

INDIVIDUAL OPINION OF JAN PAULSSON
(pursuant to Article 48(4), ICSID Convention)

1. Incidental divergences with fellow arbitrators do not, in my view, necessarily require written expression. I have never before felt impelled to dissent. In this instance, I unfortunately find myself in disagreement with respect to the decisive proposition advanced by my two esteemed colleagues, which as far as I can see could be obtained only by an impermissible rewriting of the Treaty we are bound to apply. Given my duty to exercise independent judgment, I find it impossible to subscribe to the decision, and necessary to record my reasons for differing. My Individual Opinion is lengthy, because it seems fair that I should not content myself with criticising what I view as the majority's decisive error (this can be done, as will be seen, in a few paragraphs). I thus also (i) set out what I view as the proper solution and (ii) expose a number of *fausses pistes*.

2. HEP, a Croatian Government-owned joint stock company, has brought this arbitration against Slovenia under an agreement signed by Ministers representing Slovenia and Croatia on 19 December 2001. HEP properly refers to this instrument as a treaty, and indeed invokes the Vienna Convention on the Law of Treaties ("the VCLT") as applicable to its interpretation. It therefore seems appropriate to refer to it as "the Treaty." HEP claims damages on account of non-delivery of electricity as from 1 July 2002 to 19 April 2003. And yet:

- (i) HEP is not a signatory of the Treaty;
- (ii) the Government of Slovenia does not produce or market electricity; and
- (iii) above all, the Treaty simply does not contain an undertaking to deliver electricity as from 1 July 2002.

3. The first two problems would perhaps not have sufficed to cause me to part ways with the majority; with some legal footwork they could have been sidestepped. (Whether the majority have indeed succeeded in finding a solid path remains, however, a matter of doubt; see Paragraph 75 below.) But to conclude that a treaty which does not

establish an obligation of delivery nevertheless creates liability for non-delivery is one long bridge too far. I find no words in the Treaty that support such an extraordinary outcome.

4. I have naturally sought an overriding cause for this sharp divergence. It appears to me that there are in fact two related causes.

5. The first is a basic difference of approach, in which the majority's natural desire to reach a result that they consider fair and reasonable leads them to imply terms that are not in the Treaty, to ignore terms that *are* in the Treaty, and to give retroactive effect to a Treaty when neither its express terms nor its object require retroactivity. I would have great faith in my colleagues, whom I know well and whose views I often share, if they were entrusted with a mission of determining matters of fairness and reasonableness. Yet this Tribunal has not been authorised to decide the dispute *ex aequo bono* (as would have been required under Article 42(3) of the ICSID Convention). Even if the contrary were true, we would not be in a position to exercise that discretion at this stage of the case. The transformations attendant on the breakup of Yugoslavia gave rise to complex disputes that, as of the signing of the Treaty, had been ongoing for a decade. Originally, nuclear plants had been envisaged to be built in Croatia as well as in Slovenia. The plan for a Croatian plant was abandoned; Croatia became a customer of the plant in Slovenia, but no longer as a fellow federated State within Yugoslavia. This led to predictable divergences. Slovenia invoked international obligations requiring significant investments for Krško NPP ("the Plant"). (This factor is conspicuously absent from the majority's account under the rubric "The Nature of the Dispute", paras. 6-15.) HEP objected that the expenses had been budgeted unilaterally, and were therefore not opposable to it. On the Slovenian side, it was said that HEP's unjustified interruption of off-take threatened the Plant's financial ruin. HEP retorted that the cause for these difficulties was a failure to respect its right of participation in matters of governance. The list goes on, and the complications are endless. I simply do not see how we could at this stage assess the equities of a long narrative where sharply opposed theses have not been fully presented or examined.

6. The second cause of my disagreement is a difference in our understanding of the bargain set out in Exhibit 3 to the Treaty. For the majority, that bargain includes a "critical date" of 30 June 2002. If electricity did not begin to flow to HEP on that date, they apparently believe, it became inequitable to enforce the other terms of the bargain – which, in their view, were all to take effect as of that purportedly "critical date" – without compensating HEP. The problem with this

analysis is not only that it is incorrect in principle to rewrite the Treaty to comport with post hoc notions of equity, but that it is unnecessary to do so. The Treaty does not say that the other elements of Exhibit 3 take effect on 30 June 2002. The perceived unfairness to HEP simply does not arise. Ordinarily, the “critical date” for any treaty requiring ratification is the date when the treaty enters into force, and so it is here. Most notably, until the Treaty entered into force and HEP began receiving and paying for electricity, Croatia (and HEP) had no obligation under the Treaty to bear the Plant’s modernisation costs. Also, while Slovenia had taken the view that HEP would have such an obligation if the Treaty had not been concluded, all of NEK’s claims against HEP were in any event waived as of the date the Treaty entered into force – including, therefore, any claim for modernisation costs accruing between 30 June 2002 and the Treaty’s entry into force. The majority apparently believe that it would be inequitable for HEP not to receive electricity on the same date that it assumed 50% responsibility for modernisation costs and exchanged mutual waivers of claims with NEK. But there is no need to imply terms or to introduce retroactivity to achieve that result: the Treaty’s text already provides for all of those elements to take effect on the same date. The fact that that date is the Treaty’s entry into force, rather than 30 June 2002, does not change the essence of the Exhibit 3 bargain; nor does it render it less equitable. On a proper reading of the Treaty, HEP starts sharing responsibility for costs as of the day electricity deliveries commence, after the Treaty’s entry into force.

