



REPUBLIKA SLOVENIJA
USTAVNO SODIŠČE

Partially Dissenting Opinion of Judge Mag. Miroslav Mozetič

1. I agree with points I to IV of the operative provisions of the Opinion, but I cannot agree with points V and VI. I could agree with these points only if I understood the Arbitration Agreement solely as "an instrument whose purpose is to establish a mechanism for the peaceful settlement of the border dispute", meaning that it is not an instrument whose purpose is to determine the course of the state borders (see point 60 of the reasoning of the Opinion). This is the view of the majority, which follows from the wording of the Agreement and does not take into account its fundamental purpose.

2. In my opinion, such understanding ignores the fact that the main purpose of the Agreement is to "originally" determine the border between the Parties to the Agreement, which is to be determined by the Arbitral Tribunal which is to be established by this Agreement. Its decision will be binding and will constitute a definitive settlement of the dispute (the second paragraph of Article 7 of the Agreement). The Parties to the Agreement undertake, within six months of the award, to take all necessary steps to implement the award, including by revising national legislation if necessary (the third paragraph of Article 7 of the Agreement).

3. The purpose of the Agreement is therefore not the mere establishment of the Arbitral Tribunal, the determination of its tasks, the establishment of the rules of procedures for deciding, and the determination of the legal effects of its decisions, but the original determination of the border between the Parties to the Agreement. This purpose is clear from the Agreement itself, as it constitutes its sole task, and that is the determination of the border between the two countries. I cannot simply ignore this fact when assessing the Agreement. Undoubtedly, the Agreement itself does not determine the border; the border will be determined by the Arbitral Tribunal. The Agreement authorises the Arbitral Tribunal to determine the state border between the Parties to the Agreement. Given the legal nature and authority of the Arbitral Award, it is in my opinion indisputable that this decision will interfere with the state border with Croatia, which was constitutionalised by the BCC and Article 4 of the Constitution. This constitutes an interference with the Constitution. This competence of the Arbitral Tribunal is based on the Arbitration Agreement, and therefore, in my opinion, it cannot be reviewed separately from that fact. If treated separately from this fact, it is of course not inconsistent with the Constitution.

4. In my view, the conclusion that necessarily follows from the reasoning of the Opinion (in particular from sections B-III., B.-IV., and B.-V.), the majority of which I agree with, is that the National Assembly should amend the Constitution even before the ratification of the Agreement as the state borders of the Republic of Slovenia are regulated in national law under Section II. of the BCC "and constitutionalised" and are therefore a part of the Constitution. Otherwise, the National Assembly, as the institution empowered to amend the Constitution, will find itself in a situation where due to the decision of the same Assembly, but now in its legislative capacity, it will have to amend the Constitution. The decision of the legislature (the ratification of the Arbitration Agreement), which was adopted by a

majority of the votes cast by the deputies present at the session where the quorum was attained, binds the legislature, as the institution empowered to amend the Constitution, to amend or supplement the Constitution by a two-thirds majority of all deputies. I think that therefore the National Assembly cannot adopt such a decision or, if it does so, such would be inconsistent with the Constitution.

5. It follows from the Opinion that the BCC in conjunction with Article 4 of the Constitution constitutionalised the state borders of the Republic of Slovenia (point 34), that these provisions entail a constitutional obstacle to altering the state borders, that in a territorially fairly small state such provisions also have a guarantee function and that the constitution framers established the state territory and state borders as one of the fundamental values which must be protected at the constitutional level (point 38). The Opinion continues: "A treaty which would alter the course of the state borders would also entail an alteration of the territory on which the BCC on 25 June 1991 established the state sovereignty of the Republic of Slovenia and would therefore be inconsistent with Section II of the BCC." Next, in point 46 the Opinion clearly emphasises that a treaty that would alter the course of the borders between Slovenia, Italy, Austria, and Hungary which were already determined in treaties would be inconsistent with Section II of the BCC in conjunction with Article 4 of the Constitution. This means that the National Assembly should not ratify such a treaty without a previous amendment to the Constitution (as the institution empowered to amend the Constitution). If there were no amendment to the Constitution, the National Assembly should reject the ratification of such a treaty.

6. Regarding the state borders between Slovenia and Croatia, the situation is somewhat different. Here the state border is not defined by a treaty. However, the Opinion emphasises that the border between the two states (in national law) was determined at the constitutional level "in accordance with the principles of *uti possidetis iuris* and *uti possidetis de facto*" (point 48). In addition, the Opinion emphasises in point 50 that "the land border between the Republic of Slovenia and the Republic of Croatia is constitutionalised in Section II of the BCC as the border that had its course along the borders of the hitherto municipalities or cadastral municipalities, whereas the maritime border is constitutionalised as having its course along the line up to where the Republic of Slovenia de facto exercised its authority within the former SFRY." In point 51 of the Opinion it is also pointed out that the constitutionalisation of the state borders on one hand entails that the National Assembly may not ratify by a law a treaty which would alter the state borders as they are determined in Section II of the BCC. On the other hand, this does not entail the prohibition that the course of the state border between Slovenia and Croatia is determined in nature, since such has not yet been determined in nature. I of course share these views, since otherwise it would not be possible to determine this state border in nature. However, this does not mean that such views should only apply to "real" treaties regulating the state border and not to cases in which a state border which could not be determined by consent to a treaty is regulated by the award of an arbitral tribunal set up by the states in a special treaty in which they undertake to respect and implement its decision.

