



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

Rm-2/02  
5 December 2002

**OPINION**

At a session held on 5 December 2002 in proceedings to review the constitutionality of a treaty on the proposal of a third of the deputies of the National Assembly, the Constitutional Court

hereby issues the following opinion:

1. Art. 10 of the Treaty between the Government of the Republic of Slovenia and the Government of the Republic of Croatia on the Regulation of Status and Other Legal Relations Connected with the Investments in the Krško Nuclear Power Plant, its Use and Decommissioning, is not inconsistent with Arts. 72.1 and 72.2 of the Constitution.
2. Art. 11 of the Treaty, cited in Paragraph 1 of the operative provisions, is not inconsistent with Arts. 72.1 and 72.2 of the Constitution.
3. Art. 3 of the Treaty, cited in Paragraph 1 of the operative provisions, is not inconsistent with Arts. 2, 72.1 and 72.2 of the Constitution.
4. Arts. 2.3, 2.6, 2.7, 3, 5.7, 8, 9, 12.2 and 12.3 of the Treaty, cited in Paragraph 1 of the operative provisions, are not inconsistent with Arts. 14.2 and 74.1 of the Constitution.

**Reasoning**

**A.**

**I. The Proposal of a Third of the Deputies**

1. On 18 June 2002 a third of the deputies of the National Assembly (hereinafter the group of deputies) filed before the Constitutional Court a proposal requesting the issuance of an opinion on the conformity of Art. 2.3 and 7, Art. 3, Art. 5.7, Art. 8, Art. 9, Art. 10, Art. 11 and Art. 12.2 of the Treaty between the Government of the Republic of Slovenia and the Government of the Republic of Croatia on the Regulation of Status and Other Legal Connected with the Investments in the Krško Nuclear Power Plant, its Use and Decommissioning (hereinafter the Treaty or the Treaty on the Krško Nuclear Power Plant - NEK) with the Constitution. The group of deputies opined that, despite its title, the Treaty does not contain provisions on the decommissioning of NEK or on the disposal of nuclear waste and spent nuclear fuel (hereinafter radioactive waste). Arts. 10 and 11, which refer to the regulation of these issues, allegedly left such regulation to future agreements. Instead of the precise regulation of the disposal of radioactive waste and decommissioning, Art. 10 allegedly envisaged only the adoption of a joint program. As the resolution of these issues was postponed until a time subsequent to the end of the operation, Art. 10 allegedly inadmissibly interfered with the right to a healthy living environment (Art. 72 of the Constitution). The "foggy provision" of Art. 11 should allegedly replace the system that had applied and that, despite disturbances, had worked well on the basis of the Act on the Fund for the Financing of the Decommissioning of the Krško Nuclear Power Plant and for the Disposal of Radioactive Waste from the Krško Nuclear Power Plant (Official Gazette RS, Nos. 75/94 and 35/96 - hereinafter ZFR).

Thereby the question of the financing of a radioactive waste dump and the decommissioning of NEK were allegedly postponed to a future time. The Treaty itself allegedly provided for the possibility that the States do not make any agreement on such until the end of the operating period of the power plant. As such, the regulation lowered the already established level of environmental protection, Art. 11 was also considered inconsistent with Art. 72 of the Constitution. From Art. 72.1 and 2 of the Constitution, it allegedly follows that the State is obliged to ensure a high level of protection in connection with the use of nuclear energy for the production of electric energy. The obligations of the State in the area of ensuring nuclear safety allegedly also follow from the Convention on Nuclear Safety (Official Gazette RS, No. 61/96, IT, No. 16/96 - hereinafter MKJV, Para. 3 of the Introduction, Art. 2.1, Art. 4, Art. 7.2.1 and 2 and Art. 19.2), the Joint Convention on the Safety of Spent Fuel Management and the Safety of Radioactive Waste Management (Official Gazette RS, No. 7/99, IT, No. 3/99 - hereinafter MKVIGRO, Paras. 3, 6 and 9 of the Introduction) and Art. 81.1 and 2 of the Europe Agreement establishing an Association between the European Communities and their Member States, Acting within the Framework of the European Union, of the One Part, and the Republic of Slovenia, of the Other Part (Official Gazette RS, No. 44/97, IT, No. 13/97 - MESP).

2. A number of provisions allegedly exempted NEK from the legal system of the Republic of Slovenia and granted to it a certain type of extraterritorial status. Such allegedly included the provisions of Art. 2.3, 6 and 7, Art. 3, Art. 5.7, Art. 8, Art. 9 and Art. 12.2 and 3 of the Treaty. The exclusion of the application of certain valid statutes was allegedly without sound reason. Thus, these provisions were allegedly inconsistent with the principle of equality before the law (Art. 14.2 of the Constitution) and with that of free economic initiative (Art. 74 of the Constitution). The interference was allegedly inadmissible as it was not appropriate and necessary to achieve the goal pursued, i.e. the safe and uninterrupted operation of NEK. The level of nuclear safety was allegedly lowered with the ratification of the Treaty; all other issues were able to be regulated by a contract of partnership between the investors from Slovenia and Croatia; and the Republic of Slovenia would allegedly take the necessary measures within the powers of the State.

3. Art. 3 of the Treaty was allegedly also inconsistent with Arts. 72 and 2 of the Constitution. The prescribed system of decision-making was allegedly unclear and led to a situation in which a decision could not be reached. Due to ineffective decision-making the safety of the object was allegedly endangered. The group of deputies suggested that the Constitutional Court issue an opinion finding the challenged Treaty provisions inconsistent with the Constitution.

4. The group of deputies pointed to an imbalance of the Treaty.

They opined that Croatia achieved everything that was in its interest. It was recognized a half capital share connected with entitlements concerning management, a price which does not include the expenses for the radioactive waste dump and for the decommissioning of NEK and the independent acquisition of funding for the regulation of the dump and for the decommissioning.

5. The group of the deputies suggested that, pursuant to Art. 35.2 of the Constitutional Court Act (Official Gazette RS, No. 15/94 - hereinafter ZUstS), the Constitutional Court call a public hearing, at which they would be allowed to further explain their position.

## II. The Opinion of the Government

6. The Government rejected the grounds of the arguments contained in the proposal requesting the issuance of the opinion of the Constitutional Court. The Treaty allegedly regulated the matters that refer to the obligations of the owner of the nuclear power plant, and did not allegedly interfere with the valid legal order in the area of nuclear safety.

7. Art. 10.1 of the Treaty allegedly contained the explicit obligation of both owners of the nuclear power plant to respect the MKVIGRO provisions. The program determined in Art. 10.3 of the Treaty allegedly contained a proposal on the potential division of radioactive waste, the criteria for handling the waste before disposal, the necessary financial means and the time period for the carrying out of such. Art. 10.4 allegedly obliged the contracting Parties to adopt a program to decommission the nuclear facility and to submit this program to confirmation by the competent body. Every administrator

of a nuclear facility is allegedly obliged to adopt such a program and submit such for confirmation by the competent public administration body. The program adopted in such a manner did not allegedly interfere with the Slovenian legislation concerning radioactive waste management, but only regulated the relations between the owners of NEK in a manner so as to ensure an effective response to the requirements of the competent public administration body. As the repeated supervision of the programs, determined in Art. 10.5, is envisaged to figure only in future legislation on the protection against ionizing radiation and on nuclear safety,[1] it allegedly even increased the established level of environmental protection. The competent public administration body has already permitted the temporary storing of nuclear waste at the location of their origin (Art. 10.6 of the Treaty), so there should be no obstacles for such storing until the end of the operation of NEK, if all the conditions for nuclear safety are fulfilled. It was allegedly impossible to avoid temporary storage as the waste must be appropriately handled and gathered in a suitable quantity prior to their disposal. Such temporary storing is allegedly a well-established practice in numerous nuclear power plants around the world. Art. 10.7 allegedly did not exclude the possibility of joint nuclear waste management, but on the contrary confirmed the obligation of each contracting Party concerning the resolution of the disposal of such. Under the new regulation of the financial obligations of both owners of NEK, Art. 11 allegedly improved the existing state of affairs, as the funding for the electricity supplied to the Republic of Croatia do not flow into the fund created on the basis of ZFR. Thus, also this provision allegedly contributed to a higher level of nuclear safety.