7. I moreover feel constrained to express my disappointment upon reading paras. 11-12 of the majority’s Decision, which appears in what one would expect to be an objective introductory section of the Decision (“The Nature of the Dispute”). These passages are, in my view, anything but neutral; they read like pleadings on behalf of HEP and seem intended to induce the reader into a strong intuitive sense of the essential fairness of HEP’s position, and thus to lay the groundwork for a section of the Decision, commencing with para. 191, entitled “Good Faith”. The fact is that these two paragraphs express views of great controversy. Naturally arbitrators have the authority to resolve controversies, but only after examining both sides of the debate and giving reasons for their findings. Here the majority seem to reverse-engineer from their desired outcome, which becomes clear when one reaches para. 191 and its remarkable statement that in treaty interpretation good faith is “the core principle about which all else resolves”. This follows the even more curious affirmation in para. 176 that the degree of clarity of a treaty term does not give it “greater or lesser force”. I shall revert to this matter in due course (see Paragraphs 23 and 39-51 below).

The merits in a nutshell

8. NEK operates the Plant; its Slovenian and Croatian customers are ELES and HEP, respectively. For HEP's claim to prosper, it must prove that from 1 July 2002 it was to receive (i) electricity from the Plant or (if the Treaty had not entered into force by that time) (ii) the benefit of the price at which electricity would have been delivered between 1 July 2002 and the date of entry into force. (This benefit is, on HEP's view, the difference, if any, between that price and that of the alternative supply HEP was forced to purchase elsewhere.) In short, HEP's claim is that from 1 July 2002 Slovenia had an obligation to supply electricity to HEP, or its monetary equivalent.

9. The problem is that the Treaty does not say so.

10. The majority reason that the settlement of financial issues in Article 17 and Exhibit 3 of the Treaty assumes a general point of equilibrium as at 30 June 2002, irrespective of ratification; and that the general financial settlement with respect to the past somehow overrode (or expanded upon) the explicit terms of the Treaty (see Paragraph 13 below) that deal with the specific future obligation to supply electricity. I fail to see how this is a conceivable construction of the terms of the Treaty.

The key terms of the Treaty

11. The Treaty was ratified by Croatia on 3 July 2002 (i.e. *after* the "equilibrium" date of 30 June assumed by the majority), and by Slovenia (after intense public and parliamentary debate) on 25 February 2003. It entered into force, in accordance with the mechanism defined in Article 22(4), on 10 March 2003, when Slovenia's ratification was received by Croatia. Since then, it has been performed continuously by both sides.

12. The Treaty defines no deadline for its ratification and entering into force.

13. The duty to supply power is dealt with in Article 5(2) of the Treaty as follows:

The Contracting Parties [i.e. the two States] agree that the Company [i.e. NEK] shall deliver the produced power and electricity to the Shareholders in equal proportions, half to each Shareholder, until the end of the regular useful life of the nuclear power plant in the year 2023, i.e. [sic; it appears that "i.e." should be read as "or", T, Day 4, 11:34] until the extended useful life of the power plant, if approved (hereinafter: useful life).

Article 5(4) deals with the routing and cost of transmission in very general terms ("shortest transmission routes ... transmission costs in accordance with the existing and international practices"). Article 5(6) establishes that the cross-border transmission does not attract customs duties.

14. The Treaty nowhere defines a starting date for the supply of power. The operative date is therefore the date of the Treaty's entry into force. Neither side has suggested otherwise.

15. Article 17 of the Treaty, entitled "Past Financial Issues," reads as follows:

(1) Mutual financial relations existing up to the signing of this Agreement between NEK d.o.o., ELES d.o.o., ELES GEN d.o.o. and HEP d.d. shall be regulated in accordance with the principles set forth in Exhibit 3 of this Agreement.

(2) The Contracting Parties agree that, as of the date of entry into force hereof, all obligations of NEK d.o.o. to the Fund for financing the dismantling of NE Krško and disposal of radioactive waste from NE Krško, which obligations arose from the application of the Act on Fund for Financing of Dismantling of NE Krško and Disposal of Radioactive Waste from NE Krško ("Official Gazette" of the Republic of Slovenia No. 75/94), shall cease to exist.

Exhibit 3 is referred to nowhere else in the Treaty but in this Article 17(1).

