The Partially Concurring and Partially Dissenting Opinion of Judge Dr. Škrk

In the case at issue I voted in favor of Items 1, 3 and 4 of the operative provisions and against Item 2 of the operative provisions. Concerning Items 3 and 4 of the operative provisions, I fully join the reasoning in Opinion No. Rm-2/02 (Opinion). My partially concurring opinion refers to the review of Art. 10 of the Treaty on NEK and its conformity with Art. 72.1 and 2 of the Constitution (I below), and to the issue of the contents of Art. 3 of the Act on ratification of one of the contracting Parties, the Republic of Croatia, from the view of evaluating whether it entails a proviso (III below).

The partially dissenting opinion refers to Item 2 of the operative provisions or to the review of Art. 11 of the Treaty on NEK (II bellow).

I.

In dealing with this case, I was initially concerned about the conformity with the Constitution of Art. 10 of the Treaty on NEK, which regulates the decommissioning, disposal and taking possession of radioactive waste and spent nuclear fuel, and of its Art. 11, which deals with the financing of decommissioning and disposal, in that part relating to its conformity with Art. 72.1 and 2 of the Constitution (healthy living environment).

If I had followed only the reasoning of the Opinion (here I refer to the arguments as to the review in Para. 38 of the reasoning) concerning the review of Art. 10 of the Treaty on NEK (Decommissioning, Radioactive waste and Spent Nuclear Fuel), the majority opinion would not have convinced me and I would have also voted against Item 1 of the operative provisions. However, I opine that, irrespective of the Treaty on NEK, the State of Slovenia has ensured a high level of nuclear safety in the sense of the decommissioning of the nuclear power plant and the disposal or storage of radioactive waste and spent nuclear fuel, which meet the standards determined in Art. 72 of the Constitution. The Treaty on NEK or its Art. 10 do not reduce the existing level of nuclear safety, thus I have joined the majority opinion that Art. 10 of the Treaty on NEK is not inconsistent with the Constitution.

In the same manner as is stated in Para. 28 of the reasoning, I support the starting-point that Art. 72.1 and 2 of the Constitution impose on the State the obligation to ensure a high level of nuclear safety, and that this concerns an indefinite legal concept, which needs to be continuously defined by considering the existing state of the development of science and technology. The constitutional provisions of Art. 72.1 and 2 contain the elements of blank norms (they do not define the healthy living environment). Concerning NEK, their substantive- law content is, given the general principles on long-term development, defined in particular by MKJV, MKVIGRO and ZVISJV (see also Item 29 of the reasoning of the Opinion).

What has a decisive meaning for the review of the constitutionality of Art. 10 of the Treaty on NEK is the fact that ZVISJV is a comprehensive regulation which is in common sense terms convincing enough as regards respect for the most modern findings of the industry and the complete regulation of protection against ionizing radiation. If the matter concerns a source of radiation which is intended for obtaining nuclear energy, ZVISJV regulates the carrying out of nuclear safety measures and, if the matter concerns the use of a nuclear product, also special measures of protection (last sentence of Art. 1.1).

Regarding the manner in which Art. 10 of the Treaty on NEK regulates handling radioactive waste and spent nuclear fuel, this article by itself does not ensure nuclear safety following the criteria of Art. 72 of the Constitution. I namely agree with the majority findings in the Opinion (Para. 38 of the reasoning) that Art. 10 of the Treaty on NEK, which refers to radioactive waste disposal (and also to the storage of spent nuclear fuel), in Para. 7 imposes on the contracting Parties only the duty to negotiate

concerning this issue, if they are not successful in carrying out procedures under the previous paragraphs of this article.

From here on the majority opinion is satisfied in Para. 38 of the reasoning with the finding that, irrespective of the Treaty, the sufficient criterion for satisfying Art. 72 of the Constitution is the fact that "... the State must plan the handling of radioactive waste" and that the State of Slovenia is, regardless of whether a joint solution concerning radioactive waste disposal is adopted following the Treaty, or not, despite the possible coming into force of the Treaty, responsible for ensuring that the solutions adopted meet the highest standards as required by the Constitution. The criterion of the planning of dealing with radioactive waste and spent nuclear fuel is, in my opinion, for a review of constitutionality, too low and not convincing enough.