8. The solutions envisaged in the Treaty provisions, which were allegedly inconsistent with Art. 14.2 and Art. 74 of the Constitution, were adopted, as otherwise the negotiations could not have been completed. Allegedly it is not possible to come to an agreement on the purchase of the Croatian share. Considering the half share of Croatia in the financing of NEK and the half share in managing and exploiting this facility, as confirmed by the agreements and treaties entered into by both sides in the years 1970, 1974, 1982 and 1985, the legal regulation of NEK as a limited liability company with two "half" owners and a parity manner of decision-making, is allegedly the only remaining solution. As the constituting act is a treaty, entering into a partnership contract in the form of a notarial protocol, was allegedly unnecessary. The legislature has allegedly acted similarly in cases in which a company was established by statute. The agreed manner of management is allegedly possible in any company established according to the Slovenian legal order.

Decisions on the selection of suppliers and performers are allegedly a question of the business operations of every company. By the Treaty the States, as the owners of the capital of the companies that are entering into the partnership contract, regulated these issues. As the Slovenian partner will by signing the partnership contract express its consent to the provisions thereof, the concern about the violation of Art. 74 of the Constitution is allegedly unfounded. Art. 5.7 of the Treaty was allegedly in fact to the benefit of the Slovenian side. If all the electric energy produced by NEK was added into the Slovenian electro-energetic system, this would - with regard to the obligation of keeping reserves - result in an additional expense for the ELES Company. The dual nature of setting the prices of electric energy was allegedly envisaged in all the hitherto effective legal acts. The provisions on the participation of workers in management (Art. 3.6 and 7), on education and employment (Arts. 8 and 9), and on the non-imposition of new public duties on NEK (Art. 12.2 and 3) were allegedly substantiated despite their deviation from the applicable statutory regulation. Their purpose was to preserve certain rights of the Croatian investors under the agreement of 1970.

The second reason was in the special nature of NEK as a nuclear facility, and in the obligation of Croatia to accept nuclear waste.

9. The concern about the inconsistency of Art. 3 with Art. 2 and Art. 72 of the Constitution was also allegedly unsubstantiated.

The provision allegedly more effectively than in the past regulates the manner of resolving potential disagreements in managing NEK. The previous agreement allegedly made possible a deadlock and resolution by arbitration with the competent federal body of the former joint State. According to the Treaty, until an arbitration decision, the decision of the president of the board allegedly applies.

## B. - I.

## III. The Proposal to Hold a Public Hearing

10. As the circumstances have been sufficiently explained and there was no need for additional explanations by the participants, the Constitutional Court did not accept the proposal of the group of deputies to call a public hearing.

Thereby it did not begin the review of whether a public hearing is, considering the second sentence of Art. 70 of ZUstS, at all admissible in proceedings to review the constitutionality of a treaty.

## B. - II.

## IV. The Purpose of Entering into and the Content of the Treaty

11. The building of NEK was envisaged by the Agreement (Official Gazette SRS, No. 44/70 - hereinafter the Agreement) that was reached on 27 October 1970 by Slovenia and Croatia, then republics of the former SFRY. In the Agreement they supported the electric companies and other interested organizations that decided to build a joint nuclear power plant, and obliged themselves to aid each other in carrying out this project (Item 1). It was agreed that the investors from both the republics would participate in the financing in equal proportion, that they would share the rights and obligations in the same proportion, and that they would on equal principles determine the rights and obligations during the period of use of the power plant (Item 4). The decision on the organizational form of the nuclear power plant was left to the investors. The relations between the investors and the relations with the power plant were to be regulated by a business contract. Among these, the Agreement explicitly envisaged the rights and obligations of the investors concerning the joint power plant, the legal position of the power plant and the rights and obligations connected with the building and use of the power plant (Item 11).

12. Based on the 1970 Agreement and the authority granted by the Slovenian and Croatian electric companies, on 22 March 1974 the companies Savske elektrarne of Ljubljana and Elektroprivreda of Zagreb entered into a treaty on the pooling of funds for the joint construction and use of the Krško Nuclear Power Plant. The treaty implements the principle agreement made in the Agreement on the equal participation of investors in the financing, management and use of NEK. Regarding radioactive waste management, the treaty contains the obligation of the parties to "take the prescribed measures and actions concerning radioactive waste disposal " (Item 18.5.1). By an annex to the treaty, adopted on 16 April 1982, an obligation of the parties was added requiring that after the construction of NEK is completed, they do everything necessary to ensure safety measures to prevent possible detrimental consequences to the environment, and that the expenses for the realization of these measures and the expenses deriving from the storing of nuclear fuel and radioactive waste materials are covered by the founders in a 50- to-50 proportion (supplement to Item 17.4.1).

13. On 16 April 1982 the Self-Management Agreement on the Regulation of the Mutual Rights and Obligations of the Founders and NEK was entered into by the founders of NEK and NEK. The Self-Management Agreement required parity regarding the composition of the bodies of NEK (Items 11.2 and 12) and the reaching of unanimous decisions by the managing board (Art.

11.4). If an agreement could not be made also following an internal reconciliation procedure, an arbitration board at the Society of Yugoslav Electric Industry was empowered to issue a decision (Item 15.1).

14. On 30 July 1998, the Government of the Republic of Slovenia adopted the Decree on the Transformation of the Krško Nuclear Power Plant, full liability company, into the Krško Nuclear Power Plant Public Corporation, Ltd. (Official Gazette RS, Nos. 54/98, 57/98 and 106/01 - hereinafter the Decree). By the Decree the Krško Nuclear Power Plant, full liability company, was transformed into the Krško Nuclear Power Plant Public Corporation, Ltd. (Art. 1.1). The founder of NEK, Ltd., is the Republic of Slovenia (Art. 5.1), while the Republic of Croatia or Hrvatska Elektroprivreda was on the basis of the funds invested recognized the position of the co-founder (Art. 1.3). The management of the public corporation was divided between the founders, the managing board (acting in the function of

a supervisory board) and the director (Art. 18.1). The co-owner has the right to participate in management concerning the issues related to the priority right to be supplied electric energy, in the determination of the criteria for setting the price of electric energy, and in other questions envisaged in the acts previously adopted on the relations between the investors and between the investors and NEK (hereinafter the acts on NEK, Art. 18.2). Four members of the managing board are appointed by the founder, four by the co-founder. The president of the managing board is appointed by the founders from among themselves (Art. 20). In the case of an equal number of votes in favor and against a decision, the president's vote is deciding. If a resolution or a decision cannot be adopted, in eight days another meeting of the managing board is held (Art. 21). The elements of the price of power and energy are determined by the managing board, according to the acts on NEK adopted until then (Art. 22). The price and conditions of supply are otherwise the subject of a special contract between NEK and Elektro-Slovenija, Ltd., of Ljubljana and Hrvatska elektroprivreda, Inc., of Zagreb (Art. 17). The Decree has preserved the validity of the acts on NEK adopted until then, insofar as these were not inconsistent with the legislation and the Decree. It has also envisaged entering into a treaty between the Republic of Slovenia and the Republic of Croatia, which was to regulate comprehensively the property relations of both States with the NEK public corporation (Art. 1.3). The Decree applies until the coming into force of the mentioned treaty (Art. 28).

