REPUBLIKA SLOVENIJA
USTAVNO SODIŠČE

Rm-1/09
18 March 2010

O P I N I O N

At a session held on 18 March 2010 in proceedings to review the constitutionality of a treaty, initiated upon the proposal of the Government of the Republic of Slovenia, the Constitutional Court The Arbitration Agreement

i s s u e d t h e f o l l o w i n g o p i n i o n:

I. The Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia is an applicable constitutional act and as such a permanent and inexhaustible constitutional source of the statehood of the Republic of Slovenia.

II. Section II of the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia protects the state borders of the Republic of Slovenia and in conjunction with Article 4 of the Constitution entails the applicable and relevant constitutional determination of the territory of the Republic of Slovenia.

III. In the part in which Section II of the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia protects the state borders between the Republic of Slovenia and the Republic of Croatia it must be interpreted within the meaning of the international law principles of *uti possidetis iuris* (on land) and *uti possidetis de facto* (at sea).

IV. In accordance with Section II of the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia, the land border between the Republic of Slovenia and the Republic of Croatia is constitutionally protected where the border between the republics of the former Socialist Federative Republic of Yugoslavia was drawn, whereas the maritime border is protected along the line up to the High Sea to where the Republic of Slovenia *de facto* exercised its authority before its independence.

V. The Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia does not determine the course of the state borders between the Parties to the Agreement, but it establishes a mechanism for the peaceful settlement of the border dispute.

VI. Article 3 (1) (a), Article 4 (a), and Article 7 (2) and (3) of the Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia, which must be interpreted and reviewed as a whole in terms of content, are not inconsistent with Article 4 of

the Constitution in conjunction with Section II of the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia.

R e a s o n i n g

A

1. The Government of the Republic of Slovenia filed a proposal with the Constitutional Court that the Constitutional Court issue an opinion on the conformity of Article 3 (1) (a) of the Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia (hereinafter referred to as the Agreement) with Article 4 of the Constitution in conjunction with Section II of the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia (*Temeljna ustavna listina o samostojnosti in neodvisnosti Republike Slovenije* – hereinafter referred to as the BCC). The Government is of the opinion that the Agreement is entirely in conformity with the BCC and the Constitution; it filed the proposal with the Constitutional Court that it issue an opinion due to the fact that a part of the expert public has allegedly expressed reservations and concerns regarding the constitutional conformity of the individual parts of the Agreement. In the opinion of the Government, the second paragraph of Article 160 of the Constitution enables the Government to file a proposal for the review of the constitutionality of the Agreement although it is of the opinion that the Agreement is not inconsistent with the Constitution. With reference to such, the Government refers to the position of the Constitutional Court in Opinions No. Rm-1/97 of 5 June 1997 (Official Gazette RS, No. 40/97, and OdlUS VI, 86) and No. Rm-1/02 of 19 November 2003 (Official Gazette RS, No. 118/03, and OdlUS XII, 89).

2. The position of the Government is that Section II of the BCC established the land border between the Republic of Slovenia and the Republic of Croatia, and the border so-established only needs to be demarcated in nature. Therefore, the power of the Arbitral Tribunal to determine the course of the land border is allegedly not inconsistent with Section II of the BCC and Article 4 of the Constitution, but allegedly only entails the precise determination of the land border. With reference to the maritime border, the Government proceeds from the regulation in the Socialist Federative Republic of Yugoslavia (hereinafter referred to as the SFRY) whereby the regime regulating the sea and the maritime zones was determined uniformly, therefore the maritime border between the Republic of Slovenia and Croatia was not determined. Consequently, also the power of the Arbitral Tribunal to determine the course of the maritime border is allegedly not inconsistent with Section II of the BCC and Article 4 of the Constitution. The possible doubts regarding the unconstitutionality of Article 3 (1) (a) of the Agreement are allegedly resolved also by Article 3 (1) (b) and (c), which require the Arbitral Tribunal to determine Slovenia's junction to the High Sea and the regime for the use of the relevant maritime areas. These two provisions of the Agreement allegedly ensure the preservation of the right of Slovenia, which it already had in the former SFRY, to territorial junction to the High Sea.

3. In order to support its position that the Agreement is not inconsistent with the Constitution, the Government refers to Opinion of the Constitutional Court No. Rm-1/00 of 19 April 2001 (Official Gazette RS, No. 43/01, and OdlUS X, 78), in which the

Constitutional Court adopted the standpoint that "the BCC and the Constitution do not prohibit the conclusion of treaties that would regulate border issues […] provided that such a treaty remains within the framework of Article 4 of the Constitution". When reviewing whether the Agreement is in conformity with the Constitution, also the position of the Constitutional Court from the above-cited Opinion that the border between Slovenia and Croatia is "presumably known, however, not yet concretised in a border treaty and demarcated in nature" must be, in the opinion of the Government, taken into account.

4. The Government furthermore states that the Agreement is not a treaty on the common state land and maritime border, but is a foundation for submitting the settlement of the border dispute to an independent international judicial body, which is allegedly also in conformity with general principles and rules of international law, which on the basis of Article 8 of the Constitution are binding on Slovenia and are a part of its legal order.

5. In the supplementation to its application, the Government supplemented its proposal with certain specific reservations and concerns voiced by the expert public regarding the constitutionality of Article 3 (1) (a) of the Agreement. These concerns of the expert public, as stated by the Government, in their substance primarily refer to the question of whether the decision of the Arbitral Tribunal would entail merely a precise determination of the border, which is presumably already known, or whether such would concern a new determination or alteration of the border, which would allegedly require a prior amendment to the BCC. In the above-mentioned concerns, the expert public furthermore states that the Agreement entails a special manner of establishing the border between Slovenia and Croatia, whereby the Agreement nowhere refers to the existing border as determined by the BCC. The BCC namely determines that the border with Croatia is where the border between the republics within the former Yugoslavia was. Differently than the BCC, the Agreement determines the rules and principles of international law as the criteria for determining the course of the border.

B – I

6. The second paragraph of Article 160 of the Constitution reads as follows: "In the process of ratifying a treaty, the Constitutional Court, on the proposal of the President of the Republic, the Government or a third of the deputies of the National Assembly, issues an opinion on the conformity of such treaty with the Constitution. The National Assembly is bound by the opinion of the Constitutional Court." In addition to the powers stated in the first paragraph of Article 160 of the Constitution, such regulation vests in the Constitutional Court special competence for the *a priori* constitutional review of treaties.

7. A proposal for the *a priori* review of the constitutionality of a treaty may be filed by three applicants, as determined by the Constitution, i.e. the President of the Republic, the Government, or a third of the deputies of the National Assembly. In the case at issue, the proposal was filed by the Government, which is of the opinion that the Agreement is not inconsistent with the Constitution or the BCC.

8. In accordance with the first paragraph of Article 162 of the Constitution, proceedings before the Constitutional Court are regulated by law. Article 70[1] of the Constitutional Court Act (*Zakon o Ustavnem sodišču* – Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the CCA) reiterates the powers of the Constitutional Court from the second paragraph of Article 160 of the Constitution, whereas it does not contain other explicit procedural provisions with reference to expressing an opinion when reviewing treaties. Therefore, in accordance with the first paragraph of Article 49 of the CCA, the provisions of Chapter IV of this Act, which provides for the review of the constitutionality and legality of regulations, are to be applied, *mutatis mutandis,* for procedures for the review of a treaty (see Constitutional Court Opinion No. Rm-1/97).

9. In proceedings for the review of the constitutionality of a regulation, the Constitutional Court reviews the constitutionality of the provisions of the regulation which an applicant, as provided for in Articles 23 or 23a, or a petitioner, as provided for in Article 24 of the CCA, alleges are inconsistent with the Constitution. The Constitutional Court may not extend *ex officio* its review of the constitutionality to provisions which are not challenged, except in cases in which such is allowed by the principle of connectivity provided for in Article 30 of the CCA.[2] In addition to the challenged provisions, a request or petition must also contain the provisions of the Constitution or law with which the challenged provisions are allegedly inconsistent. Moreover, an applicant or a petitioner must also state the reasons why the challenged provision is allegedly unconstitutional or unlawful.[3] A matter that should be decided by the Constitutional Court should be formulated as a dispute on the constitutionality or legality of the challenged provisions. If an applicant initiating proceedings does not have any doubts regarding the constitutionality or legality of the challenged provisions, there is no need for legal protection provided by a Constitutional Court decision.

10. Reasons for a different position do not exist with reference to the procedure for the *a priori* review of treaties. When expressing an opinion on the constitutionality of a treaty, the Constitutional Court also reviews only the provisions of the treaty whose review is requested by the entitled applicant; it reviews other provisions only under conditions which apply for the principle of connectivity. As a general rule, the Constitutional Court reviews the matter only from the viewpoint of the provisions of the Constitution which were referenced by the applicant. In instances in which an applicant is the Government, it cannot be required from the Government that it alleges the unconstitutionality of a treaty – the Government is namely, as a general rule, a signatory to treaties, whereas at the same time the second paragraph of Article 160 of the Constitution gives the Government the right and power to propose the [constitutional] review of every treaty. However, the fact that it cannot be required from the Government that it be subjectively convinced that a treaty is unconstitutional does not entail that the Government does not need to provide a statement of reasons for its proposal. Regardless of its standpoint on the conformity of the relevant treaty with the Constitution, the Government must state which provisions of the treaty the Constitutional Court should review as well as which provisions of the Constitution it must take into consideration when doing so. The Government also has to state reasons why individual provisions of a treaty could be disputable from the constitutional point of view. Although the Government does not have reservations regarding the conformity of the treaty with the Constitution, it must nevertheless state

in the proposal which reservations regarding the constitutionality of the treaty otherwise exist (e.g. those of the parliamentary opposition or expert public).

11. The power of the Constitutional Court in the procedure provided for by the second paragraph of Article 160 of the Constitution is limited to the review of treaties which are in the ratification procedure. A condition for such a procedure to be initiated before the Constitutional Court is that the procedure for the ratification of the treaty has been initiated in the National Assembly. It proceeds from the second paragraph of Article 160 of the Constitution, which determines that in the process of ratifying a treaty the Constitutional Court issues an opinion "on the conformity of such treaty with the Constitution", that the subject of the review is the content of the treaty, i.e. its individual provisions. The subject of the review cannot be the ratification procedure. Possible deficiencies in the ratification procedure[4] may concern the act on the ratification, however such deficiencies cannot be alleged in the procedure for the *a priori* review of a treaty.[5] As is the case for the review of the constitutionality and legality of regulations, also in cases calling for the *a priori* review of the constitutionality of a treaty, the Constitutional Court does not assess whether the treaty is appropriate. Therefore, the Constitutional Court does not provide a value judgment or an assessment of the implementation of the public interest which is pursued by a treaty.

