the BCC. In any case, I agree with the majority that "the decision of the Arbitral Tribunal [will be,] in its nature, […] a judicial decision whose precise content cannot be predicted" (Para. 58 of the reasoning). This is quite logical. If the outcome of the arbitration proceedings were predictable, the Agreement would not have been concluded, as any endeavour on the part of the Tribunal would be completely unnecessary. The purpose of entrusting such determination to the Arbitral Tribunal lies precisely in the fact that its ruling is unpredictable. Is not this the very essence of such disputes? Without an uncertain outcome of the dispute, when it is already clear in advance which of the conflicting parties is right, there can be no dispute. This applies as well to large, international legal disputes between states, as well as to completely ordinary "civil" disputes. What is essential for the review of the constitutionality of the Agreement is therefore not (and as the BCC does not determine the actual course of the border with Croatia in nature, it cannot be) where the border will actually be concretised at the level of international law, but according to which rules this will happen. There can be only one constitutional law dimension of the predictability of the award of the Arbitral Tribunal – and that is the one determined in Article 4 of the Constitution in conjunction with Section II of the BCC. If the award is not inconsistent with these constitutional acts, it cannot be problematic from the point of view of constitutional law. That this will be the case arises from the fact that the substantive provisions of the Agreement together with the safeguard provided in Article 3(1)(b) essentially overlap with the interpretation of Section II of the BCC by the Constitutional Court.

4. I understand the concerns of those who warn about the possibility of disappointment. This is certainly not impossible – on the contrary, it is embedded in the resolution of the dispute by the Arbitral Tribunal. It is highly probable that in the end at least one of the parties to the arbitration proceedings, although they have the same constitutional law views regarding the border, will be disappointed and dissatisfied with the award.[2] However, it should be noted that the border, although it might not be concretised in accordance with our notions of where it should run based

on the principles of international law *uti possidetis iuris* (on land) and *uti possidetis de facto* (at sea), which are also the criteria determined in Section II of the BCC, will still be a border determined on the basis of these principles – and therefore it will not be contrary to the Constitution. The substantive provisions of the Agreement are (may be) vague to the extent to which Section II of the BCC is vague regarding the definition (determination) of the border in order to still remain consistent with the Constitution.[3] At this point, it may therefore be said: there will be nothing wrong with the award of the Arbitral Tribunal from the aspect of constitutional law as long as it falls within this range of latitude. Concretising the border, which is allegedly known, can never be unconstitutional if it is only carried out within this range, i.e. within what is supposedly known and guaranteed by constitutional acts (and by the substantive provisions of the Agreement, which are consistent with the latter). The state border with the Republic of Croatia is certainly constitutionalised, but (unlike the borders with other states, which are determined and concretised by treaties) not demarcated down to every boundary stone, every angle is not marked, nor are the geographical coordinates determined. Only the manner of concretely determining where the border runs in nature is constitutionalised. And as long as the concrete determination of the border moves within this framework of constitutional law, the border so defined cannot be contrary to the Constitution.

5. The question, however, is what if the award oversteps this framework and extends into a field outside that defined in Section II of the BCC and in the substantive provisions of the Agreement, which are essentially consistent with this Section. At first glance, it appears that this situation would be unconstitutional. In theory this would be possible, however actually, and I think even legally, it is not by any means. Firstly, because the Arbitral Tribunal should simply be trusted – trusted in a way that the courts should be trusted in a state governed by the rule of law, trusted to such an extent that what is decided is taken to be true. And secondly, because it also is true.[4] If the border is disputed, because each of the parties in the dispute has their own views on where its course should be on the basis of undisputed rules on its concretisation in nature, the dispute may be resolved only in two ways: either by an agreement, or through a third party – an arbitrator. Both methods should be consistent with the Constitution. Regarding the Agreement, both parties must act in accordance with an interpretation of Section II of the BCC and Article 4 of the Constitution that is consistent with the constitutional review case law, but if they decide to settle the dispute with the assistance of a third party, they must agree that when resolving the dispute this international judicial body will be bound in the same way and to the same degree as that by which the borders are constitutionalised. What the truth is here (which in itself is not recognisable by means of direct insight), can be said only after both sides of the dispute agree upon it (i.e. the agreement), or when their consent is replaced by a definitive and binding award of the Arbitral Tribunal, which draws its legitimacy also from determining the border in a manner that is consistent with the Constitution. The same logic applies as for resolving any other dispute (i.e. what is established by a court is not the truth because it is a reflection of the objective reality, but rather because the matter has been ruled on definitively, irrevocably, and finally by a court, and because in a state governed by