15. In such a legal situation, on 19 December 2001, the Treaty was signed as a bilateral interstate agreement. From its title it already follows that it was to regulate the legal position of NEK and its use, the position of the investors and the decommissioning of the power plant. The Treaty envisages the transformation of NEK, Ltd., from a public corporation into a limited liability company. Certain issues relating to the legal position of the company are regulated by the Treaty. The regulation of other issues is left to a contract of partnership, which is to be entered into on the basis of the Treaty by the legal successors to the investors, i.e. ELES Gen, Ltd., of Ljubljana and Hrvatska elektroprivreda, Inc., of Zagreb (Art. 2 of the Treaty). Other provisions of the Treaty regulate in particular the obligations of the contracting Parties, i.e. the Republic of Slovenia and the Republic of Croatia, concerning the regulation of the legal position of NEK and its partners and concerning the decommissioning of NEK and radioactive waste. The Treaty has four annexes: the contract of partnership, the procedure for asserting the preemption right, the principles on the regulation of financial relations, and the rules of procedure on the work of the interstate commission. The first and the last annexes are not part of the Treaty.

#### V. The Challenged Treaty Provisions

16. The challenged Treaty provisions read as follows: "Art. 2 (the NEK Company, Ltd.):

(3) A contract which is entered into by the founders (hereinafter: the contract of partnership) shall be based on the provisions of this Treaty and the provisions of the Companies Act of the Republic of Slovenia. ... The contract of partnership shall be considered the founding act of the company and to apply it does not need to be composed in the form of a notarial protocol, as determined by the Companies Act. ...

(7) The contracting Parties shall oblige themselves to act in a manner such as not to deprive or limit the rights of the partners.

#### Art. 3 (The Bodies of the Company):

(1) The bodies of the company shall be the assembly, the supervisory board and the managing board, which are composed according to the parity principle, unless this Treaty provides otherwise.

(2) The Slovenian partner shall have the right to nominate the president of the managing board, while the Croatian partner, the deputy president. When no agreement can be reached within the managing board composed in accordance with the parity principle, it shall be considered that the decision reached is that for which the president of the managing board voted in favor of (hereinafter the deciding vote). The deciding vote of the president of the managing board shall be used exceptionally, which is in cases in which a disagreement in the managing board could endanger the safety of

operation, essentially endanger achieving the goals determined by a yearly business plan adopted, or cause great harm to the company.

(3) When the president of the managing board casts the deciding vote, they must immediately require that the president of the supervisory board call a session of the supervisory board, at which the reasons for casting the deciding vote are discussed and appropriate decisions taken.

(4) In the event a deciding vote is cast the members of the managing board who voted against the decision shall not be liable for damage that would result from such a decision of the president of the managing board.

(5) The Croatian partner shall have the right to propose the president of the supervisory board, and the Slovenian partner the deputy president.

(6) The representatives of the employees of the NEK Ltd. shall have the right to participate in the work and the decision-making of the supervisory board (its broader composition), however, only when labor-law issues relating to the employees of NEK Ltd. are directly addressed and decided upon. In such cases the supervisory board shall have a tripartite composition, which is a composition of an equal number of representatives of the Slovenian partner, the Croatian partner, and the representatives of the employees of NEK Ltd., who are appointed according to the regulations dealing with the participation of workers in management. More detailed provisions on the composition and work of the supervisory board in its broader composition shall be contained in the contract of partnership.

(7) The contracting Parties agree that the Slovenian regulations on co-management by workers that relate to the director of workers shall not be applied to NEK Ltd.

(8) The assembly of the company shall appoint the proposed members of the managing board and the supervisory board if these are proposed in agreement with this Treaty and the contract of partnership.

(9) The contracting Parties agree that the issues which cannot be resolved by the bodies of the company due to their parity character shall be resolved by business-technical arbitration, the decision of which will be final and binding on this company. The provisions on the composition, powers and operation of this arbitration shall be contained in the contract of partnership. ...

#### Art. 5 (Production and the Transfer)

...

(7) The Slovenian regulations on the electric energy market shall not apply to the electric energy produced in the Krško Nuclear Power Plant which consistently with Para. 2 of this article is transferred to the Croatian partner.

...

#### Art. 8 (Employment, Education):

(1) The contracting Parties agree that the contract of partnership shall determine the obligation of NEK Ltd. to respect in employment the principle of parity for the members of the managing board and for other workers with special authorities determined by the contract of partnership.

(2) The company will determine those expert positions for which free employment shall be ensured considering the principle of safety, the optimal operation of the power plant and the appropriate representation of experts from both the contracting Parties.

(3) The Republic of Slovenia shall bind itself to ensure the free employment of persons who have the status of foreigner on the proposal of the company, in accordance with Paras. 1 and 2 of this article.

(4) Regarding education, scholarships and professional training, NEK Ltd. shall respect the principle of equal rights irrespective of citizenship.

(5) The provisions of this article shall also apply to the already employed workers of NEK Ltd.

#### Art. 9 (Contractors)

(1) The contracting Parties agree that for the requirements of regular operation as well as in extraordinary cases NEK Ltd. shall ensure the participation of companies and institutions which fulfill the conditions of qualified contractors in nuclear power plants. In fulfilling the mentioned conditions and the conditions of competition, NEK Ltd. shall ensure in general the equal participation of suppliers and contractors from both the contracting Parties.

(2) The contracting Parties agree that for the needs of NEK Ltd., suppliers and contractors from the contracting States shall be in all matters treated equally.

#### Art. 10 (Decommissioning, Radioactive Waste and Spent Nuclear Fuel)

(1) The decommissioning of the Krško Nuclear Power Plant, the disposal of radioactive waste and spent nuclear fuel, as determined in the joint Convention from the preamble of this Treaty, shall be the joint obligation of the contracting Parties.

(2) The contracting Parties agree that they shall find an effective solution to the decommissioning and the disposal of radioactive waste and spent nuclear fuel, from the positions of economy and environmental protection.

(3) The disposal of radioactive waste and spent nuclear fuel from the operation and decommissioning shall be carried out in accordance with the program of the disposal of radioactive waste and spent nuclear fuel (hereinafter the program of the disposal of RAO and IJG). The program of the disposal of RAO and IJG shall be, pursuant to international standards with the participation of NEK Ltd., elaborated by professional organizations that will be determined by the contracting Parties in sixty days after the coming into force of this Treaty. The program of the disposal of RAO and IJG inter alia includes: the proposal of the possible division and the assumption of possession of radioactive waste and spent nuclear fuel, the criteria of acceptability for such disposal and the estimation of necessary financial means and the time limits for the carrying out thereof. The program of the disposal of RAO and IJG shall be made in twelve months from the coming into force of this Treaty, and shall be confirmed by the interstate commission determined in Art. 18 of this Treaty. The program of the disposal of RAO and IJG shall be revised every five years.

(4) The decommissioning shall be carried out in accordance with the program of decommissioning. The program of decommissioning shall also include dealing with all radioactive and other waste stemming from the decommissioning until their removal from the site of the Krško Nuclear Power Plant, the estimation of necessary financial means and the time limits for the carrying out thereof.

(5) The program of decommissioning shall be made by the professional organizations determined in Para. 3 of this article together with NEK Ltd., in accordance with international standards, in twelve months at the latest from the coming into force of this Treaty. The program of decommissioning shall be confirmed by the interstate commission determined in Art. 18 of this Treaty and approved by the public administration body of the Republic of Slovenia, which is competent for nuclear safety. The program of decommissioning shall be revised every five years at least.

