



**REPUBLIKA SLOVENIJA**  
**USTAVNO SODIŠČE**

**The Partially Concurring and Partially Dissenting Opinion of Judge Dr. Ribičič**

1. Thirty-one deputies of the National Assembly imposed on the Constitutional Court a difficult task, much more difficult than it had had in issuing its opinions on the constitutionality of other treaties. Hitherto the question of the constitutionality of a treaty has been usually raised by those (the Government, deputies from a governing coalition) who have been convinced of its constitutionality and only expected that the Constitutional Court would confirm their interpretation concerning constitutionality and the effects of a certain treaty. In a [previous] concrete case, following an explicit question asked by the Constitutional Court, the proponents responded that they had not asserted the unconstitutionality of the treaty but that those who were of the opposite opinion (the latter did not even try to challenge the treaty before the Constitutional Court) had asserted that it prejudiced the border with the neighboring country. This time the thirty-one deputies, mainly members of the opposition, who requested the review of the constitutionality of the Treaty on NEK, are not simulating a constitutional dispute. Moreover, in their argumentation they do not refer to others' positions but express their own concerns as to the constitutionality of this treaty. They submitted the request in their name with argumentation in which they believe.

2. The essence of the argumentation submitted by the thirty-one deputies in their request for the Constitutional Court to issue an opinion on the Treaty on NEK, which is in the process of ratification, is the following: Arts. 10 and 11 of the Treaty do not contain solutions concerning the decommissioning of NEK, the disposal of radioactive waste and spent nuclear fuel, but leaves these to be adopted by future agreements between the States. The adoption of a joint program and financing are left to some future time, which will lower the level of nuclear safety and environmental protection, which is contrary to Art. 72 of the Constitution. The safety of NEK is also allegedly endangered by the provisions referring to its management (Art. 3 of the Treaty) as they are unclear and do not ensure the effective management of NEK. The Treaty exempts NEK from the constitutional system of the Republic of Slovenia. Furthermore, according to the proponents, it is unbalanced, as Croatia has managed to achieve everything in its interest while Slovenia has failed to do the same.

3. The argumentation stated in the previous paragraph convinced me to a great extent, in particular concerning the unconstitutionality of Arts. 3 and 11 of the Treaty, to vote against the operative provisions of the Opinion of the Constitutional Court (Paras. 2 and 3). Moreover, the issue of a proviso for the Republic of Croatia appeared subsequently, which was expressed during the ratification of the Treaty on NEK in the Croatian Sabor.

4. Regarding Art. 11, my concerns about Art. 10 of the Treaty, and the proviso that the Republic of Croatia declared in the ratification of the Treaty on NEK, I join the separate opinion of Judge Dr. Škrk and entirely agree with her argumentation. In this separate opinion I am, however, in particular explaining my reasons for voting against Para. 3 of the operative provisions of the Opinion, which establishes the conformity of the regulation of Art. 3 of the Treaty on NEK (this provision refers to the management of NEK) with the Constitution. However, I am not persuaded by the assertion of the group of deputies that it entailed an attempt to unconstitutionally exempt NEK from the legal system of Slovenia. Undoubtedly, it would make more sense and be more convincing if the limitations concerning the participation of workers in the management of NEK were contained in the internal legal system of the Republic of Slovenia as, due to their being a composite element of the Treaty on NEK, it could appear that such limitations are not the consequence of ensuring a high level of nuclear safety in Slovenia, but of asserting the particular interests of one or the other contracting Party. However, in my opinion, this is not a sufficient reason to find this part of the Treaty unconstitutional.

5. I am also aware that also the negotiators of both States had a difficult task to perform and that such a task has also been imposed on the National Assembly as regards it deciding on the ratification of the

Treaty on NEK. The main difficulty due to which the negotiators could not reach clear solutions but had to resort to compromise solutions, which may also be constitutionally disputable, is that NEK had been established in essentially different circumstances and that today it is unfortunately impossible to regulate anew and free from burdens the relations that had originated in the process of building and using NEK decades ago.

6. In reviewing the constitutionality of the Treaty on NEK, I was not guided by the question of if and to what extent the negotiators of the Republic of Slovenia were successful in ensuring that the Treaty represents a document balanced from the perspective of both the States. I agree with the position taken in the Opinion of the Constitutional Court that the evaluation of this matter falls within the powers and responsibilities of the National Assembly and not the Constitutional Court, which must restrain itself to reviewing the constitutionality of the Treaty on NEK (Para. 41 of the Reasoning of the Opinion to the Treaty on NEK). In reviewing the Treaty on NEK, I have therefore restricted myself to the question: what does it entail as regards ensuring a high level of nuclear safety in Slovenia and thereby as regards implementing the State obligations concerning the level of environmental protection prescribed by Art. 72 of the Constitution? After serious reflection I consciously decided on a particularly strict review in seeking an answer to this question. In my opinion it is not all the same what a certain treaty refers to, that is, whether to economic, political, cultural, scientific, sport or other cooperation, or to cooperation that is directly connected with ensuring nuclear safety. I do not try to conceal the fact that my review would be less strict if I had before myself a treaty by which two neighboring States agree for example on the joint organization of the Winter Olympic Games, and not the Treaty on NEK, on which the ensuring of nuclear safety directly depends.