B – II

12. The Agreement, which in the original English version is entitled *Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia*, was signed by the President of the Government of the Republic of Slovenia and the President of the Government of the Republic of Croatia on 4 November 2009 in Stockholm, Kingdom of Sweden. At a session held on 17 November 2009, the Government determined the text of the draft Act on the Ratification of the Agreement and submitted it for adoption to the National Assembly. During the procedure for the ratification of the Agreement, the Government submitted the proposal that the Constitutional Court review whether Article 3 (1) (a) of the Agreement is in conformity with Article 4 of the Constitution in conjunction with Section II of the BCC.

13. The proposed criteria for the constitutional review are Article 4 of the Constitution and Section II of the BCC. Article 4 of the Constitution reads as follows:

"Slovenia is a territorially unified and indivisible state."

Section II of the BCC reads as follows:

"The state borders of the Republic of Slovenia are the internationally recognised state borders between the hitherto SFRY and the Republic of Austria, the Republic of Italy and the Republic of Hungary in the part where these states border the Republic of Slovenia, and the border between the Republic of Slovenia and the Republic of Croatia within the hitherto SFRY."

14. The proposed subject of the review is Article 3 (1) (a) of the Agreement, which in the original English version reads as follows:

"The Arbitral Tribunal shall determine the course of the maritime and land boundary between the Republic of Slovenia and the Republic of Croatia."

In the draft Act on the Ratification of the Agreement, the above-cited provision in the Slovene translation reads as follows:

"*Arbitražno sodišče določi potek meje med Republiko Slovenijo in Republiko Hrvaško na kopnem in morju*."[6]

15. Article 3 (1) (a) of the Agreement specifies the power of the Arbitral Tribunal to determine the course of the border between the Parties to the Agreement. It does not in and of itself proceed from this provision where the Arbitral Tribunal will determine the course of the border or which criteria it will apply in this regard. Article 3 (1) (a) is therefore inseparably connected with Article 4 (a) of the Agreement, which determines what the Arbitral Tribunal will have to apply when determining the course of the border. Article 4 (a) of the Agreement in the original English version reads as follows:

"The Arbitral Tribunal shall apply the rules and principles of international law for the determinations referred to in Article 3 (1) (a)."

In the draft Act on the Ratification of the Agreement, the above-cited provision in the Slovene translation reads as follows:

"*Arbitražno sodišče uporablja pravila in načela mednarodnega prava za odločanje po točki (a) prvega odstavka 3. člena."*[7]

16. For the effects of the decision of the Arbitral Tribunal also Article 7 (2) and (3) of the Agreement are essential. It follows from these provisions that the decision of the Arbitral Tribunal will not merely be an opinion or a recommendation, but a decision that will be definitive and legally binding for the Parties to the Agreement and will thus have the nature of a judicial decision. Article 7 (2) and (3) of the Agreement in the original English version read as follows:

"(2) The award of the Arbitral Tribunal shall be binding on the Parties and shall constitute a definitive settlement of the dispute.

(3) The Parties shall take all necessary steps to implement the award, including by revising national legislation, within six months after the adoption of the award."

In the draft Act on the Ratification of the Agreement, the above-cited provisions in the Slovene translation read as follows:

"(2) Razsodba arbitražnega sodišča je za pogodbenici zavezujoča in pomeni dokončno rešitev spora.

(3) Pogodbenici v šestih mesecih po sprejetju razsodbe storita vse potrebno za njeno izvršitev, vključno s spremembo notranje zakonodaje, če je to potrebno."

17. Article 3 (1) (a), Article 4 (a), and Article 7 (2) and (3) of the Agreement are mutually inseparably connected, as only their joint legal effect entails that the Arbitral Tribunal, applying the rules and principles of international law, will definitively and with legally binding effect determine the course of the state border between the Parties to the Agreement – the Republic of Slovenia and the Republic of Croatia – on land and at sea. As the above-mentioned provisions of the Agreement are mutually connected, the Constitutional Court, on the basis of Article 30 of the CCA, decided to extend the procedure for the review of the constitutionality of Article 3 (1) (a) also to Article 4 (a) and Article 7 (2) and (3) of the Agreement. The Constitutional Court interpreted and reviewed the above-mentioned provisions of the Agreement as a whole.

B – III

18. The formation and cessation of states and the questions of the state territory and state borders are questions which are primarily in the domain of international law. It is in the nature of the matter that state borders concern two or more states and are in general a result of their mutual agreement. State borders exist as *de facto* effective demarcation lines between sovereign states, when determined at the level of international law, either by a treaty, by a decision of an international body, or by exercising *de facto* authority which a neighbouring state does not oppose. In the Republic of Slovenia, the state borders are also regulated in national law, namely in Section II of the BCC; also Article 4 of the Constitution refers to the state territory. State borders, as established in national law, do not bind other states and do not have international law effects in and of themselves. Thus, regarding the state borders of the Republic of Slovenia one must distinguish between international law and national law positions. These concern two separate legal systems, however when interpreting national law one must proceed from international law, as state borders are by nature a question of international law. The formation of a new state is in international law to a great extent a question of fact,[8] however, its recognition and acceptance by the international community also depend on the fact whether the state respected the rules and principles of international law upon its formation. Especially the rules and principles of international law which refer to the formation of new states following the dissolution of a common state, as was the case of the former SFRY, are relevant. Such concern the rules and principles of international law which regulate fundamental relations between newly established and already existing neighbouring states or between newly established states themselves, especially concerning their territory and state borders.

19. In order for a state border to be justified under international law, it is of key importance that a state demonstrates legal title (*iustus titulus*). International law titles (French *titre*) on which the course of the state borders is based have two functions. Firstly, legal title is a basis for exercising state sovereignty[9] and indicates from where a state draws legal entitlement to its territory and sovereignty. Secondly, legal title demonstrates and protects also the specific course of the border demarcated in nature.[10]

20. Within the former SFRY the Republic of Slovenia had external state borders with the Republic of Austria, the Republic of Italy, and the Republic of Hungary. In the former SFRY the state borders with these three states were determined by

treaties.[11] After the dissolution of the common state, these external Yugoslav borders became the state borders of the Republic of Slovenia. Under international law, the Republic of Slovenia succeeded to these borders on the basis of the rules and principles of international law which determine the inviolability of state territory and the continuity of state borders. These rules and principles are provided for in certain most important universal and regional documents. The Charter of the United Nations of 1945 (hereinafter referred to as the UN Charter), among the principles of how its Members should act, determines the principle of the sovereign equality of all its Members and the prohibition of the threat or use of force against the territorial inviolability or political independence of any state. Respect for territorial inviolability is furthermore emphasised by the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations of 1970 (hereinafter referred to as the Declaration of Seven Principles).[12] The Helsinki Final Act on Security and Cooperation in Europe of 1975 (hereinafter referred to as the Helsinki Act) is especially important for peaceful coexistence between the states of Europe, which among the principles guiding relations between European states also determines the inviolability of frontiers and the territorial integrity of states. Considering the fact that in the territory of the former SFRY the new states were established as a result of its dissolution, both Vienna Conventions, which refer to the law of treaties, must especially be taken into account. Treaties governing state borders are namely concluded for an indefinite period of time; such concern so-called permanent treaty regimes. This entails that in accordance with Article 62 (2) (a) of the Vienna Convention on the Law of Treaties of 1969,[13] a fundamental change of circumstances may not be invoked in cases of such treaties (i.e. the *rebus sic stantibus* clause) as grounds for terminating or withdrawing from a treaty. Article 11 of the Vienna Convention on Succession of States in respect of Treaties of 1978[14] moreover determines the generally applicable principle of international law that a succession of states does not as such affect a boundary established by a treaty.

21. The duty to respect the territorial integrity of the neighbouring states and the inviolability of state borders, and especially the duty to respect treaties which determine the state borders, thus follow from the rules and principles of international law which applied during the time Slovenia was gaining independence and which were binding on Slovenia as a newly emerging state. The dissolution of the state and the establishment of the new states do not influence the applicability of the treaties which, before the establishment of the new states, determined the borders between the hitherto existing states (i.e. the principle of the continuity of the state borders) or which referred to other territorial issues (i.e. territorial provisions). The tendency towards legal safety in international relations is reflected in the rules on the continuity of state borders.

22. From the viewpoint of international law, the establishment of new states following the dissolution of a common state, as was the case of the SFRY, is a special situation which concerns the state borders between newly established states. Before independence these states did not have borders determined in accordance with international law; there existed only certain internal demarcations which merely served the purpose of administrative division between the individual parts of the territory. For instances of the dissolution of states in which administrative borders between the individual constitutive parts of the federal territory were determined,

international law determines that legal title for the course of the borders between newly established states is the principle of *uti possidetis iuris*. This principle entails that until a possible different agreement is reached, the internationally recognised border between the new states lies where the administrative border within the former common state had been. The principle of *uti possidetis iuris* was applied when the states of Latin America and Africa, after the former colonial powers had withdrawn, were gaining independence, and the International Court of Justice recognised this principle as a general principle of international law, as it is logically connected with the act of achieving independence.[15] The purpose of the principle is to protect the integrity of the borders which the newly established states succeeded to from the former common state and to prevent the threat to the independence and stability of the new states. The principle of *uti possidetis iuris* secures the territorial *status quo* which existed when independence was achieved; the International Court of Justice namely underlined that this principle "stops the clock" or "freezes the territorial title".[16] Its primary aim is to secure respect for the territorial boundaries which existed at the time when independence was achieved.[17]

23. From the legal point of view, the principle of *uti possidetis iuris* secures and protects legal title to territory. If or until the states reach an agreement on the common border, the principle of *uti possidetis iuris* is an international law foundation of the states' sovereignty. The principle presupposes that between the former federal units of the federal state there existed a legally determined delimitation, thus that these units did not merely exercise a "bare" *de facto* authority but they had the right or legal basis to exercise authority in their territory. The International Court of Justice has underlined numerous times that in the name of this principle the word *iuris* does not refer to international law but to the constitutional or administrative law of the pre-independence sovereign state.[18] The principle of *uti possidetis iuris* thus entails that the border between newly established states is where the legal delimitation of authority between individual administrative units within the common state had existed. If a different agreement is not reached, a newly established state succeeds to the territory which was under its authority as a constituent part of the common state.