(6) The site of the Krško Nuclear Power Plant can be used for the temporary storage of radioactive waste and spent nuclear fuel until the end of its operating period.

(7) If the contracting Parties do not agree until the end of the operating period on a joint solution to the disposal of radioactive waste and spent nuclear fuel, they shall oblige themselves to cease the transfer and removal of radioactive waste and spent nuclear from the location of the Krško Nuclear Power Plant in two years at the latest after the expiry of this time limit. Further transfer and removal shall be

carried out every five years in accordance with the program of the disposal of RAO and IJG and the program of decommissioning, if the confirmed programs do not determine otherwise.

(8) If a premature closing of the Krško Nuclear Power Plant occurs due to the activities of the authorities of the Republic of Slovenia which are not a consequence of force majeure or chance in the sense of Art. 6 of this Treaty, the Republic of Croatia shall participate in the decommissioning and disposal of radioactive waste and spent nuclear fuel in proportion to the electric energy received by the Croatian partner, concerning the electric energy that the Krško Nuclear Power Plant would produce in normal circumstances from the beginning of operation until the end of the operating period.

#### Art. 11 (The Financing of Decommissioning and Disposal)

(1) The contracting Parties oblige themselves to ensure to an equal extent the financing of the expenses of the elaboration of a program of decommissioning, the expenses for carrying it out, and also the expenses for the elaboration of the program of the disposal of RAO and IJG.

(2) If the contracting Parties agree on a joint solution to the disposal of radioactive waste and spent nuclear fuel, also these expenses shall be financed by equal shares. If no such agreement is made, the contracting Parties shall independently cover the expenses of all those activities in implementing the program of the disposal of RAO and IJG that are not of joint character.

(3) The contracting Parties shall in twelve months from the coming into force of this Treaty adopt appropriate regulations for ensuring funds to finance the expenses determined in Paras. 1 and 2 of this article, in a manner such that every contracting Party ensures regular payment to its own special fund in the amount envisaged in the confirmed programs determined in Art. 10 of this Treaty. The contracting Parties or the special funds shall each finance half of all activities in connection with the decommissioning and disposal of all radioactive waste and spent nuclear fuel originating from the time of the operation and decommissioning of the Krško Nuclear Power Plant, which are confirmed by the interstate commission determined in Art. 18 of this Treaty.

#### Art. 12 (The Protection of Investments)

...

(2) The contracting Parties oblige themselves to not impose on the production and transfer of electric energy from the NEK Ltd. any public duties prescribed by the State or a local community which did not exist at the time of the signing of this Treaty and relate to the Krško Nuclear Power Plant as a nuclear facility, or that they shall not in real terms increase these public duties. Concerning other public duties, the Republic of Slovenia ensures that it shall treat NEK Ltd. equally as other legal entities in the Republic of Slovenia.

(3) If for the production of electric energy it is first necessary for the Republic of Slovenia to grant an appropriate concession, it obliges itself to grant such a concession without compensation to NEK Ltd., this having duration until the end of the operating period of the power plant."

#### VI. The Constitutional Basis for the Review

17. The provisions of the Constitution that are the basis for the review read as follows:

"Art. 2: Slovenia is a state governed by the rule of law and a social state.

...

#### Art. 14 (Equality before the Law)

...

(2) All are equal before the law.

...

#### Art. 72 (Healthy Living Environment)

(1) Everyone has the right in accordance with the law to a healthy living environment.

(2) The state shall promote a healthy living environment. To this end, the conditions and manner in which economic and other activities are pursued shall be established by law. ...

#### Art. 74 (Free Enterprise)

(1) Free economic initiative shall be guaranteed. ..."

### B. - III.

#### VII. Powers and the Scope of Review of the Constitutional Court

18. Art. 160.2 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." By the mentioned regulation, the Constitutional Court has been, besides the powers cited in Art. 160.1 of the Constitution, granted a special power of preventive (a priori) constitutional review of treaties. This power is limited only to a review of conformity with the Constitution, not with ratified treaties and the general principles of international law, as applies to the conformity of statutes and other internal regulations, in accordance with Art. 160.1.2 of the Constitution. Therefore, the Constitutional Court did not review the possible inconsistency of the Treaty with the treaties stated in the proposal of the group of the deputies (the same position was taken in the opinion Rm- 1/97 dated 5 June 1997, Official Gazette RS, No. 40/97 and DecCC VI, 86).

19. The purpose of the preventive constitutional review of treaties is to prevent the State at the moment of ratifying a treaty from assuming an obligation under international law that would be inconsistent with the Constitution. The mentioned position already follows from the opinion Rm-1/97, in which it was held that an obligation under international law would be contrary to the Constitution if at the coming into force of a treaty it created in internal law directly applicable unconstitutional legal norms, or if it obliged the State to adopt an act of internal law that would be inconsistent with the Constitution.

20. An opinion of the Constitutional Court issued pursuant to Art. 160.2 of the Constitution is not a consulting opinion.

Despite its different name, it is in fact a decision of the Constitutional Court, the legal nature of which is, by its effect, the same as other Constitutional Court decisions. It differs from such other decisions in that the Constitutional Court must not interfere by such with the treaty itself, as it can do in the case of internal legal acts. As a treaty is the result of an agreement reached between contracting parties, the Constitutional Court cannot annul or annul ab initio certain individual treaty provisions, and cannot require that the National Assembly bring it into conformity with the Constitution in a manner such that it regulates a certain issue that it otherwise does not regulate.

21. When the Constitutional Court issues an opinion that the individual provisions of a treaty are inconsistent with the Constitution, the effect of such a decision can be double: (1) if the treaty can be ratified with a proviso, the National Assembly can ratify such only provided that it uses its proviso concerning those provisions for which the opinion on inconsistency was issued; (2) if the treaty does not allow a proviso or if such is not admissible according to the provisions of the Vienna Convention on the Law of Treaties (Official Gazette SFRY, No. 30/72 - hereinafter DKPMP), given the valid constitutional system, the National Assembly must not ratify such a treaty or can ratify such only after it appropriately amends the Constitution. When the Constitutional Court issues an opinion that a treaty

is not inconsistent with the Constitution, the decision on adopting an act of ratification is a matter of the political decision making process of the National Assembly.

Similarly, as when it reviews regulations, the Constitutional Court may not embark on the issue of the appropriateness of certain solutions when it decides on the consistency of a treaty with the Constitution; even less so can it review the issue of whether certain solutions are favorable for the State, or not.

22. The subject of review in proceedings to issue an opinion on the conformity of a treaty with the Constitution are only the treaty provisions in the text that is submitted to the process of ratification (see the already mentioned Opinion Rm-1/97). By 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), the Republic of Croatia as the contracting Party ratified the Treaty, which is the subject of review of these proceedings. The Act on Ratification began to apply eight days after its publication in the National Gazette. According to Art. 3.1 of the mentioned Act, the Croatian representatives in the interstate commission may confirm the program for disposing of radioactive waste and the program for decommissioning NEK only with the prior consent of the Croatian Sabor [i.e. the parliament].<sup>[2]</sup> Pursuant to Art. 3.2 of the mentioned Act, the Croatian delegation in the interstate commission must ensure that the Croatian Sabor give its consent prior to confirming all the activities in connection with the program for disposing of radioactive waste and the program for decommissioning NEK, if this is necessary to protect the environment and public health.<sup>[3]</sup> As mentioned above, the subject of review in the proceedings before the Constitutional Court is the Treaty in the text in which it is the subject of the ratification process in the National Assembly (Art. 160.2 of the Constitution), the Constitutional Court did not need to answer the question whether the provisions represent a proviso in the sense of the DKPMP provisions. The National Assembly will have to evaluate in the process of ratification whether it still concerns a treaty with the same content, or not.