The fact is that Slovenia, as the State in whose territory the nuclear facility is located, is responsible for the same and for its safe operation according to the highest domestic and international safety standards.

In Rm-1/97, regarding the review of the Europe Agreement, the Constitutional Court had refused the idea that the State would "temporarily remedy" the unconstitutionality by an interpretative declaration and take care of its conformity with the Constitution at its coming into force. In Para. 17 of the reasoning it had initially written: "The Constitutional Court establishes the conformity of treaty provisions with the Constitution at the time of decision-making, and irrespective of when (and if at all) the treaty takes effect." I opine that in the case at issue there is no reason to abandon this finding. What is in my opinion decisively significant for the review of the conformity of Art. 10 of the Treaty with the Constitution is the answer to the question whether the State has, irrespective of the Treaty, taken care of the highest standards concerning the disposal and storage (or possible export) of radioactive waste and spent nuclear fuel at the time when the Constitutional Court reviews the conformity of the Treaty prior to its ratification in the National Assembly (a priori review of a treaty).

The answer concerning Art. 10 of the Treaty on NEK is affirmative. Namely, the State has a valid regulation, ZVISJV, which regulates nuclear safety according to the highest standards and at the same time gives substance to Art. 72 of the Constitution. The Treaty on NEK does not prevent radioactive waste and radioactive fuel from being dealt with pursuant to the requirements of this Act. Despite the Treaty, the State that has a nuclear facility must continuously deal with this waste (particularly if such is stored at the site of the nuclear facility) and thereby fulfill the obligations determined in the Constitution. Furthermore, MKVIGRO obliges the State to comply with this obligation. Already Item 11 of the preamble, and in particular Arts. 4 and 11 of this convention, impose on the State that has a nuclear facility the duty to adopt legislative and other measures regarding the disposal and storage of radioactive waste. Also, the principle of the non-transferability of burdens on environmental protection to future generations requires from the State such a care.

The legal position of decommissioning is not fully identical with waste disposal and its storage. Decommissioning follows the expiry of the operating period of a nuclear facility, however, it should be taken care of already during the time of its operation. On the normative level, ZVISVJ regulates the decommissioning of a nuclear device in Art. 61 through the ensuring of appropriate financial means during its operating period (Paras. 2 and 3), or in the form of appropriate guarantees whose form and manner of implementation is determined by the Government (Para. 4). Thus, also the decommissioning of NEK survives the test of constitutionality, as it has been taken care of on the normative level in ZVISVJ and MKJV, according to which the State on whose territory the nuclear facility is located (Para. 40 of the reasoning) is responsible for nuclear safety. Therefore, I voted in favor of Item 1 of the reasoning.

II.

However, the Opinion does not persuade me concerning the review of Art. 11 of the Treaty on NEK (the Financing of Decommissioning and Disposal). In the review of Art. 10 of the Treaty on NEK I proceeded from the starting-point that it is supplemented by ZVISJV, which in this respect gives substance to Art. 72.1 and 2 of the Constitution. Such an approach is not possible in reviewing Art. 11.

From the view of Art. 8 and Art. 160.1 of the Constitution, in conjunction with Art. 153.2 of the Constitution, treaties ratified by the National Assembly and promulgated are in constitutional terms above statutes and are hierarchically higher legal sources. However, as follows from the preceding findings, the procedure for the disposal of radioactive waste and spent nuclear fuel and the decommissioning of NEK (Art. 10 of the Treaty) do not interfere with the normative regulation of nuclear safety according to ZVISJV. In this respect the Treaty on NEK also does not derogate ZVISJV as a higher or more special regulation. The obligation of the State according to ZVISJV remains in force, obliges it, and gives substance to Art. 72 of the Constitution irrespective of whether programs for radioactive waste disposal and the decommissioning of NEK are carried out and realized in accordance with the Treaty on NEK provisions, or not. In the area of international environmental protection, what is generally accepted is the starting-point that States may adopt stricter and more detailed internal standards than those established in international law. Certain international environmental instruments even explicitly prescribe this.

