REPUBLIKA SLOVENIJA
USTAVNO SODIŠČE

The concurring opinion of Judge Dr Mitja Deisinger

1. With this concurring opinion I wish to additionally substantiate what, in my opinion, paragraph IV of the operative provisions of the Opinion entails.

2. In Paragraph 47 of the statement of reasons of the Opinion the Constitutional Court establishes that "the Republic of Slovenia is a coastal state and it [...] *de facto* exercised its authority in a part of the Adriatic Sea and also had access to the High Sea". This is concretised in footnote 27 and it also follows from the acts mentioned in footnote 38. The standpoint in paragraph 54 is important, namely that the award of the Arbitral Tribunal will entail a division of the former legally unilateral, although *de facto* divided, Yugoslav sea in the north Adriatic at the international level. From this proceeds the obligation of the Republic of Slovenia to submit an appropriate proposal for a fair and just division of this part of the Adriatic Sea as well as a proposal for a junction of the territorial sea of the Republic of Slovenia to the High Sea (Para. 55 of the statement of reasons of the Opinion).

3. a/ This position of the Constitutional Court can be substantiated on the basis of national and international law. Slovenia as part of the former Yugoslavia had territorial access to the High Sea, as was also explicitly admitted by Croatia in one of its notes. In Note of the Ministry of Foreign Affairs of the Republic of Croatia No. 5893/03 of 18 November 2003, Croatia unambiguously stated that Slovenia had had territorial access to the High Sea when it was part of the former SFRY.[1] In compliance with the principle of respecting the status as on 25 June 1991, Slovenia thus still has territorial access to the High Sea.
b/ Slovenia is the only successor to the Treaty between the Government of the SFRY and the Government of the Republic of Italy with Annexes I to X of 10 November 1975 (i.e. the Osimo Treaty). According to the Osimo Treaty, which defines the border between Slovenia and Italy, this border extends to point T5 in the south, which is the point of Slovenia's territorial access to the High Sea. It is precisely the Osimo Treaty that establishes Slovenia's right to a territorial junction to the High Sea in an international context. When in 1954 Yugoslavia acquired Zone B of the Free Territory of Trieste, the purpose of the Osimo Treaty was that Slovenia acquire access to the sea[2] to a full extent with access to the High Sea at point T5. The territorial junction of Slovenia to the High Sea is thus based on international law.
c/ Slovenia is a successor to the 1968 Agreement between the Government of the Socialist Federal Republic of Yugoslavia and the Government of the Italian Republic on the Delimitation of the Continental Shelf between the Two Countries. Slovenia has notified Italy (Note of the Ministry of Foreign Affairs of the Republic of Slovenia No. ZSD-JVE-46/03 of 24 July 2003 – Annex 6) as well as Croatia of the succession to this Agreement. Italy has taken note of Slovenia's succession to the Agreement (Note of the Ministry of Foreign Affairs of the Italian Republic No. 003889/205 of 22 December 2003)[3], thus recognising Slovenia the continental shelf to the south of T5. With the continental shelf, Slovenia logically also has territorial access to the High Sea. In accordance with Article 3(1)(c) of the Agreement, the Arbitral Tribunal will determine the external borders of the continental shelf of Slovenia.