23. The Constitutional Court limited its review of conformity with the Constitution to those Treaty provisions which were explicitly mentioned in the request for an opinion, and to the extent to which they were challenged in the reasoning of the proposal.

24. The group of deputies asserted the inconsistency of the challenged Treaty provisions with the provisions of Art. 72 of the Constitution on a healthy living environment, the right to equality before the law determined in Art. 14 of the Constitution, and the right to free economic initiative determined in Art. 74 of the Constitution.

25. As only Art. 72.1 and 2 of the Constitution refer to a healthy living environment, and not also its Para. 3 (which regulates liability for damage caused to the living environment) and 4 (which refers to the protection of animals from cruelty), the Constitutional Court limited its review to only a review of the conformity of the challenged provisions with this part of the constitutional provision. Due to the fact that in connection with Art. 14 of the Constitution the group of the deputies asserted only the violation of equality before the law, and not the application of any discriminating circumstance, it reviewed the challenged provision only from the viewpoint of Art. 14.2 of the Constitution. Furthermore, in referring to the violation of Art. 74 of the Constitution, the proposal only mentioned the right to free economic initiative. This is determined in Art. 74.1 of the Constitution, which is the reason for limiting the review to conformity with this provision.

## B. - IV.

## VII. The Review of the Conformity of the Treaty with Art. 2 and Art. 72.1 and 2 of the Constitution

26. The group of the deputies asserted that several articles of the Treaty were inconsistent with Art. 72 of the Constitution.

Art. 10 was allegedly inconsistent with this constitutional provision, as radioactive waste management and the decommissioning of NEK were not regulated or the decision on such was postponed to a time following the closure of NEK. Art. 11 of the Treaty was allegedly inconsistent with Art. 72 of the Constitution, as it lowered the already achieved level of environmental protection concerning the financing of the decommissioning and the disposal of radioactive waste. Art. 3 of the Treaty was allegedly inconsistent with Art. 2 of the Constitution for reason of not being clear enough. As the safety of the facility was allegedly endangered due to the ineffectiveness of the envisaged manner of decision-making by the managing board, the provision was also inconsistent with Art. 72.1 and 2 of the Constitution.

## The Content of Art. 71.1 and 2 of the Constitution

27. According to Art. 72.1 of the Constitution, everyone has the right to a healthy living environment. Art. 72.2 of the Constitution imposes on the State the promotion of a healthy living environment and, to this end, specifically determines the conditions and manners in which economic and other activities should be pursued. In accordance with the established case law of the Constitutional Court, what follows from these provisions is the obligation of the State to adopt standards or the framework of admissible interferences with the environment such that the health of people will not be endangered (cf. Ruling No. U-I-24/96, dated 9 December 1999, OdlUS VIII, 279 and Decision No. U-I-315/97, dated 16 March 2000, Official Gazette RS, No. 31/2000 and OdlUS IX, 57).

28. Giving consideration to the effect of the use of nuclear energy on people and the environment, nuclear safety is a constitutive part of a healthy living environment. Due to the great danger to the life and health of people and the environment, which may be caused by the use of nuclear energy, the State is, together with a decision to use nuclear energy, obliged to take technical, organizational, and similar measures to lower the risk to the minimal possible extent. In the words of the legislature, the Constitution requires that all measures be taken to ensure that the damage to the health of people and radioactive contamination of the living environment due to ionizing radiation as a consequence of the use of sources of such radiation be reduced to the minimal possible extent, which still allows the development, production and use of sources of radiation and the carrying out of ionizing activities (Art. 1.1 of ZVISJV). Art. 72.1 and 2 of the Constitution impose on the State the obligation to ensure the highest degree of nuclear safety. It entails an indefinite legal concept, which needs to be continuously defined by considering the existing state of the development of science and technology.

29. As already mentioned above, the criterion of review in proceedings for the preventive review of treaties is only the Constitution, not also ratified and promulgated treaties.

However, this does not mean that treaties may not define the contents of a constitutional norm. In this context MKJV and MKVIGRO are important. In connection with ensuring nuclear safety, what derives from these conventions is the same obligation of the State as is determined in Art. 72.1 and 2 of the Constitution. Individual aspects that constitute the concept of nuclear safety can thus be defined by means of the mentioned conventions. Furthermore, in order to define the obligations of the State - given general legislation in the field of environmental law, from which the principle of compulsory subsidiary action by the State needs to be emphasized in the context of this case - ZVISJV is relevant from the view of the individual elements of nuclear safety. As follows from the above-mentioned definition of the subject of regulation in Art. 1 of ZVISJ, this Act implements Art. 72.1 and 2 of the Constitution from the view of nuclear safety.

30. Thus, both the mentioned conventions and ZVISJV determine or implement the obligation of the State to enact appropriate regulations to ensure nuclear safety. According to MKJV, the State, which has jurisdiction over nuclear facilities (Para. 3 of the Introduction), is responsible for nuclear safety. In

connection with the safety of nuclear waste management, the State is, pursuant to MKVIGRO, obliged to take appropriate, strict, measures to avoid the actions whose influences on future generations can be logically predicted, and are greater than allowed on the present generation, and measures intended to avoid shifting too excessive burdens onto future generations (Items 4 and 7 of Art. 4.2 and Items 6 and 7 of Art. 11.2). In conformity with the Fundamental Safety Principles of the International Atomic Energy Agency, which refer to radioactive waste management,[4] from the principle of the prohibition against the unnecessary burdening of future generations, there follows inter alia also the responsibility of the present generation to plan the management of such waste and to ensure a system of funding (Principle 5: The Burdening of Future Generations). In accordance with both conventions, the State is obliged to adopt internal law regulations and take other measures as are necessary in order to fulfill the obligations arising from the convention (Art. 4 of MKJV and Art. 18 of MKVIGRO). The State is obliged to determine by regulations appropriate State safety requirements and regulations, a system of mandatory permits for nuclear facilities which may be revoked, and a system of administrative inspection and evaluation of nuclear facilities in order to evaluate conformity with the appropriate regulations and the conditions of the permits (Art. 7 of MKJV). The statutes and regulations on regulating the safety of radioactive waste management must determine appropriate State safety requirements concerning protection against radiation, a system of issuing permits, a system for prohibiting the operation of facilities without a permit, a system for appropriate institutional control, supervision, recording and reporting, for ensuring respect for the regulations and the conditions of the permits, and a clear division of responsibility between the organizations included in different phases of radioactive waste management (Art. 19 MKVIGRO). Furthermore, the State is obliged to take appropriate measures to ensure that adequate funding is available necessary to ensure the safety of radioactive waste management facilities during their operating period and to ensure their decommissioning (Art. 22.2 of MKVIGRO). Also, it must take appropriate measures to ensure the safety of the decommissioning of any nuclear facility. Among such are also measures to ensure adequate financial sources for decommissioning (Art. 26 of MKVIGRO).

31. ZVISJV regulates a system of permits both for the building, operation and decommissioning of nuclear facilities and for the disposal of radioactive waste (in particular, Arts. 57 to 87 and 110 to 117). It also determines the obligation of the State concerning radioactive waste management (in particular, Arts. 93 to 99 of ZVISJV). It emphasizes that an entity that has radioactive waste must ensure that the shift of the burden of such waste to future generations is avoided to the greatest extent (Art. 93.1.2 of ZVISJV). Concerning the financing of the decommissioning of a nuclear facility and the disposal of radioactive waste, ZVISJV determines as a rule that the operator of the nuclear facility must be ensured financial means to implement the prescribed measures of nuclear safety during the entire operating period of the facility. These means must suffice also for the payment of all the costs of radioactive waste management and for the decommissioning of the facility.