24. In order to understand the effects of the international law principle of *uti possidetis iuris* in the case of the dissolution of the SFRY, it is necessary to proceed from the constitutional position of Slovenia in the former common state. What is particularly relevant are the introductory provisions and basic principles of the Constitution of the former SFRY of 1974.[19] In Article 1 of the federal Constitution, the SFRY was defined as "a state community of voluntarily united nations and their [...] Republics", whereas in Article 2 the republics and autonomous provinces which comprised Yugoslavia were listed. Of key importance was Article 5 of the Constitution, which determined that the territory of the SFRY "consists of the territories of the [...] Republics" and that "the territory of a Republic may not be altered without the consent of that Republic". Already before the normative part, in the preamble and basic principles, the Constitution of 1974 underlined that the relations in the federation were based on the consolidation of the rights and responsibilities of the republics and autonomous provinces. With reference to such, it proceeded from the right of every nation to self-determination, including the right to secession, on the basis of which nations were united in a federative republic. The SFRY was thus not divided into republics only after it was established, but the

republics constituted the federal state by joining it.[20] It is especially important that the federal constitution proceeded from the principle that the sovereignty rested primarily in the republics, whereas the sovereignty rested in the federal state only inasmuch as the republics transferred the exercise of the sovereignty by the unanimous and voluntary decision to join the federal state. In the basic principles of the Constitution (Section I) it was namely determined that the nations and nationalities exercised their sovereign rights in the republics, whereas they exercised these rights in the federation when in their common interests it was so specified by the federal Constitution. The Constitution of the SFRY of 1974 thus strongly emphasised the role of the republics at the expense of the federation. The federation and its powers were established "on the basis of the right of every nation to self-determination and original state authority and powers of the republics as primary bearers of the state authority."[21] The presumption of the state power was to the benefit of the republics and also the constitutions of the republics followed such. The SFRY was established as a federal state on the basis of the decisions of the republics and provinces to join the common state. The fact "that the Republic of Slovenia has been a state under the constitutional order [...][of the SFRY] and has exercised only a part of its sovereign rights within the [SFRY]" was also declared in the preamble to the BCC at the constitutional level.

25. The emphasised state sovereignty of Slovenia (and the other republics) within the SFRY entailed that the republics also had a certain territory where such sovereignty was exercised. It clearly proceeds from the constitutional regulation of the SFRY that the territory of the republics and the determination of the delimitations between the republics did not fall within the competence of the SFRY but was left to agreement between the republics. As the Constitution of the SFRY determined that the republic borders could be altered only with the consent of the republics concerned, it is clear that the borders between the republics, at least the land borders, had to be known. This entails that on 25 June 1991, when the Republic of Slovenia declared its sovereignty and independence, the Slovene-Croatian state border on land was known, and namely its course ran along the borders of the frontier municipalities or cadastral municipalities.[22] This border was naturally not an interstate border, but only an administrative delimitation which, notwithstanding its weaker legal status, indicated to where the republic sovereignty of Slovenia as a federal unit extended.

26. Upon independence, the land border between Slovenia and Croatia, as it existed within the former SFRY, became an internationally recognised state border, substantiated by the international law principle of *uti possidetis iuris.* Therefore, the rules and principles of international law apply for such – especially the principle of the inviolability of state borders, according to which borders can only be altered unanimously, by a treaty between the states. The key characteristic of the principle of *uti possidetis iuris* is that it does not have the character of a peremptory norm of international law (*ius cogens*), but the states involved may always determine the course of the state border by a treaty, either to confirm a border as it proceeds from the principle of *uti possidetis iuris*, or to determine its course differently, taking into account different circumstances. Until a different agreement between the Republic of Slovenia and the Republic of Croatia is reached, their state border on land is where the border between the republics within the former SFRY had been, i.e. along the borders of municipalities or cadastral municipalities, as they existed on the day of the establishment of the new states. Upon independence the internal land border

between the republics became the external state border, which, in accordance with the rule of the preservation of the territorial *status quo*, may only be altered with their consent.

27. Also the Arbitration Committee of the Conference on Yugoslavia (i.e. the Badinter Committee) after the dissolution of Yugoslavia in its Opinion No. 3 based the establishment of the new states on the principle of *uti possidetis iuris*.[23] In its starting point this Opinion was based on the standpoint of the International Court of Justice that the principle of *uti possidetis iuris* is a general principle of international law, which is connected with achieving independence, whenever such occurs. The Committee adopted a standpoint supporting the inviolability of the existing external state borders of the former SFRY, whereby it underlined that such follows from the UN Charter, the Declaration of Seven Principles, the Helsinki Act, and the Vienna Convention on Succession of States in respect of Treaties. Regarding the internal republic borders, it furthermore adopted the standpoint that "except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial *status quo* and, in particular, from the principle of *uti possidetis.*" The Badinter Committee considered that the principle of *uti possidetis* applies all the more readily, as the Constitution of the SFRY of 1974 stipulated that the republics' territories and boundaries could not be altered without their consent.[24]

28. Thus there are various international law titles concerning the course of the state borders of the Republic of Slovenia. Regarding the borders with Austria, Italy, and Hungary, the legal titles are the treaties which the SFRY had concluded with these states and which Slovenia succeeded to in accordance with international law. Regarding the land border with Croatia, the legal title is the principle of *uti possidetis iuris.* This principle presupposes the territorial delimitation within the former common state and protects the territorial *status quo* after independence. In the definite nature of the legal title in the sense of *lex certa* there is an important difference between treaties and the principle of *uti possidetis.* In instances of treaties, state borders are determined in the manner which is usual at the level of international law; namely, in order to say that a state border is determined, its course must be described with words, determined by geographic coordinates, and thereafter the border must be drawn on a reference map. Parties to the agreement must consent to all these elements, which they demonstrate by concluding a treaty whose essential elements are these elements that define a state border. Permanent or *ad hoc* international tribunals determine the course of the state borders in the same manner in instances in which the states cannot themselves reach an agreement thereon and unilaterally transfer the power to determine the borders to such tribunals. The last act of determining the borders is always their demarcation in nature and by boundary stones.

29. Differently than in instances of treaties (and the judgments of international tribunals), the definite nature of the principle of *uti possidetis iuris* depends on the fact of how clearly and precisely the border was determined before the new states were established. In the case of the dissolution of the SFRY, the principle of *uti possidetis iuris* presupposes the existence of the delimitation between Slovenia and Croatia within the former SFRY, however, in certain parts, regardless of the commitment of both states to this principle, it does not provide a clear answer on the

course of the otherwise internationally recognised state border. The land border before independence was known (its course ran along the borders of the municipalities or cadastral municipalities), however, the republics never determined its course in a manner in which the borders were determined at the international level, namely by an agreement in which the borders would be clearly described, demarcated, and drawn on a map. The deficiency of the principle of *uti possidetis iuris* is evident with regard to those sections of the border where the borders of the municipalities or cadastral municipalities in the former republics overlapped or were not completely clear for some other reason already at that time. In cases of such disputable sections of the land border, the states can agree that the principle of *uti possidetis iuris* is a relevant criteria and that it is necessary to proceed from the territorial *status quo* on the day when the states became independent, however, this does not lead to a solution if they do not agree on what the specific course of the border demarcated in nature between the municipalities was or have different ideas regarding the territorial situation that the principle of *uti possidetis iuris* should protect. The situation could be even more complicated, as due to the unclear legal delimitation *de facto* authority (police, courts, etc.) may have overlapped in certain areas.[25] If the states interpret the application of the principle of *uti possidetis iuris* differently, it is clear that this principle can only be a temporary legal title concerning the course of the state borders. Especially with regard to the disputable sections, the states should agree on the definitive precise course of the border demarcated in nature, either directly by a treaty or by transferring this decision to an international judicial body. In comparison with the principle of *uti possidetis iuris*, clarity, which for determining the course of the border is entailed by a treaty or judicial decision, is an important element of the stability of the state borders.

30. From the viewpoint of international law, the separate question of the maritime border between the Republic of Slovenia and the Republic of Croatia arises. Differently than the land border, the maritime border between the republics within the former SFRY was not determined. Quite on the contrary, it proceeds from the former federal legislation that the SFRY had sovereignty at sea.[26] The sea was a unified federal territory on which the republics did not have their own, independent of the federation, legal title to exercise authority. This naturally does not entail that the republics did not exercise any *de facto* authority at sea or that the exercise of authority was not divided between them.[27] Upon gaining independence, the Republic of Slovenia became a coastal state. In view of the fact that a coastal state cannot exist without an appropriate area of sea, this entails that a part of the Adriatic Sea and the territory under this sea are a part of its state territory. What part of the sea with the pertinent maritime zones is Slovene state territory is in the first place a question which should be resolved applying the rules and principles of international law. However, they are effective only inasmuch as the states observe them when concluding border treaties or inasmuch as they are a basis for the decisions of international tribunals.

31. In the event of the dissolution of a state such as the SFRY, the question of succession at sea is open until a final agreement on the border is concluded. Also with reference to succession at sea, international law determines as a starting-point principle that the territorial *status quo* is protected by the principle of *uti possidetis.* In view of the fact that the border between Slovenia and Croatia within the former SFRY was legally not determined, the territorial situation at sea on the day of gaining

independence is not protected by the principle of *uti possidetis iuris,* but is protected by the principle of *uti possidetis de facto.* This principle is applied in instances in which delimitation within the former common state was not determined, but *de facto* existed.[28] A *de facto* existing border is even more relevant under international law if it is based on express or tacit agreement between the states.[29] Given that before 25 June 1991 the Republic of Slovenia exercised *de facto* authority in the Bay of Piran, and especially given that from the conduct of the Republic of Croatia before independence it can be concluded that it expressly agreed therewith or tacitly consented to such, thus the international law principle of *uti possidetis de facto* protects the factual situation on the day of achieving independence. However, from the viewpoint of precision and the stability of the state borders, also this principle does not ensure permanently satisfactory results, especially not in the event of a dispute when each state has its own idea regarding the facts before independence. A definitive settlement of the border issue is therefore possible only by a treaty regulating borders or a treaty on transferring a decision to an international judicial body.

B – IV

32. From the viewpoint of national law, with the adoption of the BCC the Republic of Slovenia became a sovereign and independent state. The BCC was adopted on 25 June 1991 as the fundamental constituting state act of the Republic of Slovenia. With its adoption the Republic of Slovenia definitively broke its ties with the SFRY and established itself as a sovereign state.[30] Section I of the BCC declared that the Republic of Slovenia is a sovereign and independent state and determined that the Constitution of the SFRY ceased to be in force for the Republic of Slovenia and that the new state assumed all rights and duties which under the republic or federal constitution were transferred to the authorities of the SFRY. An essential element of statehood is also a territory in which the state is the highest legal and *de facto* authority. The territory of the Republic of Slovenia was defined by Section II of the BCC, and namely so that it defined its state borders. As an internal act, the BCC did not have direct effects at the level of international law, even though its influence at the international level cannot be denied. With its adoption, the state 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. The aim of the BCC was thus 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.

33. From the formal perspective of the hierarchy of legal acts, the BCC was adopted as a legal act at the constitutional level.[31] The constitutional power of the BCC, however, was not limited only to the moment of its adoption, but it is permanently applicable law. This is additionally confirmed by the fact that also the Constitution in its preamble refers to the BCC, where the BCC is explicitly defined as one of the starting points of the Constitution.[32] The Constitution, which by its authority as the highest legal act determines the organisation of the state power and by its determined human rights and fundamental freedoms, also its limits,[33] draws its power also from the BCC. The BCC is a formally applicable constitutional act and as such a permanent and inexhaustible constitutional foundation of the statehood of the Republic of Slovenia.

