

SLOVENIJA IN NASLEDSTVO DRŽAVNE POGODBE O PONOVI VZPOSTAVITVI NEODVISNE IN DEMOKRATIČNE AVSTRIJE (ADP)

Podpisana na Dunaju 15. 5. 1955

Začela veljati 27. 7. 1955 po deponiranju pri
vladi USSR instrumentov o ratifikaciji s strani
USSR, ZK, ZDA, Francije in Avstrije v skladu z
členom 38

NASLEDSTVO DRŽAV GLEDE MEDNARODNIH POGODB

- **OSNOVNO TEORETIČNO IZHODIŠČE:**
- “*clean slate*” ali “*tabula rasa*” pristop (Avstrija, DK o nasledstvu držav glede mednarodnih pogodb, 1978, za novo nastale države).
- **Pristop kontinuitete** (večina držav, DK o nasledstvu držav glede mednarodnih pogodb, 1978, v primeru odcepitve ali razpada, čl. 3/I Ustavnega zakona za izvedbo UZITUL).

RELEVANTNI ČLENI ADP

Izbor členov, ki so pomembni za
nasledstvo s strani Slovenije

Article 5

FRONTIERS OF AUSTRIA

The frontiers of Austria shall be those existing on 1st January, 1938.

7. člen

- Daje Sloveniji pravni naslov za silo zaščitnico do slovenske manjšine na Koroškem in Štajerskem

Article 27

AUSTRIAN PROPERTY IN THE TERRITORY OF THE ALLIED
AND ASSOCIATED POWERS

1. The Allied and Associated Powers declare their intention to return Austrian property, rights and interests as they now exist in their territories or the proceeds arising out of the liquidation, disposal or realization of such property, rights or interests, subject to accrued taxes, expenses of administration, creditor claims and other like charges, where such property, rights or interests have been liquidated, disposed of or otherwise realized. The Allied and Associated Powers will be prepared to conclude agreements with the Austrian Government for this purpose.

2. Notwithstanding the foregoing provisions, the Federal Peoples' Republic of Yugoslavia shall have the right to seize, retain or liquidate Austrian property, rights and interests within Yugoslav territory on the coming into force of the present Treaty. The Government of Austria undertakes to compensate Austrian nationals whose property is taken under this paragraph.

ODLOČBA USTAVNEGA SODIŠČA RS

Up-547/02 z dne 8. 10. 2003

- Ugoditev ustavni pritožbi na temelju razlage čl. 27/II ADP na podlagi Navodila za izvrševanje odloka o likvidaciji avstrijskega premoženja na podlagi Državne pogodbe o vzpostavitvi neodvisne in demokratične Avstrije (Ur. l. FLRJ, št. 4/58). Us je razlagalo Navodilo posledično pa vprašanje razlage pojma 'avstrijski državljan' kot sta ga razlagali nekdanja FLRJ in Avstrija v zvezi z vprašanjem upravičenosti odškodnine s strani Avstrije. S tem je štelo Slovenijo za naslednico ADP (tč. 19 obrazložitve in pritrdilno ločeno mnenje sodnice Škrk).

Določbe teritorialne narave

- 31. člen Določbe, ki se nanašajo na Donavo
- 32. člen Tranzitne ugodnosti

Article 37

ACCESSION TO THE TREATY

1. Any Member of the United Nations which on 8th May, 1945 was at war with Germany and which then had the status of a United Nation and is not a signatory to the present Treaty, may accede to the Treaty and upon accession shall be deemed to be an Associated Power for the purposes of the Treaty.

2. Instruments of accession shall be deposited with the Government of the Union of Soviet Socialist Republics and shall take effect upon deposit.

DK O NASLEDSTVU DRŽAV GLEDE MEDNARODNIH POGODB, 1978

- /izhajamo iz stališča, da so v nadaljevanju predstavljene določbe odraz običajnega mednarodnega prava/
- **Article 11**
- **Boundary regimes**
- A succession of States does not as such affect:
- (a) a boundary established by a treaty; or
- (b) obligations and rights established by a treaty and relating to the regime of a boundary.
(povezava s čl. 62/II (a) DKPMP, 1969)

Article 12

Other territorial regimes

1. A succession of States does not as such affect:

- (a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of any territory of a foreign State and considered as attaching to the territories in question;
- (b) rights established by a treaty for the benefit of any territory and relating to the use, or to restrictions upon the use, of any territory of a foreign State and considered as attaching to the territories in question.

2. A succession of States does not as such affect:

- (a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of a group of States or of all States and considered as attaching to that territory;
- (b) rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and considered as attaching to that territory.

3. The provisions of the present article do not apply to treaty obligations of the predecessor State providing for the establishment of foreign military bases on the territory to which the succession of States relates.