The appropriateness of the method of ensuring financial means, their amount and guaranties are evaluated in the procedure for issuing an operating permit (Art. 61.1,2 and 6 of ZVISJV).

32. From the above mentioned it follows that the State is obliged to ensure a high level of nuclear safety by adopting regulations and implementing them. The issue of whether the mentioned provisions prevent the implementation of this duty of the State is crucial for the review of Arts. 3, 10 and 11 of the Treaty from the view of Art. 72.1 and 2 of the Constitution. As already stated above, the challenged provisions would be inconsistent with the Constitution if they prevented the State from fulfilling its obligations to ensure a high level of nuclear safety on the basis of Art. 72.1 and 2 of the Constitution, or if the State were on their basis obliged to enact a regulation that prevented it from fulfilling these obligations.

33. As the Treaty has not yet become part of the internal system of the Republic of Slovenia, the Constitutional Court used for its interpretation the interpretative provisions of DKPMP.[5] In Art. 31.1, this determines that a treaty must be interpreted in good faith and thereby the expressions used in the treaty must be considered according to their usual meaning, in the framework of the text as a whole and in light of its subject and goal.[6] For the purpose of interpretation, also the preamble (introduction), annexes, agreements and instruments that have been made in connection with entering into the treaty whose interpretation is at issue, belong to the contents of the treaty as a whole (Art. 31.2). Given the text as a whole, also all the relevant rules of international law that apply to the

contracting Parties must be *inter alia* considered (Art. 31.3.c). Regarding linguistic interpretation, the expressions must be interpreted according to their usual meaning, and are ascribed a special meaning only if it is determined that the contracting Parties meant so (Art. 31.4). Thus, the Constitutional Court reviews the conformity of such treaty with the Constitution according to its contents as they are formulated.

34. In its interpretation of the challenged Treaty provisions the Constitutional Court considered that its preamble refers *inter alia* to MKJV and MKVIGRO. The theory of international public law takes the position that there is no hierarchy between several treaties, which does not limit contracting parties to constitute such. Potential inconsistencies between treaties must be evaluated according to principles such as *lex posterior* and *lex specialis*. If a subsequent treaty refers to a previous one in a manner such that it demonstrates that it is subordinate to it or that it should not be understood that it is contrary to the previous one, the previous treaty has priority.<sup>[7]</sup> From the above-mentioned it follows that referring to MKJV and MKVIGRO must be understood in a manner such that these two treaties supplement the Treaty. In the event of disagreement between the two of them and the Treaty, the first two have priority. If a provision of the Treaty is more specific, it has priority.

35. In reviewing the conformity of a treaty with the Constitution the Constitutional Court presumes that in the implementation thereof the contracting Parties will behave in good faith and in conformity with the *pacta sunt servanda* principle (Art. 26 of DKPMP). Therefore, in reviewing the challenged treaty provisions, the Constitutional Court presumes that the contracting parties will fulfill the obligations arising from the Treaty. In the event of potential non-implementation of the Treaty, the contracting parties may resort to a procedure envisaged in Art. 20 of the Treaty (Peaceful Resolution of Disputes), or to the measures envisaged according to international law in the event of the violation of a treaty.

#### The Review of Art. 10 of the Treaty

36. According to Art. 10 of the Treaty, the disposal of radioactive waste and the decommissioning of NEK are the joint obligation of the contracting Parties. The disposal of radioactive waste and the decommissioning of NEK are to be carried out following a program. The contracting Parties are obliged in 60 days after the coming into force of the Treaty to determine expert organizations which will create such programs (in conformity with international standards and with the participation of NEK). The programs must be formulated within one year after the coming into force of the Treaty. They must be confirmed by the interstate commission determined in Art. 18 of the Treaty. The program of decommissioning must be confirmed by the public administration body of the Republic of Slovenia which is competent for nuclear safety.<sup>[8]</sup> If the program of the disposal of radioactive waste is not confirmed by the end of the regular operating period of NEK, the contracting Parties oblige themselves to each assume possession of one half of the radioactive waste within two years (sentence 1 of Art. 10.7).

37. From Art. 72.1 and 2 of the Constitution there arises the obligation of the State to ensure the formulation of a plan for its decommissioning and radioactive waste management during the regular operating life of a nuclear facility. The solutions adopted must, in conformity with the principle of prohibition against too excessive burdening of future generations, respect the strictest safety standards.

38. Art. 10, in the part in which it refers to the disposal of radioactive waste, obliges the contracting Parties to negotiate concerning this issue. If the contracting Parties adopt a joint solution by the end of the regular operating life of NEK, they are obliged to implement such. If by the end of the regular operating life of NEK the negotiations do not entail a joint solution, the Treaty envisages a solution determined in Art. 10.7. Regarding the obligations of the State determined in Art. 72.1 and 2 of the Constitution, the State must, irrespective of the Treaty, plan radioactive waste management. Irrespective of the fact whether a joint solution concerning radioactive waste disposal is adopted or not, despite the possible coming into force of the Treaty, the State still has the obligation to ensure that any solution adopted is in conformity with the highest safety standards, respect for which is required by the mentioned constitutional provision. Accordingly, Art. 10 of the Treaty is in the part in which it refers to radioactive waste disposal, not inconsistent with Art. 72.1 and 2 of the Constitution.

39. Furthermore, in the part, in which Art. 10 of the Treaty refers to the decommissioning of NEK, it is not inconsistent with Art. 72.1 and 2 of the Constitution. The contracting Parties agreed that they would negotiate a joint solution concerning the decommissioning of NEK. Art. 10.5, pursuant to which a program of decommissioning is, in addition to the interstate commission, confirmed by the competent body in the Republic of Slovenia, ensures that the program will be in conformity with the domestic legal system. Contrary to the regulation of radioactive waste management, the Treaty does not contain provisions in case the contracting Parties do not adopt a joint solution by the moment of the commencement of decommissioning. There is no solution envisaged in the Treaty in the event the interstate commission does not confirm a program of decommissioning prepared by the expert organizations.

40. Such a regulation does not either lessen the responsibility of the State or prevent the fulfillment of its obligations in connection with the decommissioning of NEK according to the Constitution. In this respect, Art. 10 of the Treaty supplements MKJV, according to which the State, which has jurisdiction over a nuclear facility, is responsible for nuclear safety (Item 3 of the Introduction). In conformity with the general rules of interpretation (Art. 31.1 of DKPMP), Art. 10 of the Treaty cannot be understood in a manner such that the Republic of Slovenia may wait for an indefinite time for a joint solution concerning the decommissioning of NEK to be adopted. The State is obliged to fulfill its part of the obligation determined in the Treaty.

After the end of the regular operating life of NEK it must, as the State on whose territory NEK is located, ensure that its decommissioning is carried out and, if necessary, also take all the necessary measures by itself.

41. Accordingly, Art. 10 of the Treaty is not inconsistent with Art. 72.1 and 2 of the Constitution (Item 1 of the operative provisions). The question whether, in the negotiations on the Treaty, the Government has reached a balanced and a just and acceptable solution for both the contracting Parties, or whether the Republic of Slovenia thereby assumed new obligations, is not a subject of constitutional review, but a matter of political evaluation to be made by the National Assembly. It concerns circumstances that must prior to reaching a decision on ratification be weighed by the National Assembly, which is also politically accountable for its decision.