7. I opine that the Constitutional Court acted reasonably when it did not submit to the pressures or at least certain political expectations that it decide overnight on such a demanding issue as the constitutionality of a treaty, and on such a serious application as the proposal of thirty-one deputies of the National Assembly. Consequently in the Constitutional Court proceedings there were enough opportunities to examine the numerous disputed aspects of the necessary weighing of reasons in favor of a positive, not negative, response to the posed question on the constitutionality of the Treaty on NEK. In these proceedings a convincing majority was gradually constituted on the basis of the presented arguments that the Treaty, as it appears in the process of ratification by the National Assembly, is not inconsistent with the Constitution. I could only partially join this opinion (I voted in favor of Paras. 1 and 4 of the operative provisions), although it was consistently elaborated. Its superiority is in that it mainly does not hide the weakness of the Treaty on NEK and points to possible dangers and traps into which its ratification and unilateral application might lead. In this respect it seems to me especially important that the Opinion point out that the Republic of Slovenia must not wait "indefinitely for the possible adoption of a joint solution concerning the decommissioning of NEK", and that the Treaty on NEK "cannot be understood such that by it the Republic of Slovenia relieves itself of the responsibility to safely dispose of the radioactive waste and decommission NEK". I am afraid, however, that the scope of such warnings, with which I agree, is much more limited than the Constitutional Court wishes it to be. Guaranties of this kind should be contained in the Treaty on NEK itself; the fact that, in my opinion, it does not contain such (to a sufficient extent) cannot be fully remedied no matter how logical and bindingly formulated the warnings of the Constitutional Court are.

8. The arguments on the basis of which I opine that the Constitutional Court should have issued a negative opinion, that is, an opinion by which it establishes the inconsistency of the Treaty on NEK with the Constitution, are mainly not an expression of a different interpretation of the contents and effects of this Treaty. My basic concerns are mostly addressed and critically evaluated in the Opinion of the Constitutional Court, but the scales I used are different, more sensitive than the scales by which the majority measured out the different result. The basic starting point of the majority is that treaties must be reviewed in good faith. In accordance with the majority, the provisions would be contrary with the Constitution only "if they prevented the State from fulfilling the obligations it has in ensuring a high level of nuclear safety on the basis of Art. 72.1 and 2 of the Constitution" (Para. 33 of the Reasoning of the Opinion on the Treaty on NEK; underlined by the author). I am of a different opinion. A treaty that refers to NEK must ensure a high level of nuclear safety, positively contribute to such, or at least not impede, worsen, postpone or make more difficult in an important manner the ensuring of such safety, for which the State on whose territory NEK is located is undoubtedly responsible, that is the Republic of Slovenia. That only a treaty which would directly make impossible the ensuring of a high level of

nuclear safety is unconstitutional is, in my opinion, a too lenient starting point for the review of the constitutionality of a treaty that refers to ensuring nuclear safety.

9. Although the questions of how successful Slovenia was in the negotiations with Croatia, and how much it succeeded with its favorable, acceptable, just and balanced solutions, must not influence the review of the constitutionality of the treaty, nevertheless the actual relations between the States which are entering into the treaty and which will have to apply it in their mutual cooperation activities, (indirectly) influence to a certain extent the interpretation of possible consequences which the application of the treaty will entail. The many years of open questions, problems and difficulties solving such warrant the conclusion that problems and also the treaty on NEK will not be applied only in the spirit of mutual understanding and creative cooperation. Therefore, I am not satisfied by the good intentions of the negotiators, about which I do not doubt, but I must consider what difficulties the Treaty on NEK might cause and what negative consequences it allows, makes possible or at least fails to prevent between States that have unsuccessfully resolved mutual problems. The forthcoming acceptance of Slovenia into the European Union will not by itself alleviate the resolving of problems between the States; in the transitional period, until the Republic of Croatia becomes a full member of the European Union, even the contrary would apply. Thus, in this case it is in my opinion questionable to refer to general principles important for the interpretation of treaties, pursuant to which a "treaty must be interpreted in good faith" (Paras. 33 and 35 of the Reasoning of the Opinion on the Treaty on NEK).

10. I agree with the majority that the basis for the review of the constitutionality of the treaty on NEK is Art. 72 of the Constitution in particular, as there can be no doubt that especially the ensuring of a high level of nuclear safety is a very important element of ensuring that the State promote a healthy living environment. In contradistinction with the majority, I opine that the Treaty on NEK is inconsistent with the mentioned article of the Constitution, due to the solutions embodied in Arts. 2 and 3.