34. From the viewpoint of its substance, upon its adoption the BCC did not only have declaratory international law effects, but as a constitutional act it mainly had internal constitutive legal effects. The constitutional effect of Section II of the BCC was that it defined the state borders and thereby determined the territory on which the Republic of Slovenia became a sovereign and independent state. It is immediately clear that Section II of the BCC did not determine the borders in a manner that is usual in treaties, as it did not describe their course or determine them by geographic coordinates. However, as the provision refers to the internationally recognised external state borders of the former SFRY and to the border with Croatia, as it existed within the former SFRY, the borders were determined also in national constitutional law. Section II of the BCC thus constitutionalised the state borders of the Republic of Slovenia.

35. The constitutionalisation of the state borders in Section II does not merely entail a definition of the initial territorial state of affairs, thus the determination of the territory on which the Republic of Slovenia became a sovereign state on 25 June 1991. Namely, when interpreting Section II of the BCC also the provisions of the Constitution must be taken into account, which in relation to the BCC is *lex posterior*. Only by a joint consideration of the provisions of the Constitution and the BCC can the substantive law effects of Section II of the BCC be definitively determined. Thereby, it is immediately clear that the Constitution did not explicitly abrogate in any way any provision of the BCC. Quite on the contrary, the Constitution in its preamble explicitly refers to the BCC and defines it as one of its starting points, whereby the formal applicability of the BCC was undoubtedly also extended into the present and the future. Furthermore, for the question of the substantive application of Section II of the BCC, particularly Article 4 of the Constitution is relevant.

36. Article 4 of the Constitution, which determines that Slovenia is a territorially unified and indivisible state, has in and of itself two meanings. On one hand, territorial unity refers to the type of organisation of the state. This entails that Slovenia is a unitary state and may not be organised as a federal state; in the state the establishment of territorial units that would have the status of federal units is not allowed. On the other hand, the indivisibility of the state refers to the sovereignty of the state in its territory. The state authorities exercise their authority in the entire state territory, therefore, it is not allowed to renounce to the benefit of another state a part of the state territory or the exercise of the functions of the sovereign authority in this territory.[34] In another meaning, Article 4 of the Constitution presupposes that the territory of the Republic of Slovenia is known and defined by the state borders and it is precisely this that was the aim of Section II of the BCC. The Constitution was adopted on 23 December 1991, thus six months following the BCC, and the territory whose unity and independence are ensured by Article 4 of the Constitution was undoubtedly the territory determined by the state borders defined in Section II of the BCC. If Article 4 of the Constitution is to be an effective constitutional provision also today, then also Section II must be considered applicable law which has a legally relevant substance still today.

37. Upon its adoption, the BCC undoubtedly mainly had a legal-historical task to constitute the state of the Republic of Slovenia and in this sense it is a formally applicable constitutional basis of the state sovereignty still today. However, Section II of the BCC is not only a formally applicable provision, but because of Article 4 of the

Constitution it is still today a substantively effective constitutional provision which must be taken into account when the borders with neighbouring states are altered at the level of international law. Article 4 of the Constitution and Section II of the BCC are mutually connected, namely that the content of Article 4 of the Constitution depends on Section II of the BCC, which draws its current applicability from Article 4 of the Constitution. The preamble to the Constitution underlines the continuous legal applicability of the BCC, whereas it proceeds from Article 4 of the Constitution that Section II of the BCC is living law in terms of its substance. Section II of the BCC is not exhausted in terms of substance, but together with Article 4 of the Constitution it entails an applicable and relevant constitutional definition of the territory of the Republic of Slovenia.

38. In the above-mentioned sense, these constitutional provisions 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. 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. Regarding Austria, Italy, and Hungary, the altered borders would be internationally recognised state borders, however, they would no longer be the "internationally recognised state borders [of] the hitherto SFRY", as determined by Section II of the BCC. Regarding Croatia, a treaty establishing the border would entail the alteration of the "border [...] within the hitherto SFRY" if the border were not determined where the border between the republics in the SFRY had been, as the Republic of Slovenia understood the border when declaring independence and as the Republic of Slovenia constitutionalised it in Section II of the BCC. For the constitutional review of the Agreement this entails that Article 4 of the Constitution and Section II of the BCC constitute a whole and are together a major premise for constitutional deciding. Nonconformity with Section II of the BCC would at the same time also entail nonconformity with Article 4 of the Constitution.

39. Considering the legal nature of the BCC and its historical role as a constitutive act of the state of the Republic of Slovenia, the BCC as a constitutional act is nevertheless different than the Constitution in the sense that it cannot be amended through direct interventions in its text. Such intervention with the BCC would not only entail amending the text retroactively, but also *de facto* changing the legal and factual context in which it was adopted. Therefore, it is completely logical that the BCC, differently than the Constitution, does not envisage a procedure for amending it. Nevertheless, from the substantive point of view, Section II of the BCC is not an unchangeable constitutional provision. Its content can be amended by an act at the constitutional level, i.e. an act adopted in the procedure for amending the Constitution, however, not by directly intervening in the BCC, but by amending the Constitution. Such constitutional amendment can explicitly amend Section II of the BCC, or it may only be an amendment in accordance with the interpretative principle that a later regulation amends an earlier one (*lex posterior derogat legi priori*).

40. Proceeding from the finding that Section II of the BCC constitutionalised the state borders of the Republic of Slovenia and that also today it is an applicable and relevant constitutional law, the question arises what exactly is the substance of this constitutional provision. In the Republic of Slovenia the state territory and state borders are also a constitutional subject-matter, however, the question is in what sense and scope, as well as what this entails regarding amending such.

41. In addition to the role and aim of the BCC in its entirety, when interpreting Section II also the circumstances of law and fact that influenced the adoption of the BCC must be separately taken into account. In addition to the already mentioned constitutional and statutory law of the former SFRY and the former republic of Slovenia, the Constitutional Court, when interpreting Section II of the BCC, considered to be of a key importance the rules and principles of international law that regulated the fundamental relations after the dissolution of the SFRY, particularly regarding the territory and state borders between the newly established and neighbouring states, as well as between the newly established states themselves. With the adoption of the Constitution, the supremacy of international law over constitutional law was not recognised in the constitutional system of the Republic of Slovenia, however, the interpretation of Section II of the BCC must proceed from the fact that questions of the formation of new states and determining their state borders lie primarily within the sphere of international law and that these generally binding rules and principles of international law existed when Slovenia became a sovereign and independent state. When interpreting Section II of the BCC in the light of the rules and principles of international law which regulate questions of the territorial integrity and continuity of state borders, the Constitutional Court also considered the preamble to the BCC and the Constitutional Act Implementing the BCC (*Ustavni zakon za izvedbo temeljne ustavne listine o samostojnosti in neodvisnosti Republike Slovenije* – hereinafter referred to as the CAIBCC) of 25 June 1991, as well as national and international instruments and political documents, from which it proceeds that already in the process of gaining independence, the state committed itself to respecting international law, as such was important for obtaining recognition by other states.

42. As regards Austria, Italy, and Hungary, Section II of the BCC determines that the state borders are "the internationally recognised state borders between the hitherto SFRY [...] in the part where these states border the Republic of Slovenia". As the internationally recognised state borders of the hitherto SFRY are defined as the state borders of the Republic of Slovenia, the BCC refers to treaties which were valid legal titles concerning the course of the state borders before independence and also determined precisely where the borders ran their course. In this sense, Section II of the BCC was a unilateral declaration by which the existing international state of affairs on 25 June 1991 was affirmed regarding the state borders with Austria, Italy, and Hungary. Affirming the existing internationally recognised state borders in national law was not absolutely necessary, as already from the rules and principles of international law which applied during the time Slovenia was gaining independence and which bound Slovenia as a newly emerging state, there follows the requirement that the territorial integrity of the neighbouring states and the inviolability of the state borders be respected, and especially the requirement that the treaties that determine the state borders be respected, as the cessation of the former state and the

establishment of the new states do not have an influence on the applicability of the treaties regulating the state borders. From the perspective of international law, the aim of Section II of the BCC was primarily to demonstrate the commitment to international law in the process of gaining independence. This also clearly proceeds from the Declaration of Independence (*Deklaracija ob neodvisnosti*) of 25 June 1991, which the former Assembly of the Republic of Slovenia adopted together with the BCC; the Declaration in Section IV, *inter alia*, determines that "the Republic of Slovenia [as an international and legal entity] pledges to respect all the principles of international law and, in the spirit of legal succession, the provisions of all international contracts signed by Yugoslavia and which apply to the territory of the Republic of Slovenia". A similar provision is contained in Article 3 of the CAIBCC, which was also adopted together with the BCC, and reads as follows: "Treaties concluded by Yugoslavia which apply to the Republic of Slovenia remain in force on the territory of the Republic of Slovenia."

43. In the part which refers to Croatia, Section II of the BCC determines that "the border [...] within the hitherto SFRY" is the state border between the Republic of Slovenia and the Republic of Croatia. Proceedings from the supposition that the Republic of Slovenia gained independence in accordance with the generally applicable rules and principles of international law, the text of Section II of the BCC in the part which refers to Croatia is to be understood within the meaning of the international law principle of *uti possidetis*. This actually already proceeds from the preamble to the BCC, in which the Republic of Slovenia declared its commitment to "respect [...] [the] sovereignty and territorial integrity [of other Yugoslav republics]". Also the Constitutional Court in Opinion No. Rm-1/00 with reference to the border with the Republic of Croatia has already adopted the position that "in terms of international law, at the moment of the establishment of the independent and sovereign Slovenia, its former republic border "within the former SFRY" became its state border, on the basis of the principle of *uti possidetis*." Following a detailed definition of this principle, the Constitutional Court, "considering such interpretation of the BCC", thus in the sense of the principle of *uti possidetis,* reviewed the Agreement between the Republic of Slovenia and the Republic of Croatia on Border Traffic and Cooperation.[35] Moreover, affirmation of the principle of *uti possidetis* at the constitutional level was not necessary, as this is a general principle of international law which takes effect automatically when a new independent state is established. Also in this part the significance of Section II of the BCC from the perspective of international law is primarily a unilateral recognition of the territorial *status quo* between the Republic of Slovenia and the Republic of Croatia until the states determine the course of the border by a treaty.