č/ Prior to 25 June 1991, Slovenia exercised jurisdiction in the Bay of Piran and beyond the Bay to point T5 by the supervision of the Koper Border Police Station at the Yugoslav-Italian maritime border.[4]
d/ The Bay of Piran had within the SFRY the status of internal sea waters (Official Gazette SFRY, No. 49/87). It retained such status also after independence. In accordance with Article 5 of the Maritime Code (Official Gazette RS, No. 120/06 – official consolidated text), all bays constitute internal sea waters, thus also the Bay of Piran. In the same manner, the Republic of Croatia retained all bays as internal waters.[5] Until 25 June 1991, the Bay of Piran was formally treated as part of Slovenia. For instance, also the territory of the entire Bay of Piran was determined as a cadastral municipality within the borders of the territory of the Republic of Slovenia by the Long-Term Plan of the Socialist Republic of Slovenia for the 1986-2000 period (consolidated cartographic part) with fourteen maps (Official Gazette SRS, No. 36/90). Furthermore, in the Atlas of the Environmental Agency of the Republic of Slovenia the entire Bay of Piran is determined to be Slovene and the border of Slovene territorial waters up to the junction to the High Sea is demarcated. The Agency has data from official registers which were collected on the basis of the Water Framework Directive (WFD) and the land survey data of the Republic of Slovenia, whereby they represent the border of the cadastral municipality Morje [Sea]. A delimitation inside the Bay of Piran is not applicable also in accordance with international law, as the United Nations Convention on the Law of the Sea (Official Gazette SFRY, MP, No. 1/86) in item 6 of Article 10 determined that the delimitation does not apply to "historic" bays, whereas the Bay of Piran has all the characteristics of such a bay.[6]

4. The starting points regarding Slovenia's junction to the High Sea are entirely in compliance with Articles 3 and 4 of the Agreement. As stated in paragraph V of the operative provisions and in the statement of reasons, the Agreement establishes a mechanism for the peaceful settlement of the border dispute and is thus from a legal perspective a procedural act. Only one provision of the Agreement is an exception, namely Article 3(1)(b), which entails a completely definite provision of substantive law. This provision namely already determines that Slovenia has a junction to the High Sea, whereas the task of the Arbitral Tribunal is merely to precisely determine the junction of Slovene territorial sea to the High Sea.[7] It is important that pursuant to Article 3(1) of the Agreement, the Arbitral Tribunal shall determine Slovenia's junction[8] to the High Sea, thus the Arbitral Tribunal does not decide thereon or establish such, as such is already determined in the above-cited provision of the Agreement. With reference to such, the term "Slovenia" entails its territory on land, the internal waters and territorial sea, the seabed, and the ground under and the airspace above all this territory. The junction to the High Sea entails a direct junction of the territorial sea to the open sea, whereas the open sea starts at Point T5. The western border of the territorial sea up to point T5 of the Republic of Slovenia, as the only legal successor to the Osimo Treaties, is already determined, therefore the task of the Arbitral Tribunal is merely to determine the eastern border of the territorial sea and the width of the junction to the international waters, which must enable normal transit of all vessels. Such interpretation is also completely in compliance with the applicable law in accordance with Article 4(b) of the Agreement, which requires the application of equity and the principle of good neighbourly relations in order to achieve a fair and just result by taking into account all relevant circumstances, which are precisely what was mentioned above.

5. Upon determining the course of the maritime border the Arbitral Tribunal will also have to decide regarding the coastal area. In the area of the former Zone B of the Free Territory of Trieste the border is namely undefined to the greatest extent, therefore the Arbitral Tribunal will have to determine the course of the border originally. The principle of *uti possidetis iuris* will in this case be subordinate to the rules and principles of international law (Article 4(a) of the Agreement), thus concretely to the Osimo Treaty and to the London Memorandum, with a special statute as a constituent part of the Memorandum. From the 12th century on, the Municipality of Piran comprised also the cadastral municipalities of Kaštel and Savudrija,[9] which were separated by the ordinance of the Military Administration of the Yugoslav Army in 1947. After the termination of the Free Territory of Trieste a civil political and administrative unit of Piran should have been established within the above-mentioned historical framework, whereas by virtue of Article 7 of the above-mentioned special statute, the division of civil administrative units was prohibited. When interpreting the Osimo Treaty and the instruments connected therewith, the Arbitral Tribunal will not be able to overlook the foundation of these international documents. In 1954, Yugoslavia acquired Zone B of the Free Territory of Trieste, whereas Zone A of the Free Territory of Trieste with Slovene ethnic territory and over 140,000 of our Slovene compatriots thereafter belonged to Italy.[10] In view of the fact that in the entire territory of the Free Territory of Trieste the official languages were only Italian and Slovene, the delimitation of the former Zone B of the Free Territory of Trieste should have been different. The Republic of Slovenia will have to appropriately define such in the subject-matter of the dispute in accordance with Article 3 (2) of the Agreement. In such a broader definition of the territory in which the Arbitral Tribunal is to determine the course of the land border there are no limits, as is particularly underlined in Para. 25 of the Opinion.