11. Regarding the review of Art. 3 of the Treaty on NEK, I agree with that part of the opinion (Para. 48) that establishes that the provisions which concern the management of NEK are clear and not inconsistent with Art. 2 of the Constitution (the principle of a State governed by the rule of law), and with the interpretation (Para. 49) according to which a decision that is reached following the casting of a deciding vote by the president of the managing board applies during a transitional period until a final decision is made. Furthermore, in its review of Art. 3 of the Treaty on NEK, the Constitutional Court in its Opinion does not hide the weakness of the regulation. In Para. 50 of the Opinion it states that: "The parity composition of the managing board divides responsibility concerning management between two parties and thereby, due to the need for harmonization or by the inclusion of arbitration, extends the methods for reaching a final decision. However, it is precisely for such a case in which the safety of operation of NEK is jeopardized that the institution of the deciding vote is built into this process, which enables the reaching of an immediate decision.

Furthermore, the otherwise disputed regulation of the management of the company does not prevent the State from enforcing its power in connection with the supervision of the operation of NEK and in particular concerning the ensuring of nuclear safety (inspection examinations etc.)." I agree with the evaluation that Art. 3 of the Treaty on NEK "does not prevent" the State from exercising its jurisdiction, but in my opinion decreases the ability to ensure nuclear safety. Why? The president of the managing board may cast a deciding vote exceptionally, when a deadlock in the managing board would jeopardize the safety of the operation of NEK (Art. 3.2). If the president does so, he must immediately require that the president of the supervisory board call a meeting of the supervisory board, at which the justification of the use of the deciding vote is discussed (Para. 3). If a decision entails liability for damage, this applies only for those who vote in favor of the decision (Para. 4). If the supervisory board, which is composed on the parity principle, does not resolve a dispute connected with the use of the deciding vote, the final and binding decision is reached by means of business-technical arbitration (Para. 9). My concern in connection with such regulation is that it diverts the president of the managing board from using the deciding vote although a "disagreement in the managing board might jeopardize the safety of the operation" of NEK.

12. Decision-making within the managing board and the supervisory board, both of which are composed on the basis of the parity principle, is regulated in a manner such that complex and lasting

procedures are commenced which can result in international arbitration if the president of the managing board uses the deciding vote (they may use it only exceptionally; they must immediately call a meeting of the supervisory board; they are responsible for possible damage caused; mandatory business- technical arbitration is prescribed if the supervisory board cannot resolve a dispute). These procedures force the president of the managing board to avoid, if possible, the use of the deciding vote, which can lead to hesitation, delay, and postponement in reaching urgent decisions that are important for the safety of the operation of NEK and thereby for nuclear safety. Such a manner of managing NEK is otherwise logical from the point of view of the interests of the two neighboring States to ensure the most equal as possible influence of the neighboring States on the management of NEK through the parity composition of NEK's bodies and by means of the mutual limiting of the managing board (whose chairmanship is entrusted to the Slovenian partner) and the supervisory board (whose chairmanship is entrusted to the Croatian partner), and through international arbitration.

However, Slovenia, as the State on whose territory the nuclear facility operates, is primarily responsible for the operation of NEK and the ensuring of the high level of nuclear safety. From the view of ensuring nuclear safety in Slovenia, such a manner of management is questionable and will hardly be effective in practice. A much stricter opinion is held by the Nuclear Experts Society ([www.drustvo-js.si](http://www.drustvo-js.si)), who opine that conflicts and ineffectiveness in the management of NEK are unacceptable for a nuclear facility and directly jeopardize nuclear safety; furthermore, the envisaged arbitration transfers decision-making on nuclear safety outside NEK. In their opinion, the leadership of NEK should have a free hand to take fast and effective appropriate measures, for which it is fully responsible. In my opinion, such weaknesses in the manner of operating NEK would lead to the president of the managing board not casting the deciding vote in urgent matters connected with the safety of the operation of NEK, because the system of management forces them to do so. On the contrary, they will only use it if they are determined enough and have enough courage despite the fact that the system of management prescribes for such a case unpleasant, uncertain and lasting procedures. I opine that the regulation of the manner of managing NEK contains such serious weaknesses that Art. 3 of the Treaty on NEK is inconsistent with Art. 72 of the Constitution, as the envisaged manner of management is such that it reduces the ensurance of a high level of nuclear safety.

13. I agree with the majority that the treaty on NEK does not prevent the State of Slovenia from being responsible for ensuring a high level of nuclear safety, and that given a well-intentioned interpretation and creative application it can even positively contribute to such safety and the disburdening of Slovenia, which should bear by itself the whole burden of providing for the operation of NEK, the storage of nuclear waste and spent nuclear fuel and the decommissioning of NEK. Furthermore, I fully agree with the warning that the opinion of the Constitutional Court in no manner reduces the responsibility of the National Assembly in the process of ratification in its review of the appropriateness and balance of the treaty on NEK. However, in contradistinction with the majority, I opine that this is not enough. Only such a Treaty on NEK which cannot become the basis for impeding, worsening, postponing or aggravating the activities of the Republic of Slovenia in fulfilling its constitutional obligation, and in ensuring the high level of nuclear safety that is crucial for the life and health of the people, would be consistent with Art. 72 of the Constitution and the responsibility of the State determined therein.

Judge  
dr. Ciril Ribičič