I agree with the finding of the Opinion in Para. 44 that Art. 11 of the Treaty on NEK will by its coming into force replace the system of the financing of the decommissioning and radioactive waste disposal, which is now determined by ZFR. I also agree with the principled finding in Para. 45 of the reasoning that the obligation of the State to adopt measures for ensuring financial means necessary for radioactive waste disposal and the decommissioning of a nuclear device follows from Art. 72.1 and 2 of the Constitution. However, I cannot agree with the next finding of the Opinion that the measures must be such so that at the end of the regular operating period of the nuclear facility there remain enough resources for the final disposal of radioactive waste and for the decommissioning of the nuclear device, in our case NEK.

ZFR is a regulation that in conformity with the principle of ensuring a high level of nuclear safety, imposes on the State the obligation to regularly collect funds for the decommissioning, disposal and storage of nuclear waste and spent fuel, in a special fund (Arts. 2 and 3) during the regular operation of NEK. The entity obliged to provide such funds is NEK (Art. 4.2), which is according to the existing regulation a domestic legal entity and is fully obliged to act in accordance with internal regulations on nuclear safety. Thus, pursuant to the existing regulation at the time of the review of the Treaty on NEK, when this is not yet part of internal law, the collecting of resources for the decommissioning of NEK and for the disposal and storage of radioactive waste and spent fuel is entirely taken care of.

On a principled level, such ensuring of financial resources is also envisaged by ZVISJV.

The Treaty on NEK changes the legal position of NEK to NEK Krško, limited liability company (Art. 2.1). The Treaty on NEK provisions as lex superior and lex specialis change the thus far applying obligations of the existing NEK Krško, in particular as regards the manner of the financing of decommissioning and radioactive waste disposal. The contracting Parties, the Republic of Slovenia and the Republic of Croatia, in principle oblige themselves to in equal proportion ensure the financing of the activities prescribed in Art. 11 (decommissioning and disposal), however, in a different manner than the existing one. In Para. 3 of this article, the States accept the responsibility that they will in twelve months adopt appropriate regulations to ensure funds for the financing of the expenses of decommissioning and nuclear waste disposal, in a manner such that each of them will separately establish its own special fund whereto they will (hence separately) provide regular payment. Such a manner of payment is additionally conditioned by the prior confirmation of the programs determined in Art. 10.3 of the Treaty on NEK, or by the prior approval of activities in connection with this, which falls within the power of the interstate commission determined in Art. 18 of the Treaty on NEK.

The existing system of financing the decommissioning and disposal of radioactive waste and spent fuel regulates the regular, continuous collection of resources to a full extent, and in such manner ensures the high level of nuclear safety. The system of financing, which Art. 11 will introduce given the possible coming into force of the Treaty on NEK, ensures, compared with the existing system, a regular and continuous collection of only half of the resources needed and worsens the existing degree of nuclear safety, which is also a concern of the proponents. Thus, in my opinion, Art. 11 of the Treaty on NEK is not in conformity with Art. 72.1 and 2 of the Constitution, which is why I have voted against Item 2 of the operative provisions.

The measures which do not ensure the regular, continuous and comprehensive collection of resources for the decommissioning and disposal of radioactive waste and spent fuel are also contrary to the principle of the non-transferability of burdens on environmental protection to future generations, which is one of the basic principles of long-term development and as such embraced in Art. 72 of the Constitution.

III.

Although this was not a subject of review before the Constitutional Court, what occurred to me was a question of legal nature with respect to Art. 3 of the Zakon o potvrđivanju ugovora između Vlade Republike Hrvatske i Vlade Republike Slovenije o uređenju statusnih i drugih pravnih odnosa vezanih uz ulaganje, iskorištavanje i razgradnju Nuklearne elektrarne Krško i zajedničke izjave povodom potpisivanja ugovora između Vlade Republike Hrvatske i Vlade Republike Slovenije o uređenju statusnih i drugih pravnih odnosa vezanih uz ulaganje, iskorištavanje i razgradnju Nuklearne elektrarne Krško [the Act on the Confirmation of the Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia on the Regulation of Status-Related and other Legal Relations Concerning the Investments, Use and Decommissioning of the Krško Nuclear Power Plant and the Joint Declaration on the Occasion of the Signing of the Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia on the Regulation of Status-Related and other Legal Relations Concerning the Investments, Use and Decommissioning of the Krško Nuclear Power Plant] (National Gazette, No. 9/02 dated 23 July 2002). According to Art. 3.1 of the mentioned Act, the Croatian representatives in the interstate commission may, following Art. 13 of the Treaty on NEK, confirm a program of radioactive waste disposal and a program for the decommissioning of NEK only given the prior consent of the Croatian Sabor; pursuant to Art. 3.2, the Croatian delegation in the interstate commission must following Art. 18 of the Treaty on NEK ensure the consent of the Croatian Sabor prior to confirming any activities in connection with the program of radioactive waste disposal and the program of the decommissioning of NEK, if this is necessary to protect nature and the health of people.