44. A unilateral constitutional commitment to respect the existing treaties and the principle of *uti possidetis* was also important for the international recognition of the Republic of Slovenia, which is clear from certain political instruments which were drawn at the level of the hitherto European Economic Community (hereinafter referred to as the EEC) during the process of obtaining independence. From the Guidelines for the Recognition of New States in Eastern Europe and the Soviet Union of 16 December 1991, and from the Declaration on Yugoslavia of 16 December 1991,[36] it is namely clear that the Member States of the hitherto EEC were willing to recognise the new states only if they committed themselves to international law,

inter alia, explicitly also to the principle of the inviolability of all borders which may only be altered peacefully and by common consent.

45. The question what was constitutionalised by Section II of the BCC must thus be answered that it constitutionalised the state borders, inasmuch as they were determined and secured by international law when the Republic of Slovenia became a sovereign and independent state. Under international law, the Republic of Slovenia succeeded to its borders from the former SFRY, however, by Section II of the BCC it determined them at the constitutional level. To paraphrase, 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. The constitutionalisation of the state borders furthermore entails that the borders at the constitutional level are determined as they were defined and protected in accordance with international law at the moment of the formation of the new state, thus when the BCC was adopted; the precision of their course at the constitutional level depends on how precisely they are determined at the level of international law.

46. Regarding the state borders with Austria, Italy, and Hungary, there can be no doubt that Section II of the BCC determined the course of the borders as they are determined (i.e. described, determined by coordinates, and drawn on maps) in treaties of the SFRY which Slovenia succeeded to. A treaty that would alter the course of these borders, as they existed on the day the BCC was adopted, would thus be inconsistent with Section II of the BCC in conjunction with Article 4 of the Constitution. The border with the Republic of Croatia has never been determined at the international level, whereas between the republics within the former SFRY it had never been determined "in a manner in accordance with international law". The land border did exist and was known, however it was not determined by an agreement between the republics which would clearly describe its course in its entire length and determine such by geographic coordinates. Following independence, the hitherto republic border on land became an internationally recognised border which has its international law basis in the principle of *uti possidetis iuris.* Section II of the BCC, which is a constitutional expression of this principle of international law therefore determined the Slovene-Croatian land border as the border was determined and protected by the principle of *uti possidetis iuris* following independence.

47. Differently than the land border, the maritime border between Slovenia and Croatia within the former SFRY was not determined,[37] but the sea was under the direct sovereignty of the federation. Therefore, the question arises how to interpret Section II of the BCC, which determines the state border between the states as "the border within the hitherto SFRY". As the sea was under direct Yugoslav sovereignty, the states of Slovenia and Croatia cannot demonstrate their legal titles at sea. This entails that succession in accordance with the principle of *uti possidetis iuris* does not apply. On the other hand, what should be taken into consideration is that the Republic of Slovenia is a coastal state and it was a coastal republic already as a part of the former SFRY and *de facto* exercised its authority in a part of the Adriatic Sea and also had access to the High Sea. The interpretation that the hitherto Slovene Assembly adopted the BCC by which it determined the state territory and that this BCC does not include the sea, is not acceptable precisely for this reason. From the point of view of international law, also maritime territory is a matter of succession which is secured by the principle of *uti possidetis iuris* until a treaty is adopted. If a

state cannot demonstrate a legal delimitation within a former common state, the state border after independence enjoys legal protection on the basis of the secondary principle of *uti possidetis de facto.* Due to the fact that the interpretation that the Republic of Slovenia gained independence without the sea is not acceptable from the legal point of view, Section II of the BCC as regards the maritime border must be interpreted in the sense of the international law principle of *uti possidetis de facto.*[38] This entails that, in accordance with Section II of the BCC, the maritime border between the Republic of Slovenia and the Republic of Croatia is along the line on the sea surface[39] to where Slovenia *de facto* exercised its authority before its independence.

48. The fact that Section II of the BCC constitutionalised the state borders in accordance with the principles of *uti possidetis iuris* and *uti possidetis de facto* entails that the state borders between the Republic of Slovenia and the Republic of Croatia are determined at the constitutional level. However, such constitutionalisation does not entail that also their precise course demarcated in nature is determined. In view of the long-lasting dispute between the Republic of Slovenia and the Republic of Croatia about the course of the border (at certain border sections), although it is determined in the basic constitutional charters on the sovereignty and independence of both states that the border between them is where it was within the former common state,[40] and although considering Opinion No. 3 of the Badinter Committee both states are bound under international law to respect the principle of *uti possidetis* until they agree otherwise, it is evident that this principle in and of itself does not give a completely clear, let alone acceptable answer for both states regarding the course of the state border demarcated in nature.

49. Regarding the land border between the Republic of Slovenia and the Republic of Croatia, the lack of clarity regarding its course can arise at those sections where a clear legal title cannot be demonstrated or where the states, regardless of their commitment to the same principle, interpret the principle of *uti possidetis iuris* differently. The principle of *uti possidetis iuris* as a legal title presupposes the existence of a delimitation between the republics within the former SFRY, however, it does not provide a clear answer regarding the course of the currently internationally recognised state border. The imprecision regarding the exact course of the border, which was transposed also in the national constitutional system through Section II of the BCC, is built into this principle. With regard to the border with Croatia, the principle of *uti possidetis iuris* and Section II of the BCC entail only an incomplete legal basis which presupposes that the states will agree on its course demarcated in nature, either directly by a treaty or by transferring this task to an international judicial body. In this sense, in Opinion No. Rm-1/00 the Constitutional Court has already adopted the position that the text of Section II of the BCC entails that the border is "presumably known, however, not yet concretised in a border treaty and demarcated in nature". Similarly as in the case of a land border, the principle of *uti possidetis de facto* also does not give a clear answer regarding the precise course of the maritime border. The imprecision regarding a precise course of the maritime border can be even more explicit, as the principle of *uti possidetis de facto* does not proceed from a legal delimitation of the power between the republics within the former SFRY but is based on the delimitation of *de facto* exercise of this authority. The disputable nature of this border is a result of the circumstance that the states interpret the state of the facts before independence differently, and even more so of the circumstance that the

Republic of Croatia does not at all recognise this principle as a starting point for determining the course of the maritime border.

50. Regardless of the above-mentioned deficiencies of the principles of *uti possidetis iuris* and *uti possidetis de facto,* 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 as the border that has its course along the line up to where the Republic of Slovenia *de facto* exercised its authority within the former SFRY. In both instances the state border between the states has to be concretised at the level of international law, thus common consent regarding its course demarcated in nature must be reached. Section II of the BCC therefore entails a known delimitation between the states, although it is not precisely determined either on land or at sea. In comparison with the precisely determined borders with Austria, Italy, and Hungary, this provision, in the part which refers to Croatia, is not adequately determined and will be complete in terms of substance only when the land and maritime borders are described and determined geographically.

51. 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. Regarding the border with Croatia, on the other hand, the constitutionalisation does not entail the prohibition that the course of the border is demarcated in nature. 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). 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 [...]". Owing to the connection between Article 4 of the Constitution and Section II of the BCC, it must be added that a treaty regarding the state border should also be within the frameworks of Section II of the BCC.

B – VI

52. As regards the fact that the Republic of Slovenia and the Republic of Croatia "through numerous attempts [...] have not resolved their territorial and maritime border dispute in the course of the past years" – as is admitted in the preamble to the Agreement[41] – the states have agreed that the Republic of Slovenia and the Republic of Croatia establish an arbitral tribunal whose task will be, *inter alia*, to determined the course of the land and maritime border between the states. The outcome of this agreement is the Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia, which was signed by the Presidents of the Governments on 4 September 2009 in Stockholm. On behalf of the Republic of Slovenia, the National Assembly ratifies the Agreement.[42] In accordance with Article 3 (4) of the Agreement, the Arbitral Tribunal has the power to interpret the Agreement.[43] As the ratification procedure is interrupted by the

procedure for the review of constitutionality before the Constitutional Court, the Agreement must also be interpreted by the Constitutional Court for the purposes of the constitutional review.

53. When reviewing the provisions of the Agreement, also the aim of the *a priori* review of the constitutionality of treaties must be taken into account. The Constitutional Court has already adopted positions thereon in Opinion No. Rm-1/97 and later reiterated them in Opinions No. Rm-1/00 and No. Rm-1/02. The constitutional order namely does not accept the supremacy of international law over constitutional provisions. In the hierarchy of legal acts, treaties are above statutory provisions,[44] however, they must be in compliance with constitutional provisions. *A priori* review of the constitutionality of a treaty in the ratification procedure has a preventive purpose. Its aim is to prevent the National Assembly from ratifying a treaty whose implementation would entail that either directly applicable unconstitutional norms would enter into national law (which would require direct unconstitutional functioning of state or other authorities by concrete actions or by the issuance of individual acts) or that the state would bind itself to adopt general legal acts in national law which would be inconsistent with the Constitution in order to adhere to a treaty. The preventive purpose of the *a priori* review is that in time, namely before ratification, the state is prevented from assuming international obligations which would be inconsistent with the Constitution and which the state therefore could not fulfil.[45] The Constitutional Court therefore had to review whether Article 3 (1) (a), Article (4) (a), and Article 7 (2) and (3) of the Agreement individually or together bound the state to assume an unconstitutional international obligation.

54. Article 3 (1) (a) of the Agreement, in accordance with which the Arbitral Tribunal is to determine the course of the land and maritime border, entails that the Arbitral Tribunal will have to describe the course of the border line demarcated in nature and determine such by geographic coordinates. As the course of the border between the republics in the former SFRY, and also subsequently, has never been determined in such a precise manner relevant from the perspective of international law, the Arbitral Tribunal will determine the course of the border originally. The 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.

55. When determining the course of the border, the Arbitral Tribunal is bound by the subject-matter of the dispute as specified by the Parties to the Agreement, whereby the Parties are not limited in specifying the dispute. By an award the Arbitral Tribunal will determine the course of the border on those sections of the border which the states will specify as disputable; in determining the border line, the Arbitral Tribunal will also stay within the territorial frameworks as specified by the Parties. On sections regarding which the Arbitral Tribunal will decide, the border will be determined by its award, whereas in the remaining (i.e. the majority) undisputed part, it will still be based on the principle of *uti possidetis.* This proceeds from Article 3 (3) of the Agreement, which determines that "the Arbitral Tribunal shall render an award on the dispute",[46] whereas Article 3 (2) of the Agreement in accordance with this determines that "the Parties shall specify the details of the subject-matter of the

dispute within one month. If they fail to do so, the Arbitral Tribunal shall use the submissions of the Parties for the determination of the exact scope of the maritime and territorial disputes and claims between the Parties."[47] The Agreement thus gives the Parties to the Agreement the right and duty to carefully specify their understanding of the matter from the viewpoint of international law and submit all relevant evidence. This is essential in order for the Arbitral Tribunal to reach a legally substantiated and convincing award. In drafting and specifying the subject-matter of the dispute, it is naturally also of key importance that the Republic of Slovenia, when defining its international law positions, also consider to the greatest extent possible the constitutional starting points that proceed from this Opinion and that implicitly proceed from the above-mentioned positions of the National Assembly and the Government. With reference to such, the constitutional starting points do not limit the Republic of Slovenia to specifying, on the basis of Article 3 (2) of the Agreement, with reference to the disputable parts of the land border, the scope of the territories regarding which the Arbitral Tribunal shall determine the course of the border, whereas regarding the maritime border such starting points do not limit the Republic of Slovenia to submitting an appropriate proposal for a fair and just division of the north 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.