the rule of law, where courts decide according to the procedure and criteria ensuring that the claims, proposals, and arguments of parties will be reasonably and therefore objectively decided upon, the judgments of the courts must be obeyed). Therefore, the border, no matter where it is concretised in nature, will not be unconstitutional – it will not be, because it will be determined by a trustworthy international judicial body in a manner not inconsistent with the constitutional acts. It would be completely different if the Agreement provided that the Arbitral Tribunal shall determine the border in accordance with the state of affairs when the Agreement was concluded – such a manner of determining the border would be inconsistent with Article 4 of the Constitution in conjunction with Section II of the BCC, as it is common knowledge that after 25 June 1991 Croatia expanded its actual authority. Similar would hold true if the Arbitral Tribunal was given the power to determine the border *ex aequo et bono*. This term "usually refers to external and abstract justice and its meaning can be only theoretically discussed as there is virtually no case law with regard to its application in border disputes".[5] It is therefore also not precluded that a border determined in such a manner would be inconsistent with the constitutional acts.

6. I therefore do not share the constitutional law concerns of the majority that "the statutory implementation of [the] award could entail that laws would be inconsistent with Article 4 of the Constitution in conjunction with Section II of the BCC if in the award of the Arbitral Tribunal the border were determined differently than proceeds from Section II of the BCC" (Para. 63 of the reasoning – such concern necessarily involves a degree of distrust in the ability of the Arbitral Tribunal to decide the dispute on the basis of the constitutionally consistent set of criteria that are defined in the Agreement) and do not see the need for recommendations that the National Assembly "weigh whether it would be reasonable to amend the Constitution in order to prevent any unconstitutionality of the national legislation (laws which regulate municipal territories, courts, administrative units, constituencies, etc.) by which, on the basis of the Agreement, the award of the Arbitral Tribunal is to be implemented" (Para. 63 of the reasoning).[6] Such intervention of the institution empowered to amend the Constitution would not be intended to achieve that the state borders with the Republic of Croatia would also in nature be consistent with the Constitution and the BCC (that they are not inconsistent with these constitutional acts is provided for by the substantive provisions of the Agreement in conjunction with the duty of the Arbitral Tribunal to determine Slovenia's junction to the High Sea), but would rather be required only in the imaginary case of potential unwarranted conduct of the Arbitral Tribunal such that it determined the state border by some other constitutionally inconsistent criteria, criteria that are (hence also) inconsistent with the substantive provisions of the Agreement or due to the failure to complete the duty determined in Article 3(1)(b) of the Agreement to determine the junction of Slovenia with the High Sea. An interference by the institution empowered to amend the Constitution, indicated in Paras. 62 and 63 of the reasoning, would entail nothing other than the deconstitutionalisation of the borders. Its constitutional message would namely be that the definition of the borders determined in Section II of the BCC no longer applies, that the borders may also be determined in some other manner, without regard to the principles of international law *uti possidetis iuris* and *uti*

possidetis de facto. All this is only due to the merely theoretical possibility that this international judicial body will not carry out the duty entrusted to it under the Agreement, or otherwise that its award would be arbitrary. I reject such a possibility – and together with it also reject the warnings to the institution empowered to amend the constitution in Paras. 62 and 63 of the reasoning.