Article 34

Succession of States in cases of separation of parts of a State

1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:

(a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;

(b) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone.

2. Paragraph 1 does not apply if:

(a) the States concerned otherwise agree; or

(b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

Slovenija in nasledstvo ADP

- Na podlagi načela o kontinuiteti glede nasledstva mednarodnih pogodb izhajamo iz izhodišča, da za Slovenijo ne pride v poštev pristop k ADP po 37. členu temveč po uveljavljenem načelu o kontinuiteti mednarodnih pogodb v primeru razpada države.
- Razpad nekdanje SFRJ v avstrijski doktrini ni (bil) sporen. Potrjujejo ga mnenja Arbitražne komisije nekdanje SFRJ št. 1-15 (1991-1993) in Sporazum o nasledstvu po nekdanji SFRJ, 2001 (druga alineja preambule in Priloge A-G)

TEZA O ADP KOT ZAPRTI MEDNARODNI POGODBI

Načelno teoretično izhodišče – v primeru zaprtih mednarodnih pogodb je za pristop/nasledstvo potrebna privolitev vseh pogodbenic (čl. 17/III v zvezi s čl. 36/III DK o nasledstvu držav glede mednarodnih pogodb).

Problematičnost pojma zaprte mednarodne pogodbe v praksi držav (Končno poročilo odbora ILA za nasledstvo iz New Delhija 2001 glede pogodb navaja kot edini primer Konvencijo o Donavi 1948)

Naše izhodišče

- ADP z Konvencijo o Donavi ni primerljiva. ADP je trajna mednarodna pogodba, ki je izjemnega pravnega in političnega pomena za povojno ureditev v Evropi. Zato je po svoji naravi primerljiva z multilateralnimi mednarodnimi pogodbami (k Mir. Pogodbam po II. svet. vojni so pristopile tudi nekatere neevropske države). Primerljivost s Čikaško konvencijo o civilni zračni plovbi 1944.

ČIKAŠKA KONVENCIJA

- **Article 92**
- *Adherence to Convention*
- *a) This Convention shall be open for adherence by members of the United Nations and States associated with them, and States which remained neutral during the present world conflict.*
- *b) Adherence shall be effected by a notification addressed to the Government of the United States of America and shall take effect as from the thirtieth day from the receipt of the notification by the Government of the United States of America, which shall notify all the contracting States.*

- *Article 93, Admission of other States*
- States other than those provided for in Articles 91 and 92 (a) may, subject to approval by any general international organization set up by the nations of the world to preserve peace, be admitted to participation in this Convention by means of a four-fifths vote of the Assembly and on such conditions as the Assembly may prescribe: provided that in each case the assent of any State invaded or attacked during the present war by the State seeking admission shall be necessary.

Praksa ratifikacije/pristopa držav premagank in Avstrije k Čikaški konvenciji

- Italija 1947, Avstrija 1948, Finska 1949, Nemčija 1956;
- Včlanile v OZN: Italija, Finska Avstrija 1955, obe Nemčiji 1973 (1990).

POSTOPEK UREDITVE SLOVENSKEGA NASLEDSTVA K ADP

- Slovenska mednarodnopravna doktrina in državna politika sta soglasni, da je Slovenija upravičena do nasledstva glede ADP. Pristopi niso enotni. Na voljo:
- **Avtomatično nasledstvo** – dopustno, vendar problematično zaradi pravne negotovosti. Ni v skladu z čl. 3/II Ustavnega zakona za izvedbo UZITUL, ki nalaga notifikacijo nasledstva Državnemu zboru oziroma Vladi.

- Slovenija naj deluje kot **dejanska** zaščitnica pravic slovenske manjšine iz člena 7 ADP in se smatra in deluje kot naslednica bivše SFRJ v tej pogodbi kot pa se spusti v tvegan mednarodnopravni, posledično pa tudi politični spor z Avstrijo (E. Petrič, Zunanja politika, 2010, str. 166).

NOTIFIKACIJA NASLEDSTVA PRI DEPOZITARJU VLADI RF

- Slovenija **notificira nasledstvo depozitarju** in o tem obvesti velesile (ZS, ZDA, ZK in Francijo), *mutatis mutandis* po postopku kot je Avstrija obvestila velesile o obsoletnosti nekaterih vojaških klavzul (Bohte, Škrk).
- V tem primeru priprava strategije in strokovnih izhodišč, kako reagirati na avstrijski ugovor. Po našem prepričanju čl. 34 in 35. ne prideta v poštev za rešitev spora. Njuni uporabi bo nasprotovala Avstrija, na voljo so drugi, kasnejši forumi (npr. Sodišče za spravo in arbitražo OVSE).
- Ambivalenca slovenske politike do tega vprašanja!