Dr Mitja Deisinger

Endnotes:

[1] The White Book, p. 10.

[2] Vladimir Đuro Degan, Pravni domašaj načela *uti possidetis* glede kopnenih i morskih razgraničenja u regionu s obzirom na granice prema Osimskom ugovoru iz 1975 godine, p. 79 in the book Osimska meja, Založba Annales, Koper 2006.

[3] The White Book, p. 10.

[4] Data from the White Book, pp. 10 – 11, footnote 27 of the Opinion. The Marine Fisheries Ordinance of the Coastal Communities, adopted 11 December 1987, defines in Article 7 the fishing sea waters of Slovenia as "extending from Cape Savudrija to Cape Debeli Rtič". The Republic of Croatia and the communities of Umag and Buje did not contest this Ordinance or such fishing practice before the Brioni Agreement (7 July 1991), which was intended to maintain the existing state of affairs as of 25 June 1991 at sea (Prof. Dr Darja Miheli, Zgodovinski inštitut Milka Kosa, ZRC SAZU, Ljubljana, www.delo.si/clanek, 27 October 2008).

[5] *Zemljopisni atlas Republike Hrvatske*, Školska knjiga, Leksikografski zavod, Miroslava Krleže, Zagreb 1993, pp. 40-41.

[6] There are instances of historic bays in the functioning of certain states in which it is not necessary that they belong to only one state (Prof. Dr Mirjam Škrk, *Seveda*

nam je blokada nekaj prinesla [Of Course We Gained Something from the Blocade], Priloga Večera, 3 October 2009).

[7] The former Croatian Minister for Foreign Affairs and professor of international law, Fellow of the Croatian Academy of Sciences and Arts, Dr Davorin Rudolf claims that the Agreement envisages that Slovenia must obtain access to the high seas ("[…] *sporazumom unaprijed predviđeno da Slovenija mora dobiti izlaz na otvoreno more* […]"), www.index.hr/vijesti/clanak, 30 October 2009.

[8] Different interpretations of the English word "junction" have emerged in professional circles. In the dictionary *Veliki angleško-slovenski slovar* [The Large English-Slovene Dictionary] (Grad, Škerlj, Vitorovič, DZS, Ljubljana, 1986) the term is translated as a "*spoj, stik*" [joint, contact], by the Google translation engine as a "*spoj*" [joint], in the Evroterm database as a "*točka združitve*" [point of junction] and in the translation programme Presis as "*priključek*" [connector]. The term "junction" is not only a legal concept, as it has different meanings in different contexts. It has to be put into the context of the Agreement, especially with regard to Article 4(b). Regarding this, the term "junction" is appropriate, as it also allows for a certain derogation from some rules of international law, because, in any case, international law cannot rule out a fair and just decision, i.e. to establish a junction of Slovenia with the High Sea. The term "junction" in this context entails a fusion of the territorial sea with the High Sea.

[9] Croatia as well invokes historical reasons regarding the disputed border with Bosnia and Herzegovina at Neum, i.e. that Croatia has been entitled to two islands, Veli and Mali Školj, already since the times of the Dubrovnik Republic and the Austro-Hungarian Empire (www.dnevnik.si/novice, 6 October 2006).

[10] For more regarding this issue, see the book by Dr Duša Krnel-Umek, Dokumenti o Slovencih ob Jadranu od leta 1797 do leta 2009, Razstava pokrajinskega arhiva Koper, Koper 2009, and the article by Dr Milica Kacin Wochinz, *Hrvaški »zgodovinski dolg« Slovencem*, Nova revija, Ljubljana 1999, pp. 249-254.