7. To conclude, I would like to add my own, very personal view of the importance of Section II of the BCC (as interpreted by the Constitutional Court in this Opinion) and its relation to the conclusion of treaties concerning the border. Since the Republic of Slovenia proclaimed by this constitutional document "*urbi et orbi*" that it met the criteria recognised by international law for the existence of a state, and as the BCC is a permanent and inexhaustible constitutional source of the statehood of the Republic of Slovenia, it therefore cannot be understood otherwise than as, *inter alia*, a lasting commitment of the state to international law. I therefore see in the conclusion of the Agreement the last and final act of the independence of our state, an act that will bring a lasting solution to the border issue in a manner consistent with the Constitution and thus bring peace to our neighbourly relations. Therefore I will be bold and adopt the standpoint that any suspension of the solution of this extremely important issue (which over time can lead to irreversible adverse consequences for our state) would in its essence be contrary to the Constitution. It is contrary to the Constitution firstly because it would oppose the requirements of a definitive determination and stability of the state borders, requirements clearly conveyed by the purpose of Section II of the BCC (to determine and stabilise the border in a manner consistent with international law), secondly because it is not in accordance with the principles of international law that the state committed itself to respecting – already in the process of gaining independence – the principles that are built into the very formation (the gaining of independence) of the Republic Slovenia and which can be inferred precisely from Section II of the BCC (the inviolability of the state territory and the territorial integrity of states, the peaceful settlement of disputes, the prohibition of the threat of force or use of force directed against the territorial integrity or political independence of any state, the principles of the peaceful co-existence of states and good neighbourly relations – borders that are irrevocably fixed and stable are a prerequisite for these principles, and vice versa: undefined, unclear and disputed borders are a permanent source of conflicts, disputes, provocations, incidents, and all sorts of tension and a serious obstacle to peaceful and good neighbourly relations between the two states), and finally also because the Republic of Croatia has since independence extended its actual authority to a substantial part of the territory which in terms of the international legal principle of *uti possidetis* belongs to the Republic of Slovenia[7] (without the need for any special argumentation, it is clear that the Agreement is the first step towards remedying this unconstitutional state of affairs due to the Croatian occupation of Slovene territory).

Jan Zobec

Mag. Marija Krisper Kramberger

Endnotes:

[1] Concerning the principle of equity in the case law of international tribunals on the resolution of disputes regarding maritime borders and the principle of natural prolongation as one of the criteria of the principle of equity, see J. Metelko, *Pravičnost u sukcesiji država*, Pravni fakultet u Zagrebu, Zagreb, 1992, pp. 37-88.

[2] This is vividly explained by the epigraph of the excellent monography by A. Uzelac, Istina u sudskom postupku, Pravni fakultet u Zagrebu, Zagreb, 1997, citing C. S. Pierce: "There is no distinction of meaning so fine as to consist in anything but a possible difference of practice."

[3] I completely agree with the finding that "Section II of the BCC is a constitutional reflection of international law regulating the question of the borders at the moment when Slovenia became a sovereign and independent state" (Para. 45 of the reasoning) and that "Section II of the BCC enables further determination of the course of the state border on land and at sea between the Republic of Slovenia and the Republic of Croatia, however, the legislature is thereby limited by the principles of *uti possidetis iuris* (on land) and *uti possidetis de facto* (at sea)." I also concur with the subsequent position that "the position of the Constitutional Court in Opinion No. Rm-1/00 must also be understood in this sense, namely that 'the BCC and the Constitution do not prohibit the conclusion of treaties that would regulate border issues' and that a treaty 'could also contain provisions on the state borders, which would in and of itself not be contrary to the BCC and the Constitution provided that it remains within the framework of Article 4 of the Constitution'" (all Para. 51 of the reasoning).

[4] No one has direct access to the truth. Even if we say that truth is the accordance of representations with an objective reality, we have said only what the truth is (and even then in a tautological manner: "I have realised the truth when I have realised the truth."), but we have not said anything about how to identify the truth. The truth, therefore, can not be defined by substantive criteria – none of these have yet provided a satisfactory answer – but by procedural ones. The truth is, therefore, what is generally or intersubjectively accepted as a consensus (the consensual concept of truth), or what a court finds in prooceedings which externally legitimise its outcome with its postulates of a fair trial (open, free, based on a discussion of reasonable arguments, which is identified by the adversariality, public nature, directness, and impartiality and independence of the tribunal) – in an ideal verbalised situation, this would be a constituted and in this situation legitimised truth (in a state governed by the rule of law, it is self-evident that the judgments of the courts are accepted as true by any reasonable man, i.e. as the intersubjective truth). *Cf.* A. Uzelac, *ibidem*, pp. 202, 208, 214, et seq.

[5] V. Sancin, *Kompromis med Slovenijo in Hrvaško* [The Compromise between Slovenia and Croatia], Pravna praksa, 2009, No. 45, Appendix, p. IX.