7. It clearly follows from the part of the Opinion which I agree with that the state borders of the Republic of Slovenia are raised to the constitutional level and that therefore the determination and alteration of the state borders also require

amendments to the Constitution. However, being raised to the constitutional level or the constitutionalisation of such entails that in national law they are a part of the Constitution. They are part of the *materia constitutionis*. The procedure for amending the Constitution is defined in the Constitution and is clear. Undoubtedly, the determination or alteration of the state borders is first of all an important question of international law and state borders are altered in a manner consistent with international law only by a treaty or by transferring the solution of this issue to an international judicial body. However, a treaty must be incorporated into national law in order to become a part of it, which in Slovenia occurs by ratification by means of an act. The National Assembly may not ratify a treaty if such is inconsistent with the Constitution. If, however, it would like to ratify such a treaty, it must in advance amend the Constitution (as the institution empowered to amend the Constitution). Such a conclusion is a logical consequence of the finding that the state borders are constitutional subject-matter (i.e. part of the Constitution).

8. It follows from the Opinion that a treaty determining the alteration of the state border may not be ratified without prior amendment of the Constitution. This standpoint, according to the majority, does not apply in the case of the ratification of the Arbitration Agreement, since the latter does not determine the state border and therefore does not in itself amend the Constitution. I wrote already in points 2 and 3 of this separate opinion that this position is too narrow and that I cannot agree with it. The result of the Arbitration Agreement will be an original determination of the state border. This is exactly the same as for the determination of the state border by a treaty. The difference is that in this latter case the determination of the state border is a result of the mutual agreement of both states and in the former case it will be the result of the arbitration award of the Arbitral Tribunal to which both states concerned transferred the authority to reach this decision. Another important difference is also the fact that a treaty regarding the alteration (or determination) of the state border additionally needs to be ratified, whereas this is not necessary for the arbitration award, since the states concerned have already declared in the Agreement by which they established the Arbitral Tribunal that they will accept the arbitral award and that they will respect and enforce it. Therefore, as I wrote already in point 7 of this separate opinion, I see no valid reason for the different treatment of the treaty concerning the establishment of the Arbitral Tribunal, which results not only in the establishment of the Arbitral Tribunal, but above all in the original determination of the state border (of course, by the Arbitral Tribunal).

9. Therefore, it is in my opinion necessary, with regard to the consequences (or the result of the determination of the state border) of the Arbitration Agreement and considering the legal nature of the arbitration award, which stems from the Arbitration Agreement, that considering the ratification of the Arbitration Agreement the procedure should be the same as with a treaty on a state border, i.e. that it should not be ratified without a corresponding amendment of the Constitution. Any other solution does not seem logical to me and is inconsistent with the Constitution. After the arbitration award is adopted, there will be an amendment to the Constitution, not just legislation. If, however, there is no amendment to the Constitution or if the laws implementing the arbitral award are abrogated due to their inconsistency with the Constitution, this will consequently breach the international obligations of the state which it has already undertaken on the basis of the Arbitration Agreement.

10. In view of the above, I could not vote for points V. and VI. of the operative provisions of the Opinion. I, as well as the majority, do not take sides whether the Agreement is good or not. I as well cannot know and I do not want to guess what the decision of the Arbitral Tribunal will be. In my opinion, this is not really important. Any decision will encroach upon the Constitution, as it will determine the state border. This also applies to the border with the Republic of Croatia. Even this border is constitutionalised. Certainly, this does not mean that it is not allowed to determine it by a treaty or with the assistance of an international judicial body, this is even necessary as it is not yet determined in international law by consent between the two states. Therefore, it is undisputed that an agreement concerning the establishment of such an international judicial body in itself cannot be inconsistent with the Constitution. However, the result of a treaty determining the state border or the decision of such international judicial body will entail the determination of the state border. Nevertheless, in the Republic of Slovenia the state borders are constitutional subject-matter, i.e. part of the Constitution. Therefore, the legislature, without being so authorised by the institution empowered to amend the Constitution, should not alter the state borders nor determine them in a more precise way, since it would thus interfere with the Constitution. Therefore, the caveat stated in points 62 and 63 of the Opinion will be of any significance only if it were (or if it will be) understood in this manner by the deputies. Amending the Constitution makes sense only if it is done prior to the ratification of the Arbitration Agreement. Later, the question will no longer be whether to amend the Constitution, as it will have to be amended if it was meant seriously (which I do not doubt) that the state borders of the Republic of Slovenia are constitutionalised in the national law. And if I may draw attention once again to point 38 of the Constitutional Court Opinion: "these constitutional provisions [Section II of the BCC and Article 4 of the Constitution] entail a constitutional obstacle to altering the state borders. In a territorially fairly small state, as is the Republic of Slovenia, such provisions also have a guarantee function; by these provisions the constitution framers established the state territory and state borders as one of the fundamental values which must be protected at the constitutional level."

Mag. Miroslav Mozetič