56. Article 3 (1) (a) of the Agreement is a provision bestowing authority which only provides for the power of the Arbitral Tribunal to determine the course of the land and maritime border between the Parties to the Agreement. Section II of the BCC, which in the sense of the principles of *uti possidetis iuris* and *uti possidetis de facto* constitutionalised the course of the border between the Republic of Slovenia and the Republic of Croatia, does not prohibit the state from determining the course of this border demarcated in nature in an agreement with the neighbouring Croatia. Quite on the contrary, by determining the course of the border demarcated in nature, Section II of the BCC is to be concretised at the international level. Section II of the BCC to an even lesser extent limits the state in any way in selecting the manner in which the course of the border demarcated in nature is to be determined. Section II of the BCC does not determine which international law path the state should select in order to determine the course of the state border; from the point of view of constitutional law, any mechanism of international law for determining the course of the border would be acceptable. Therefore, the states may select any possibility – they may conclude a treaty by which they directly determine the entire length of the course of the border; they may conclude several treaties by which they directly determine the border in sections; also treaties leaving the determination of the course of the border in its entirety or only in individual sections to a permanent international tribunal or other *ad hoc* international judicial body would be constitutionally admissible. In view of the fact that from the viewpoint of Section II of the BCC, the only relevant question is where the course of the state borders runs and not also how course of the state borders should be determined, Article 3 (1) (a) of the Agreement is not inconsistent with Article 4 of the Constitution in conjunction with Section II of the BCC.

57. Article 4 (a) of the Agreement will be of key importance for the deciding of the Arbitral Tribunal in terms of content; in accordance with this provision, the Tribunal will apply "the rules and principles of international law" for the determination of the maritime and land border. The rules and principles of international law will be the criteria for determining the course of the border, however, it follows from other

provisions of the Agreement that the Arbitral Tribunal will also consider certain other circumstances of law and fact when interpreting and applying the rules and principles of international law. Thus the Agreement in Article 5 determines the critical date, namely that "no document or action undertaken unilaterally by either side after 25 June 1991 shall be accorded legal significance for the tasks of the Arbitral Tribunal or commit either side of the dispute and cannot, in any way, prejudge the award."[48] The Arbitral Tribunal will thus have to consider only circumstances of law and fact as they existed in the disputed areas before 25 June 1991, which is determined in the Agreement as the critical date, and in the light of this, interpret and apply the rules and principles of international law. It will also have to consider the preamble to the Agreement[49], in which the Parties to the Agreement affirmed their commitment to "a peaceful settlement of disputes, in the spirit of good neighbourly relations, reflecting their vital interests".[50] Also these aspects of inter-state relations will be important when interpreting the relevant rules and principles of international law.

58. Also Article 4 (a) of the Agreement does not determine the course of the state borders between the Republic of Slovenia and the Republic of Croatia. The provision determines the relevant law for the determination of the course of the border, which cannot be alleged to be unconstitutional. In accordance with Article 4 (a) of the Agreement, the Arbitral Tribunal will have to substantiate its decision by means of the rules and principles of international law, which it is to interpret in the spirit of good neighbourly relations and the vital interests of the Parties to the Agreement. One of the basic and decisive principles of international law for the deciding of the Arbitral Tribunal will undoubtedly be the principle of *uti possidetis.* The Constitutional Court cannot discuss what the decision of the Arbitral Tribunal might be; in its nature, such will be a judicial decision whose precise content cannot be predicted. Also a precise analysis of the rules and principles of international law and their application in the hitherto international case law could not provide a clear answer as to where the Arbitral Tribunal will determine the border between Slovenia and Croatia. Guessing what the decision of the Arbitral Tribunal will be cannot be a task of the Constitutional Court. For a constitutional review of Article 4 (a) of the Agreement it suffices to establish that the provision does not determine the course of the border and that the rules on the basis of which the Arbitral Tribunal is to determine the course of the border are not unconstitutional.

59. The legal effects of the award of the Arbitral Tribunal are determined in Article 7 (2) and (3) of the Agreement. The second paragraph determines that the award is binding on the Parties and constitutes a definitive settlement of the dispute, whereas the third paragraph requires the Parties to take all necessary steps to implement the award, including by revising national legislation, as necessary, within six months after the adoption of the award. The award of the Arbitral Tribunal will thus be definitive, binding, and will have direct legal effects. For its applicability and implementation, either by concrete actions or by adopting the necessary regulations, additional ratification by the National Assembly will not be necessary. The provisions do not determine the course of the state borders; it also does not proceed from Section II of the BCC or Article 4 of the Constitution that the state may not bind itself to respecting the treaty or the award of the arbitral tribunal which it co-established by this treaty. Therefore, also Article 7 (2) and (3) are not inconsistent with Article 4 of the Constitution in conjunction with Section II of the BCC.

60. On the basis of the joint effect of the above-mentioned provisions of the Agreement, it is clear that the Agreement does not determine the course of the state borders between the Parties to the Agreement. The Agreement as such is an instrument whose purpose is to establish a mechanism for the peaceful settlement of the border dispute, as the states cannot by themselves agree on the course of the common state border. The peaceful settlement of disputes is a duty of states at the international level, and in the preamble to the Agreement the Parties to the Agreement even refer to Article 33 of the UN Charter, which enumerates the peaceful means for the settlement of disputes.[51] The aim of the Agreement is to establish the Arbitral Tribunal, define its tasks, determine the rules for its deciding and the legal effects of its decision, and to determine the procedure for its operation. As the provisions of the Agreement which regulate these issues are not unconstitutional, the Constitutional Court decided that the reviewed provisions of the Agreement are not inconsistent with Article 4 of the Constitution in conjunction with Section II of the BCC.

61. The second paragraph of Article 160 of the Constitution determines that the National Assembly is bound by the opinion of the Constitutional Court. In Opinion No. Rm-1/97 the Constitutional Court has already adopted the position that an opinion issued in accordance with the second paragraph of Article 160 of the Constitution is not a consultative opinion. The National Assembly is bound by the opinion of the Constitutional Court, which entails that the National Assembly may decide on ratification only after it is served with the opinion of the Constitutional Court. As the Constitutional Court decided that Article 3 (1) (a), Article (4) (a), and Article 7 (2) and (3) of the Agreement are not inconsistent with the Constitution and the BCC, the decision on the ratification of the Agreement is a matter of the political deciding of the National Assembly.

62. The fact that the state borders are protected at the constitutional level in the Republic of Slovenia, whereas the course of the land and maritime border demarcated in nature will be determined by the Arbitral Tribunal, call for a caution from the Constitutional Court. At this very moment it is not possible to predict where the Arbitral Tribunal will determine the course of the state border. Due to the fact that in doing so it will not be bound by the constitutional law of the Republic of Slovenia (nor by law of the Republic of Croatia), but will perform its task on the basis of the rules and principles of international law, which are in and of themselves not unconstitutional, it is indeed possible that the Arbitral Tribunal will determine the course of the border differently than proceeds from Section II of the BCC. This would not change the fact that the Agreement is not unconstitutional, as it is an instrument which only determines the path towards the resolution of this problem; furthermore, this would not entail that the award of the Arbitral Tribunal would be unconstitutional or even that it could be a subject of the review before the Constitutional Court. The award of the Arbitral Tribunal will entail an extraordinary legal situation, as this decision will be a legal instrument which will only exist in the sphere of international law and 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.

63. This exceptional situation with regard to international law entails that the Republic of Slovenia could also find itself in an exceptional situation with regard to national law. On one hand, it would be bound to respect the Agreement and would have to

implement the award of the Arbitral Tribunal, including by revising national legislation as necessary. On the other hand, the statutory implementation of such 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. In order to avoid such an exceptional legal situation, which at this moment cannot be predicted, the Constitutional Court calls on the National Assembly to 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.

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64. The Constitutional Court issued this opinion on the basis of the second paragraph of Article 160 of the Constitution, Article 70 of the CCA, and the third indent of the third paragraph of Article 46 of the Rules of Procedure of the Constitutional Court, composed of: Jože Tratnik, President, and Judges Dr Mitja Deisinger, Mag. Marta Klampfer, Mag. Marija Krisper Kramberger, Mag. Miroslav Mozetič, Dr Ernest Petrič, Jasna Pogačar, Mag. Jadranka Sovdat, and Jan Zobec. Points I to IV of the operative provisions of the Opinion were adopted unanimously, and Points V and VI of the operative provisions were adopted by eight votes against one. Judge Mozetič voted against and submitted a dissenting opinion. Judges Deisinger and Zobec submitted concurring opinions.

Jože Tratnik
President

Endnotes:
[1] Article 70 of the CCA reads as follows: "In the process of ratifying a treaty, the Constitutional Court, on the proposal of the President of the Republic, the Government, or a third of the deputies of the National Assembly, issues an opinion on the conformity of such treaty with the Constitution. The Constitutional Court adopts such opinion at a closed session."
[2] The principle of connectivity allows the Constitutional Court to also review the constitutionality and legality of other provisions of the same or other regulation or general act issued for the exercise of public authority for which a review of the constitutionality or legality has not been proposed, if such provisions are (a) mutually related or (b) if such is necessary to resolve the case.
[3] The content of applications is provided for in Article 24b of the CCA and Annexes to the Rules of Procedure of the Constitutional Court (*Poslovnik Ustavnega sodišča* – Official Gazette RS, No. 86/07).
[4] The procedure for the ratification is regulated in the Constitution by Articles 86 and 3a. Article 86 as a general rule determines that the National Assembly ratifies treaties by a majority of votes cast by those deputies present, whereas Article 3a as a special provision determines that treaties by which Slovenia may transfer the exercise of part of its sovereign rights to international organisations and may enter into a defensive alliance with states, must be ratified by a two-thirds majority vote of all deputies. In