I agree with the finding in Para. 22 of the Opinion that, in proceedings to issue an opinion according to Art. 160.2 of the Constitution, the Constitutional Court reviews a treaty in the text that it is submitted in the process of ratification. Thus, in principle, a possible proviso by any of the contracting Parties cannot be a subject of review before the Constitutional Court (except if this be submitted by the proponent in a process of ratification, in the framework of the text of a treaty). This does not mean that the Constitutional Court cannot consider a possible proviso in interpreting the treaty or its individual provisions.

The concept of a proviso to a treaty is defined in Para. (d) of Art. 1 of DKPMP, and means a unilateral declaration, irrespective of how it is formed or named, by which a State at signing, ratifying, entering into, confirming or acceding to a treaty intends to exclude or change the legal effect of individual provisions of such a treaty as regards their application to this State.

I opine that the contents of Art. 3 of the Act on the Ratification of the Treaty on NEK, which the Croatian Sabor passed, have the character of a proviso. It namely changes the legal effect of provisions that refer to the confirmation of the program for the disposal of radioactive waste and spent nuclear fuel and the decommissioning of NEK, and practically to all direct activities in connection with this,[1] in a manner such that the Croatian part of the interstate commission, pursuant to Art. 18 of the Treaty (and Appendix 4), cannot carry out these tasks of the interstate commission without the prior consent of the Croatian Sabor. Thereby, from the Croatian side and having effects only for it, the power to make decisions of the interstate commission is transferred from the expert/technical area to the exclusively political level, which was not the initial intention of the contracting Parties. In Art. 10.5 it is envisaged that a program for the decommissioning of NEK is confirmed by the interstate commission determined in Art. 18 and approved by the public administration body of the Republic of Slovenia competent for nuclear safety. Therefore, the Treaty on NEK does not envisage political control over disposal and decommissioning, it only allows the confirmation of decommissioning by the competent public administration body of the contracting Party in whose territory the nuclear facility is located.

In accordance with international-law theory, making provisos to bilateral treaties such as the Treaty on NEK is in principle allowed, but relatively rare in State practice.[2] Thus, a question can be raised if such a proviso does not lead to the proposal of a new treaty or its individual provisions and, therefore, to new negotiations.[3] In treaties with a limited number of contracting Parties, where also bilateral treaties and thereby the Treaty on NEK belong, a proviso must be made by all the contracting Parties (also Art. 20.2 of DKPMP).

Furthermore, the Constitutional Court cannot enter into the question whether Slovenia as a contracting Party was informed of the contents of Art. 3 of the Croatian Act on Ratification, given a (possible) written notification through diplomatic channels that the Republic of Croatia as the contracting Party fulfilled all the conditions of internal law necessary for the validity of the treaty (Art. 22.4 of the Treaty on NEK, Final Provisions).

In accordance with international law, a proviso must be communicated to contracting Parties in written form through diplomatic channels (Art. 23.1 of DKPMP, The Procedure Concerning Provisos).

I fully agree with the final finding of the Constitutional Court, concerning this issue, that the National Assembly will have to decide within the process of ratification whether the Treaty on NEK is still a treaty with the same contents, or not.

Judge
Dr. Mirjam Šrk

Notes:
[1] I can hardly imagine which activities in the field of the program of nuclear waste disposal and the decommissioning of NEK are not connected with environmental protection and the health of people.
[2] In a recent questionnaire of the International Law Commission on provisos, Slovenia and Croatia stated that they do not make provisos to bilateral treaties. International Law Commission, Report on the work of its fifty-first session (3 May - 23 July 1999), General Assembly, Official Records, Fifty-fourth Session, Supplement No. 10 (A/54/10), UN, New York, 1999, p. 296 and note 474.
[3] Ibid., p. 292. 52