#### The Review of Art. 11 of the Treaty

42. In Art. 11 of the Treaty, the contracting Parties agreed that the financing of expenses for the elaboration of both the programs determined in Art. 10 of the Treaty, i.e. the program of decommissioning and the program of radioactive waste disposal, would be equally divided between them. The financing of the implementation of the program of decommissioning is to be divided in an equal manner (Para. 1). In the event a joint solution is adopted the financing of radioactive waste disposal is divided equally between the contracting Parties. Otherwise each contracting Party bears by itself the expenses of those activities that are not of a joint character (Para. 2). The expenses for other activities in connection with radioactive waste decommissioning and disposal are equally divided (Para. 3). The financing of all those activities that is equally divided is carried out provided that they are confirmed by the interstate commission.[9]

43. Furthermore, the contracting Parties agreed that in twelve months from the coming into force of the Treaty they would adopt appropriate regulations to ensure funding for the financing of the expenses mentioned in the previous paragraph of the reasoning. The States are obliged to ensure the regular payment of funds, each to its own foundation, in the amount envisaged in the confirmed programs determined in Art. 10 of the Treaty.

44. With the coming into force of the Treaty, the challenged decision will replace the system of financing determined by ZFR. By this statute the Fund for the Financing of the Decommissioning of NEK and the Disposal of Radioactive Waste from NEK was established. The Act envisaged that the contribution, which was to be paid monthly into the mentioned fund, would be calculated in the price of the electric energy produced in NEK.

The height of the amount was to be determined by a program whose preparation the Act envisaged in Art. 6. For the time until the adoption of the program, the Act determined the amount that is to be calculated in the price of the electric energy produced by NEK. NEK is obliged to pay monthly this amount into the Fund (Art. 4.3 and Art. 5 of ZFR). ZVISJV does not change this regulation. Also following the coming into force of ZVISJV, the obligation of NEK to make regular payments into the Fund established by ZFR still exists. Art. 61.5 especially regulates a situation such that the building of a storage facility or the decommissioning of a nuclear facility are financed from the resources of a special fund established by statute. The provision at the same time means that this obligation of NEK will cease with the possible coming into force of the Treaty. The provision in general determines that the financing of the decommissioning of the nuclear facility and the storage facility for radioactive waste is ensured in accordance with the regulations on this issue. By the coming into force of the Treaty, such a regulation that deals with the financing of decommissioning and the disposal of radioactive waste will no longer be ZFR, but the Treaty.

45. From Art. 72.1 and 2 of the Constitution there follows the obligation of the State to take measures to ensure the financial means necessary for the carrying out of activities in connection with radioactive waste disposal and the decommissioning of a nuclear facility. The measures must be such that at the end of the operating life of the nuclear facility, there are enough means for the final radioactive waste disposal and the decommissioning of the nuclear facility.

46. By Art. 11 of the Treaty the Republic of Slovenia agreed with the other contracting Party only on how they would divide the financial burden concerning the decommissioning of NEK and radioactive waste disposal. The Constitutional Court has no jurisdiction to review whether the mentioned manner of ensuring means is the most appropriate. This agreement cannot, however, be understood such that the Republic of Slovenia would thereby relieve itself of the responsibility for safe radioactive waste disposal and the decommissioning of NEK, which is directly based on Art. 72 of the Constitution and the assumed international obligations. This means that the State must also after the possible coming into force of the Treaty make sure that the means for the decommissioning of NEK and for radioactive waste disposal be ensured at all times.

47. Accordingly, Art. 11 of the Treaty is not inconsistent with Art. 72.1 and 2 of the Constitution. As already emphasized in the review of Art. 10 of the Treaty, also regarding Art. 11 the evaluation of the (economic-)political and general acceptability of such solution is to be made by the National Assembly.

#### The Review of Art. 3 of the Treaty

48. The concern that the provision is not clear enough to be able to be implemented, and that for this reason it is inconsistent with the principles of a State governed by the rule of law (Art. 2 of the Constitution), is not substantiated. Pursuant to Art. 3 of the Treaty, the composition of the managing board is evenly divided and the Slovenian partner has the right to nominate the president of the board. For important decisions which cannot be reached by agreement - the vote of the president has temporarily the decisive weight including the cases in which a disagreement within the board could jeopardize the safety of operations. In such a case the president of the managing board must immediately call a session of the supervisory board, which debates the justification of the use of the deciding vote and reaches an appropriate decision. If the supervisory board cannot reach a decision due to its evenly divided composition, the decision thereof is entrusted to the business-technical arbitration board.

49. It was not explicitly determined in the Treaty that until the final decision of either the supervisory board or the arbitration, the decision of the president of the managing board applies. However, this follows from the character of the institution of the "deciding vote". Otherwise this institution, which is explicitly determined in Art. 3 of the Treaty, would namely have no significance. The provisions of Art. 3 make possible the reaching of a final decision; in the meantime, until the reaching of the final decision, what applies is the decision of the president of the managing board. Accordingly, Art. 3 of the Treaty is not inconsistent with Art. 2 of the Constitution.

50. The challenged part of Art. 3 of the Treaty is also not inconsistent with Art. 72.1 and 2 of the Constitution. The parity composition of the managing board divides responsibility concerning

management between the 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 the 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.).

51. Accordingly, the Constitutional Court hereby establishes that Art. 3 of the Treaty is not inconsistent with Art. 2 and Art.

72.1 and 2 of the Constitution (Para. 3 of the operative provisions).

## B. - V.

### IX. The Review of Conformity with Art. 14.2 and Art. 74.1 of the Constitution

52. The group of deputies assert that a treaty may contain provisions that deviate from existing statutory regulations, however, the exemption of NEK from the Slovenian legal system and the narrowing of its economic autonomy allegedly inadmissibly interfered with Art. 74.1 and Art. 14.2 of the Constitution.

53. The provisions which are allegedly inconsistent with the mentioned provisions of the Constitution regulate the formality of a contract of partnership (Art. 2.3), the obligation of the contracting States that they will not limit the rights of partners (Art. 2.7), the bodies of the company, their formation and the manner of their decision-making (Art. 3), the exclusion of the application of Slovenian regulations on the electric energy market to the electric energy produced in NEK and supplied to the Croatian partner (Art. 5.7), the respect for the principle of parity in the appointment of members of the managing board and of workers with special authority, and for other rules which must be respected in employment and the education of employees (Art. 8), respect for the principle of equal treatment in the selection of suppliers and contractors and in cooperation with them (Art. 9), the obligations of the contracting Parties connected with the burdening of NEK with public duties (Art. 12.2), and the obligation of Slovenia to grant a possible license for the production of electric energy to NEK without compensation (Art. 12.3). The concerns are not substantiated.

54. By guaranteeing free economic initiative the Constitution ensures that economic decisions on the entrepreneurial level may be freely reached.<sup>[10]</sup> This applies for the protection of the free activity of private economic subjects against State interventions (Decision No. U-I-296/96, dated 19 March 1998, Official Gazette RS, No. 42/98 and DecCC VII, 153).

55. Except for Arts. 3, 8 and 9 of the Treaty, it is not clear how the other decisions the group of deputies alleged were inconsistent with Art. 74.1 of the Constitution, could interfere with the mentioned constitutional provision. Other provisions namely strengthen the economic position of NEK.

56. However, also Arts. 3, 8 and 9 of the Treaty are not inconsistent with Art. 74.1 of the Constitution. All three provisions consider the principle of parity in the management, employment and education of employees and in the business operations of NEK. The reason for determining the envisaged manner of management is partially to ensure an appropriate degree of safe operation of NEK. In this part the restriction of the freedom of activity of NEK is substantiated by the constitutional power of the legislature to determine the conditions and manner of performing economic and other activities with the intention to ensure a healthy living environment (Art. 72.2 of the Constitution). The other reason for considering the principle of parity derives from the obligations that the former Republic of Slovenia assumed by the Agreement of 1970. By that agreement it agreed that the rights and obligations of investors would be determined in proportion to the share of financing. As a reply to the concern of the group of deputies that Art. 9 is, in the part in which it refers to ensuring balanced hiring of contractors from both States, allegedly inconsistent with the free market economic system, the Constitutional Court adds that the content of the provision is exactly such as the group of deputies believe it should

be. From the provision it follows that contractors are selected provided the fulfillment of certain conditions; it only prohibits the origin of a contractor being the decisive criterion in selection.