both procedures only a treaty whose substance is in conformity with the Constitution may be ratified.
[5] The procedure for ratification can only be reviewed if it were regulated in a treaty, thus if the treaty regulated such procedure in its provisions.
[6] Article 3 (1) of the Agreement, which determines the task of the Arbitral Tribunal, in the original English version reads as follows: "(1) The Arbitral Tribunal shall determine: (a) the course of the maritime and land boundary between the Republic of Slovenia and the Republic of Croatia; (b) Slovenia's junction to the High Sea; (c) the regime for the use of the relevant maritime areas." In the translation, as proposed in the draft Act on the Ratification of the Agreement, Article 3 (1) of the Agreement reads as follows: "*(1) Arbitražno sodišče določi: (a) potek meje med Republiko Slovenijo in Republiko Hrvaško na kopnem in morju; (b) stik Slovenije z odprtim morjem; (c) režim za uporabo ustreznih morskih območij*."
[7] Article 4 of the Agreement, which determines applicable law and other criteria which the Arbitral Tribunal is to apply when deciding, in the original English version reads as follows: "The Arbitral Tribunal shall apply (a) the rules and principles of international law for the determinations referred to in Article 3 (1) (a); (b) international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result by taking into account all relevant circumstances for the determinations referred to in Article 3 (1) (b) and (c)." In the translation, as proposed in the draft Act on the Ratification of the Agreement, Article 4 of the Agreement reads as follows: "*Arbitražno sodišče uporablja: (a) pravila in načela mednarodnega prava za odločanje po točki (a) prvega odstavka 3. člena; (b) mednarodno pravo, pravičnost in načelo dobrososedskih odnosov za dosego poštene in pravične odločitve, upoštevajoč vse relevantne okoliščine, za odločanje po točkah (b) in (c) prvega odstavka 3. člena.*"
[8] From the perspective of international law, the formation of a new state as a subject of international law is to a great extent *questio facti*. In order to speak of the state, four conditions must be met: there must exist (1) a population, i.e. a group of individuals that permanently reside in a certain (2) territory; in this territory (3) a government must be established which (4) is not legally subordinate to any other government. Article I of the Montevideo Convention on Rights and Duties of States of 1933 provides that the state should possess the following qualifications: (1) a permanent population; (b) a defined territory; (3) government; and (4) capacity to enter into relations with the other states. See I. Brownlie, Principles of Public International Law, Seventh Edition, Oxford University Press, Oxford 2008, pp. 70–72.
[9] Arbitrator Max Huber in his arbitration decision on the Island of Palmas in 1928 explained that "sovereignty [...] in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State." Cited from D. Türk, *Temelji mednarodnega prava* [Foundations of International Law], GV Založba, Ljubljana 2007, p. 407.
[10] The most common legal titles are border treaties. A special aspect of the transfer of sovereignty in a certain territory by a treaty is cession, which entails the peaceful transfer of territory from one sovereign state to another. The cession has often taken place within the framework of peace treaties following a war. Other legal titles are, for instance, peaceful occupation (connected to *terra nullis*), accretion, and prescription. In the last decades the principle of *uti possidetis* is increasingly more important for newly emerging states. More D. Türk, *ibidem*, pp. 407–421, and M. N. Shaw, International Law, Fifth Edition, Cambridge University Press, Cambridge 2003, pp. 414–451.

[11] Within the former SFRY the internationally recognised borders were determined by treaties. The Slovene-Austrian state border was determined by the Treaty of Peace of Saint-Germain of 1919 (also taking into account the results of the plebiscite held in 1920). This was again affirmed by the Austrian State Treaty (hereinafter referred to as the AST) of 1955. The precursor of the SFRY – the Federative Peoples' Republic of Yugoslavia (FPRY) – was not an original signatory to the AST, however, on 14 November 1955 it acceded to the AST. With its accession to the AST Yugoslavia became party to the AST. With its accession to the AST, Yugoslavia recognised the old border as determined by the Treaty of Peace of Saint-Germain and declared that it would respect the inviolability of the territorial integrity and independence of Austria (for more on the AST, see B. Bohte, M. Škrk, *Pomen avstrijske državne pogodbe za Slovenijo in mednarodnopravni vidiki njenega nasledstva* [The Significance of the Austrian State Treaty for Slovenia and International Law Aspects of its Succession], Pravnik, Vol. 52, No. 11–12 (1997), pp. 601–630). The state border with Italy was determined by the Paris Peace Treaty of 1947, with the exception of the part of the border that divided Yugoslavia and the Free Territory of Trieste (hereinafter referred to as the FTT). Following the implementation of the Memorandum of Understanding (i.e. the London Memorandum) of 1954, the demarcation line between Zones A and B of the FTT became the demarcation line between Italy and Yugoslavia. The border with Italy came into effect under international law in 1975 following small modifications on land and the determination of the maritime border by signing the so-called Osimo agreements (for more, see B. Bohte, M. Škrk, *Predgovor, Pariška mirovna pogodba* [Foreword, Paris Peace Treaty], Ministrstvo za zunanje zadeve RS, Ljubljana 1997, pp. v–xii). The state border with Hungary was determined by the Peace Treaty of Trianon of 1920, which in 1947 was affirmed by the Paris Peace Treaty.

[12] Resolution of the General Assembly of the United Nations 2625 (XXV).

[13] Official Gazette SFRY, MP, 30/72, The Act on Notification of Succession (*Akt o notifikaciji nasledstva*), Official Gazette RS, No. 35/92, MP, No. 9/92.

[14] Official Gazette SFRY, MP, 1/80, The Act on Notification of Succession (*Akt o notifikaciji nasledstva*), Official Gazette RS, No. 35/92, MP, No. 9/92.

[15] Case concerning the Frontier Dispute (Burkina Faso/Republic of Mali), Judgment of 22 December 1986 (Paragraph 20 of the reasoning). In recent years the International Court of Justice again underlined this in Case concerning the Frontier Dispute (Nicaragua/Honduras), Judgment of 8 October 2007 (paragraph 151 of the reasoning).

[16] Case concerning the Frontier Dispute (Burkina Faso/Republic of Mali), Judgment of 22 December 1986 (Paragraph 30 of the reasoning).

[17] Case concerning the Frontier Dispute (Burkina Faso/Republic of Mali), Judgment of 22 December 1986 (Paragraph 22 of the reasoning). See also Case concerning the Frontier Dispute (Nicaragua/Honduras), Judgment of 8 October 2007 (paragraph 153 of the reasoning).

[18] See also Case concerning the Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment of 1992 (paragraph 333 of the reasoning) and Case concerning the Frontier Dispute (Nicaragua/Honduras), Judgment of 8 October 2007 (paragraph 158 of the reasoning).

[19] Official Gazette SFRY, No. 9/74.

[20] *Cf.,* T. Jerovšek, *Temeljna ustavna listina o samostojnosti in neodvisnosti Republike Slovenije kot temeljni akt nastanka slovenske države* [Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia as the

Fundamental Act Creating the Slovene State], Studia Historica Slovenica: Časopis za humanistične in družboslovne znanosti, Vol. 7, No. 1–2 (2007), p. 239.
[21] C. Ribičič, *Ustavnopravni vidiki osamosvajanja Slovenije* [Constitutional Law Aspects of Slovenia's Path to Independence], Uradni list RS, Ljubljana 1992, p. 10.
[22] Municipal territories in the former [Yugoslav] Republic of Slovenia were provided for by the Act Regulating the Procedure for the Establishment, Unification, and Alteration of a Municipal Boundary and Municipal Boundaries (*Zakon o postopku za ustanovitev, združitev oziroma spremembo območja občine ter o območjih občin* – Official Gazette SRS, No. 28/80 *et sub*.).
[23] The Opinion is published in the European Journal of International Law, Vol. 3 (1992), pp. 184–185.
[24] See also A. Pellet, The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples, European Journal of International Law, Vol. 3 (1992), pp. 178–181.
[25] Also the specific history of the FTT from the perspective of international law and delimitation between the republics following the cessation of Zone B of the FTT, which *de facto* became a part of Yugoslavia with the Memorandum of Understanding of 1954, contributed to an unclear legal delimitation between Slovenia and Croatia at certain sections of the border.
[26] The Act Concerning the Coastal Sea and the Continental Shelf of the SFRY (*Zakon o obalnem morju in epikontinentalnem pasu Socialistične federativne republike Jugoslavije* – Official Gazette SFRY, No. 49/87) in the first paragraph of Article 1 reads as follows:"The sovereignty of the Socialist Federal Republic of Yugoslavia (hereinafter referred to as the SFRY) shall extend to the coastal sea of the SFRY, to the airspace above it, and to the seabed and subsoil of that sea.**"**
[27] Slovenia exercised *de facto* authority in the Bay of Piran before 25 June 1991, which in the former SFRY had the status of internal waters, which is evident from numerous documents published in the White Book on the Border between the Republic of Slovenia and the Republic of Croatia (*Bela knjiga o meji med Republiko Slovenijo in Republiko Hrvaško*), Ministrstvo za zunanje zadeve, Ljubljana 2006. In addition to a number of judicial and minor offence decisions of the Slovene authorities, the fact that in the former SFRY the Bay of Piran was considered a sea under Slovene authority is demonstrated also, for instance, by the Marine Fisheries Ordinance of 11 December 1987 (*Odlok o morskem ribištvu* – Official Publications of the Municipalities of Ilirska Bistrica, Izola, Koper, Piran, Postojna, and Sežana, No. 42/87; the Ordinance was adopted on the basis of the Marine Fisheries Act [*Zakon o morskem ribištvu*], Official Gazette SRS, Nos. 25/76 and 29/86), in accordance with which Slovene fishing waters extended from Cape Savudrija to Cape Debeli Rtič, and by the Long-Term Plan of the Socialist Republic of Slovenia for the 1986-2000 period (*Dolgoročni plan SR Slovenije za obdobje od leta 1986 do leta 2000* – consolidated cartographic part – Official Gazette SRS, No. 36/90) in which the Bay of Piran is drawn in thirteen cartographic maps as a part of the Republic of Slovenia. The fact that also the federal government deemed the Bay of Piran to be Slovene sea follows, for instance, from the survey of lighthouses of the Hydrographic Institute of the Yugoslav Navy in Split of 1978, in which the Savudrija lighthouse (listed under number 178, E2642) was placed among the lighthouses of Slovene Primorje. Before 25 June 1991 the Republic of Slovenia also exercised its authority outside the Bay of Piran, as the Koper border police supervised the maritime border with Italy up to Point T 5. See the White Book on the Border between the Republic of Slovenia and the Republic of Croatia, *ibidem*, pp. 10-13, and Ž. Štefan, *Od zaščitnikov do*