[6] Such a recommendation also seems illogical to me: it is not a duty of the Constitutional Court to advise the legislature to adapt the Constitution to legal acts of lower rank, but vice versa – the Constitution is always the unalterable higher premise. If the majority is of the opinion that even a completely appropriate award of the

Arbitral Tribunal might entail such a concretisation of the state border which would be inconsistent with the constitutional interpretation of Section II of the BCC, if therefore according to the opinion of the majority the substantive provisions of the Agreement also allow for such a result of the proceedings before the Arbitral Tribunal according to which the state border with the Republic of Croatia would be established without any consideration of the principle of *uti possidetis*, and if there is a real danger that an international judicial body will disregard a duty imposed upon it by Article 3(1)(b) of the Agreement (to determine Slovenia's junction to the High Sea), then I reject the finding that Article 3(3)(a), Article 4(a), and Article 7(2) and (3) of the Agreement are not inconsistent with Article 4 of the Constitution in conjunction with Section II of the BCC. Precisely because they must be, as delineated in Point VI of the operative provisions of the Opinion, interpreted and reviewed as a whole in terms of content, they would be, in my opinion, contrary to the Constitution. Their combined effect entails that the borders would be determined contrary to their definition determined in Section II of the BCC, that their determination would be binding and definitive for the Republic of Slovenia, and that within six months after the adoption of the award, our state would be obliged to take all necessary steps for its implementation, including the revision of the national legislation, if necessary. So if there is a real possibility that these provisions with their combined effect would lead to a situation where the award with its direct legal effects would definitively and bindingly break through the constitutional guarantee of the state borders with the Republic of Croatia (since the award does not require ratification, all such concerns regarding the realistic possibility that its content would be inconsistent with the constitutional documents must be dealt with in the preliminary review proceedings – there will be no "make-up exam"), then it is not possible to state that the award as an independent instrument of international law that does not require ratification would "only exist in the sphere of international law" and that "therefore it will not at all be possible to speak of its unconstitutionality in the sense of the inconsistency of national regulations with the Constitution" (Para. 62 of the reasoning). In so far as the state borders are constitutionalised (and thus legally internalised), then it is clear even without special analysis that the award, if it deviated from the constitutional provisions determining the state border, would indeed also have internal legal effects – to exactly the same extent that Article 4 of the Constitution and Section II of the BCC entail them. An award which was the result of criteria other than those guaranteed by constitutional provisions which are – and in the manner as they are – interpreted in this Opinion of the Constitutional Court, would necessarily be unconstitutional. In such a case only two options would be available, but both are bad: either to amend the Constitution to comply with the international obligation or to commit a breach of international law. The first option seems to me ("only") legally unacceptable, because it means that in the preliminary (*a priori*) constitutional judicial review of a treaty, which aims exactly at preventing the possibility of the occurrence of such a quandary, the Constitutional Court failed. I cannot accept that the Constitutional Court, being aware of the real possibility that such a quandary might occur, would, rather than decide in the opinion that the contested provisions of the Agreement are inconsistent with the Constitution, suggest that the National Assembly consider whether it would be sensible to amend the Constitution so that the unconstitutionality of national legislation could not even

occur. Hence, if this option actually exists, then it is completely logical that the Agreement, which would be the direct cause of the realisation of this option, cannot be consistent with the Constitution. I am afraid that on the basis of such hypothesis the Constitutional Court would not accomplish the aim of a preliminary review – to prevent legal provisions inconsistent with the Constitution from entering into the national legal order or to prevent a breach of international law. Another (even worse) option is to act contrary to an obligation of international law.

[7] According to the relevant White Paper of the Ministry of Foreign Affairs of the Republic of Slovenia, since 25 June 1991 the Republic of Croatia has arbitrarily appropriated a total of 1318 hectars of Slovene territory (Dragonja: 113 hectars, Snežnik: 70 hectars, Sekulić: 335 hectars, Mura: 800 hectars), and entered this territory into their regulations and maps, and the Republic of Slovenia has protested against these acts in diplomatic notes and by blocking individual chapters of Croatia's accession negotiations. The President of the Republic of Croatia has therefore issued a statement of non-prejudice and in the Agreement these documents and maps should not be taken into account. Merely according to the data of the Mission of the Republic of Croatia to the European Union, its territory increased by 520 hectars from the year 2002 to the year 2009.