57. Furthermore, the concern about the inconsistency of the Treaty provisions mentioned in Para. 53 of the reasoning of this decision with the principle of equality before the law (Art. 14.2 of the Constitution) is not substantiated. According to the established case law of the Constitutional Court, this principle does not entail that a regulation must not regulate differently the positions of legal subjects, but that it must not do such arbitrarily, without a sound reason.

58. Art. 12.2 does not create inequality with other economic subjects as to them being burdened by public duties. The provision explicitly ensures equal treatment with respect to other legal entities in the Republic of Slovenia in the mentioned area. In the remaining part it only prevents the prescribing of new public-law burdens that did not exist at the time of the coming into force of the Treaty, or a real increase in existing ones. The international-law obligation assumed in such a manner is not by itself already inconsistent with the Constitution.

59. The reason for the exception from the obligation to make a contract of partnership in the form of a notarial protocol (Art. 2.3 of the Treaty) is in that the essential elements of the contract of partnership are already determined by this Treaty.

Thereby the purpose of the prescribed formality is ensured in another manner of equal value.

60. The reason for the exclusion of the validity of the regulations covering the electric energy market (Art. 5.7 of the Treaty) stems from the fact that the Slovenian systems operator does not need to ensure reserves of power also for the power produced by NEK, which is provided to the Croatian electric- energy system. This reason cannot be considered unreasonable.

61. The purpose of Art. 2.7, Art. 3, Art. 8 and Art. 9 of the Treaty is to preserve the equal position of the Croatian and Slovenian investors, as was already agreed in the Agreement of 1970. Such a reason is sound also considering the co-ownership shares of both partners as is agreed upon by the Treaty.

Furthermore, the provision that envisages the limitation of the participation of the representatives of employees in the supervisory board to issues that directly relate to the labor-law status of employees in NEK (Art. 3.6 of the Treaty) is also not unreasonable. This reason stems from the special duty of the supervisory board of NEK to ensure the safety of operations of the power plant. The ensuring of parity in the decision-making process of the managing board and the safety of operations of NEK substantiate the non-applicability of Slovenian regulations on co-management by workers that refer to a director of workers (Art. 3.7 of the Treaty).

62. The sound reason for granting a possible license without compensation (Art. 12.3 of the Treaty) arises from the position of NEK and its significance to the Slovenian electric-energy system.

63. Accordingly, the concern over the supposed exclusion of NEK from the legal system of the Republic of Slovenia is unsubstantiated. The disputed Treaty provisions do not exempt NEK from the legal system, but for sound reasons regulate its legal position in a different manner than the position of other economic subjects.

64. From the above-said, it follows that Arts. 3, 8 and 9 of the Treaty are not inconsistent with Art. 74.1 of the Constitution and that Art. 2.3, Art. 2.7, Art. 3, Art. 5.7, Art. 8, Art. 9 and Art. 12.2 and 3 of the Treaty are not inconsistent with Art. 14.2 of the Constitution (Item 4 of the operative provisions).

### C.

65. The Constitutional Court issued this opinion on the basis of Art. 70 of ZUstS and Art. 52.6 of the Rules of Procedure of the Constitutional Court of the Republic of Slovenia (Official Gazette RS, No. 49/98 and 30/02) composed of: Dr. Dragica Wedam Lukić, President, and Judges Dr. Janez Čebulj,

Dr. Zvonko Fišer, Lojze Janko, Marija Krisper Kramberger, LL. M., Milojka Modrijan, Dr. Ciril Ribičič, Dr. Mirjam Šrk and Jože Tratnik. Items 1 and 4 of the operative provisions were adopted unanimously. Item 2 of the operative provisions was adopted by seven votes against two. Judges Ribičič and Šrk voted against. Item 3 was adopted by eight votes against one. Judge Ribičič voted against. Judges Ribičič and Šrk gave their partially dissenting and partially concurring opinions.

President  
dr. Dragica Wedam Lukić

Notes:

[1] The Act that the Government cites was adopted after the issuance of the Government's opinion, and took effect on 1 October 2002. Its title is the Act on Protection against Ionizing Radiation and Nuclear Safety (Official Gazette RS, No. 67/02 - hereinafter ZVISJV).

[2] The provision reads as follows: "Izaslanstvo Republike Hrvatske u Međudržavnom povjerenstvu iz članka 18 Ugovora, zauzet će stajalište o potvrđivanju Programa odlaganja RAO i ING i Programa razgradnje NE Krško uz prethodnu suglasnost Hrvatskog sabora." [The representatives of the Republic of Croatia on the Interstate Commission determined in Art. 18 of the Treaty shall take a position on the confirmation of the Program for disposing of RAO and ING and the Program for the decommissioning of the Krško Nuclear Power Plant only with the prior consent of the Croatian Sabor.]

[3] The provision reads as follows: "Izaslanstvo Republike Hrvatske u Međudržavnom povjerenstvu iz članka 18 Ugovora zatražit će prethodnu suglasnost Hrvatskog sabora i kada odobrava druge aktivnosti u svezi s programima iz stavka 1. ovoga članka ukoliko je to potrebno radi zaštite prirode i zdravlja ljudi." [The representatives of the Republic of Croatia in the Interstate Commission determined in Art. 18 of the Treaty shall ensure that the Croatian Sabor give its consent also when it confirms other activities in relation to the program determined in Para. 1 of this article if this is necessary to protect the environment and public health.]

[4] Following Item 14 of the Introduction to MKVIGRO, the States oblige themselves to respect these principles.

[5] Art. 31, the General Rule of Interpretation; Art. 32, the Auxiliary Methods of Interpretation; and Art. 33, the Interpretation of Treaties in Two or More Authentic Texts.

[6] Paras. 1 and 2. The principle of good faith, linguistic interpretation and intention-based interpretation are equated between themselves. Due to legal certainty and to avoid contracting Parties having too much freedom in intention-based interpretation, international case law and doctrines especially emphasize the linguistic interpretation of a treaty. UN Conference on the Law of Treaties, Vienna, 26 March - 24 May 1968 and 9 April - 22 May 1969, Official Records, Documents of the Conference, pp. 38-42.

[7] Jennings, Watts, Oppenheim's International Law, Vol. 1, Parts 2 to 4, Longeman, London and New York, 1996, p. 1275; Daillier, Pellet, Droit International Public, L.G.D.J., Paris, 1999, pp. 115 and 269; Verdross, Simma, Universelles Völkerrecht, Duncker&Humblot, Berlin, 1984, p. 504.

[8] Giving consideration to Art. 3.1 of the act by which the Republic of Croatia ratified the Treaty, and which is cited in Para. 22 of the reasoning, the Croatian representatives in the interstate commission may confirm the program only with the prior consent of the Sabor.

[9] Pursuant to Art. 3.2 of the Act stated in Para. 22 of the reasoning of this opinion, the Croatian delegation in the interstate commission must have the consent of the Croatian Sabor prior to the confirmation of all the activities in connection with the program of radioactive waste disposal and the program of decommissioning NEK, if this is necessary for the protection of the environment and the health of people.

[10] Cf. Pernuš - Grošelj, in: Šturm (ed.), Komentar Ustave Republike Slovenije (The Commentary of the Constitution of the Republic of Slovenia), Fakulteta za podiplomske države in evropske študije, Ljubljana 2002, p. 714.