pomorskih policistov: zgodovina in razvoj slovenske pomorske policije, Ministrstvo za notranje zadeve Republike Slovenije, Ljubljana 1997, pp. 77 and 109.
[28] *Cf.,* D. Türk, *ibidem*, p. 414.
[29] Such was also the position of the International Court of Justice in Case concerning the Frontier Dispute (Nicaragua/Honduras), Judgment of 8 October 2007. The Court observed that the principle of *uti possidetis iuris* might in certain circumstances, such as in connection with historic bays and territorial seas, play a role in a maritime delimitation. In cases in which the court establishes that the border, in the sense of the principle of *uti possidetis iuris,* was not determined before independence, it may justify the maritime border if it establishes certain circumstances (in the case at issue, the question whether there was a tacit agreement between the states has been raised) also on the principle of *de facto* delimitation (see especially paragraphs 232 and 253 of the reasoning).
[30] With reference to state sovereignty, we can be distinguished between internal and external sovereignty. Internal sovereignty entails that the state is the highest legal authority in its territory, whereas external sovereignty entails that it is not dependant on any other state. See R. Jennings, A. Watts (Editor), Oppenheim's International Law, Ninth Edition, Longman, London in New York 1996, pp. 120–123. On the concept of the state, see also J. Crawford, The Creation of States in International Law, Second Edition, Oxford University Press, Oxford 2006, pp. 3–254. On the concept of the state and sovereignty, see also L. Pitamic, *Država* [The State], Cankarjeva založba, Ljubljana 1997, pp. 1–44.
[31] This is also affirmed in Sections IV and V of the BCC, in which the charter calls itself "a constitutional act".
[32] The preamble to the Constitution reads as follows: "Proceeding from the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia, and from fundamental human rights and freedoms, and the fundamental and permanent right of the Slovene nation to self-determination; and from the historical fact that in a centuries-long struggle for national liberation we Slovenes have established our national identity and asserted our statehood, the Assembly of the Republic of Slovenia hereby adopts the Constitution of the Republic of Slovenia."
[33] It is precisely because of the importance of human rights and fundamental freedoms that there should be no confusion between the state and the sovereignty of the people. State sovereignty is connected to the existence of the state as a sovereign and independent subject, which is only a subject of international law, whereas the sovereignty of the people refers to the quality of such state power. With reference to the concept of the sovereignty of the people, what is determined in the second paragraph of Article 3 of the Constitution comes to the foreground, namely that in Slovenia power is vested in the people and that this power is exercised by citizens directly and through elections, consistent with the principle of the separation of legislative, executive, and judicial powers. Human rights and fundamental freedoms are especially important for a correct understanding of the concept of the sovereignty of the people, and these are also stated as a starting point in the preamble to the Constitution; even before that, upon its establishment, Slovenia bound itself in Section III of the BCC to guarantee the protection of human rights and fundamental freedoms.
[34] *Cf.,* I. Kaučič, F. Grad, *Ustavna ureditev Slovenije* [The Constitutional System of Slovenia], GV Založba, Ljubljana 2003, p. 75, and T. Jerovšek in: L. Šturm (Editor), *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the

Republic of Slovenia], Fakulteta za podiplomske državne in evropske študije, Ljubljana 2002, p. 111.
[35] Act on the Ratification of the Agreement between the Republic of Slovenia and the Republic of Croatia on Border Traffic and Cooperation (*Zakon o ratifikaciji Sporazuma med Republiko Slovenijo in Republiko Hrvaško o obmejnem prometu in sodelovanju* – Official Gazette RS, No. 43/01, MP, No. 20/01).
[36] The Guidelines for the Recognition of New States and the Declaration on Yugoslavia were adopted by the Council of Ministers of the European Economic Community. The documents are published in the European Journal of International Law, Vol. 4 (1993), pp. 72 and 73.
[37] The maritime border is determined only between the Republic of Slovenia and the Republic of Italy, and namely by the Treaty between the Socialist Federative Republic of Yugoslavia and the Republic of Italy with Annexes from I to X of 10 November 1975 (Official Gazette SFRY, MP, No. 1/77; the Act on Notification of Succession [*Akt o notifikaciji nasledstva*], Official Gazette RS, No. 40/92, MP, No. 11/92). The Republic of Slovenia is a legal successor to this treaty.
[38] Such understanding of Section II of the BCC also proceeds from the acts of the National Assembly and the Government, which were adopted after 25 June 1991, but they demonstrate how the legislative and executive branches of power understand the position regarding the sea on 25 June 1991 from the perspective of international law. In the Memorandum on the Bay of Piran (*Memorandum o Piranskem zalivu*) of 7 April 1993, the Government voiced its support for "the preservation of the integrity of the Bay of Piran under [Slovene] sovereignty and jurisdiction". The Memorandum rejects the application of the criterion of a medium line, which would be an unfair and unrealistic solution: "Consideration must be given to the fact that the Republic of Slovenia exercised its jurisdiction and authority in the Bay of Piran in the former SFRY and that such was also the situation when both states declared independence on 25 June 1991. In view of such situation, the most appropriate course of action is certainly to apply the principle of *uti possidetis,* which confirms the *de facto* exercise of authority of the Republic of Slovenia as a former republic within the former SFRY over the entire Bay of Piran from the legal point of view." The positions and resolutions adopted with reference to the Bay of Piran by the National Assembly or the Committee for International Relations (*Odbor za mednarodne odnose* – hereinafter referred to as the Committee) during its 1992-1996 term of office are similar. At a session held on 26 May 1993, the Committee adopted the following position: "With reference to the Bay of Piran, the National Assembly of the Republic of Slovenia reiterates that in modern history Slovenia had undisputed jurisdiction over the Bay of Piran. It appropriately administered such and provided for its protection and preservation. The Bay of Piran belongs to the Republic of Slovenia also in accordance with the international law principle of *uti possidetis*." At a session held on 28 June 1994 the Committee furthermore adopted the draft position that "Slovenia continues to respect the principle of *uti possidetis*, which particularly entails the full sovereignty of Slovenia over the Bay of Piran." The last such resolution of the National Assembly was adopted on 18 February 2009 – The Resolution on the Protection of Slovene Interests with regard to the Accession of the Republic of Croatia to the North Atlantic Treaty (*Sklep o zaščiti slovenskih interesov ob pristopanju Republike Hrvaške k Severnoatlantski pogodbi*) – in which the National Assembly rejects "any modifications of the situation that existed on land and at sea on 25 June 1991" and draws attention to the fact that on that day "the Slovene authorities, *inter alia*, exerted their jurisdiction in the settlements on the left bank of

the Dragonja river, on the territory on the left bank of the Mura river at Hotiza [and that] the Republic of Slovenia had a territorial junction to international waters and exercised its jurisdiction in the entire Bay of Piran."

[39] When applying the term "boundary line", what must be taken into consideration is that state borders appear as lines only on the surface of the Earth. As they also stretch into the air space and under the land surface, the state borders are in fact surfaces which two-dimensionally delimitate the area of the sovereignty of the neighbouring states.

[40] A similar provision as Section II of the BCC is contained in Section V of the Croatian *Ustavne odluke o suverenosti i samostalnosti Republike Hrvatske* of 25 June 1991: "*Državne granice Republike Hrvatske su međunarodno priznate državne granice dosadašnje SFRJ u dijelu u kojem se odnose na Republiku Hrvatsku, te granice između Republike Hrvatske i Republike Slovenije, Bosne i Hercegovine, Srbije i Crne Gore u okviru dosadašnje SFRJ.*"

[41] The preamble to the Agreement in this part in the original English version reads as follows: "[…] Whereas through numerous attempts the Parties have not resolved their territorial and maritime border dispute in the course of the past years, […]".

[42] In Opinion No. Rm-1/97 the Constitutional Court already clarified that from the viewpoint of international law, ratification is a unilateral declaration of the intention of one contracting party addressed to the other contracting party, to the effect that it accepts the content of a signed treaty as binding. Such declaration of intention is delivered by the state on the occasion of exchanging instruments of ratification. According to the fifth indent of Article 107 of the Constitution, such instruments are issued by the President of the Republic. The President of the Republic may issue such instrument of ratification after the National Assembly has adopted a law on the ratification of a treaty. The instrument of ratification is an international act, whereas the law on ratification is an act under national law, whose importance is twofold. On one hand, it is an authorisation granted to the President of the Republic, allowing him to issue an instrument of ratification and, on the other hand, it is a normative act by which obligations under international law are transformed into the national law of the state. Thus, with its implementation, the provisions of a treaty are integrated into the national legal order under the condition that they have been ratified in accordance with national law of the Republic of Slovenia.

[43] Article 3 (4) of the Agreement in the original English version reads as follows: "The Arbitral Tribunal has the power to interpret the present Agreement."

[44] In accordance with Article 8 of the Constitution, laws and regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia. In accordance with the second paragraph of Article 153 of the Constitution, laws must be in conformity with generally accepted principles of international law and with valid treaties ratified by the National Assembly, whereas regulations and other general legal acts must also be in conformity with other ratified treaties.

[45] By treaties the Republic of Slovenia binds itself as a state in relation to other parties to such treaties, these being other states or subjects of international public law. By treaties the state undertakes international obligations to which international law applies. The conclusion and implementation of treaties is mainly regulated by the Vienna Convention on the Law of Treaties, which is also binding on Slovenia. An obligation undertaken on the basis of a treaty binds the state to fulfil such obligation. In accordance with Article 26 of the Vienna Convention on the Law of Treaties, every treaty in force is binding upon the parties to it and must be performed by them in

good faith (*bona fide*). This is the principle of *pacta sunt servanda,* which is one of the fundamental principles of international contract law. If the fulfilling of an international obligation requires the adoption or amendment of a corresponding normative rule, which should apply in the national legal order, in accordance with international law, the state is obliged to fulfil the said obligation in such manner. Failure to fulfil an obligation constitutes a violation of the treaty and a breach of international law. The fulfilment of a treaty can be realised already by the fact that its provisions pass directly into the national legal order of the state at the time of the entry into force of such treaty. If the provisions of a treaty are not directly applicable, it is necessary, with a view to fulfilling contractual obligations, that appropriate measures be taken by national law – i.e. the adoption of appropriate legal instruments (see Constitutional Court Opinion No. Rm-1/97).

[46] Article 3 (3) of the Agreement in the original English version reads as follows: "The Arbitral Tribunal shall render an award on the dispute."

[47] Article 3 (2) of the Agreement in the original English version reads as follows: "The Parties shall specify the details of the subject-matter of the dispute within one month. If they fail to do so, the Arbitral Tribunal shall use the submissions of the Parties for the determination of the exact scope of the maritime and territorial disputes and claims between the Parties."

[48] Article 5 of the Agreement in the original English version reads as follows: "No document or action undertaken unilaterally by either side after 25 June 1991 shall be accorded legal significance for the tasks of the Arbitral Tribunal or commit either side of the dispute and cannot, in any way, prejudge the award."

[49] In accordance with the second paragraph of Article 31 of the Vienna Convention on the Law of Treaties, the preamble to the treaty is relevant for the interpretation of its normative provisions.

[50] The Preamble to the Agreement in this part in the original English version reads as follows: "[…] Affirming their commitment to a peaceful settlement of disputes, in the spirit of good neighbourly relations, reflecting their vital interests, […]".

[51] The Preamble to the Agreement in this part in the original English version reads as follows: "[…] Recalling the peaceful means for the settlement of disputes enumerated in Article 33 of the UN-Charter, […]".