16. Paragraph (1) of Exhibit 3 deals with responsibility for past loans on the books of NEK. They fall into two categories:

- On the one hand, insofar as they represented original capital loans from Slovenian sources carried in the accounts of NEK as of 31 December 2001, they would be entirely assumed by ELES.
- On the other hand, the reimbursement of loans extended to NEK to finance its modernisation programme would be repaid "through the cost of electricity" (i) entirely by the Slovenian shareholder until 30 June 2002 and (ii) thenceforth by both shareholders. **This is the sole Treaty provision from which HEP infers that Slovenia is liable for the consequences of non-delivery of power by the Plant to HEP commencing on 1 July 2002.**

This arrangement was not explicitly conditioned on the entry into force of the Treaty. There is of course no reason why it should; every element of a treaty is subject to its ratification, with two exceptions only: (a) provisions regarding its entry into force and the like;¹ and (b) agreements regarding the provisional application of certain or all provisions in a treaty (as to which see Paragraph 62 below).

17. It is therefore noteworthy that Paragraph (2) of Exhibit 3 begins with the words

By virtue of the entry into force of this Agreement:

before setting down five subparagraphs. The last four of these subparagraphs relate to waivers by NEK of various claims *against HEP*. The first subparagraph, by contrast, is this:

HEP d.d. waives all claims against NEK d.o.o. and ELES d.o.o. for damages, i.e. for compensation for undelivered electricity, i.e. for compensation for use of the capital, and in this regard will fully waive all claims in court therefrom ...

¹ See Article 24(4) of the VCLT.

18. Certain treaties provide a deadline for ratifications, typically by setting forth a fixed date for their entry into force.² It would be discourteous to the two States here to assume that they were ignorant of such basic techniques in treaty practice. In his opening statement, counsel for HEP stated:

Slovenia has said that nobody really thought about what would happen if the Agreement wasn't ratified by June 30th 2002, and on the whole we agree with that, but it was clearly the working assumption and understanding of the parties that it would be ratified by that time ... (T Day 3, 110:3)

This seems plausible. Yet the State parties certainly did not exclude post-30 June 2002 ratification. Each did in fact ratify after that date. And each has until now conducted itself on the premise that the Treaty is in force and binding as of the date set out in Article 22(4).

19. It is therefore not open to this Tribunal to find that the unratified Treaty would have lapsed if it had not entered into force prior to 30 June 2002; nor that there was an obligation on either Contracting State to ratify the Treaty by 30 June 2002.

The essential flaw of the Decision

20. HEP bears the burden of showing that by allowing the Treaty to enter into force on 10 March 2003, Slovenia accepted liability, as from 1 July 2002, for covering any cost for electricity supplies in excess of the cost of (undelivered) supplies from the Plant. I believe that my colleagues' acceptance of HEP's thesis is unpersuasive for reasons that can be stated in a very few sentences (see Paragraph 23 below).

21. Three crucial paragraphs of the majority's Decision appear as the conclusion of the key section headed "The Treaty's Terms". They read as follows (with emphasis added):

² The example given in the UN Handbook on *Final Clauses of Multilateral Treaties* (Sales No. E.04.V.3, 2003), a publication widely available to Foreign Ministries, is Article III(1) of the Agreement Providing for the Provisional Application of the Draft International Customs Conventions on Touring, etc. (Geneva, 16 June 1949), 45 UNTS 149; *ibid.*, at 63.

174. Exhibit 3 is entitled "Principles of the Structuring of Financial Relations". Its paragraph (1) provides that ELES GEN d.o.o. shall be responsible for the repayment of investment loans by the Slovene founders of NEK "according to the balance on December 31, 2001," and that NEK's responsibility for "remaining long-term financial obligations" arising out of "NEK's modernization project" "will be borne through the cost of electricity by the Shareholder from the Republic of Slovenia [until June 30, 2002] and from that day forward by both Shareholders." This **of course** is in line with the **parity principle** that has governed the two sides since the 1970 Agreement and which **permeates** the 2001 Agreement (see Paragraphs 196-197, below). **Accordingly**, HEP's post-30 June 2002 obligation to share NEK's previously incurred modernization costs is part of the financial settlement achieved by Article 17 and Exhibit 3 of the 2001 Agreement. That settlement is a two-way street. Paragraph (5) provides that ELES GEN "assumes the financial results of all power and electricity produced during the period from July 31, 1998 until the date HEP d.d. begins to take over the electricity again, but no later than June 30, 2002." **Hence** starting 1 July 2002, HEP would share the costs outlined in paragraph (1) in accordance with the new financial terms. As of 1 July 2002, HEP would also be entitled to the financial results of its share of the electricity produced by Krško NPP. While **of course** NEK could not be compelled actually to deliver electricity to HEP until such time as the 2001 Agreement would enter into force, the terms of the financial settlement concluded, and which **perforce** took effect with the entry into force of the 2001 Agreement, were based on the financial facts that would flow had HEP been supplied electricity starting 1 July 2002.

non sequitur

non sequitur

non sequitur

non sequitur

175. Just as Exhibit 3 determines the date as of which the new financial terms would take effect, i.e., the "critical date" of 30 June 2002, so, too, does it determine the extent of the waivers contained in Paragraph (2) of Exhibit 3. Paragraph (2) expressly refers to "delivered" and "undelivered" electricity without also giving a date against which electricity is to be classified as "delivered" or "undelivered".

The same applies to the subsequent waivers in which NEK waives "all claims against HEP" relating to the dismantling of the Krško NPP, disposal of waste, "depreciation" and "coverage of losses from previous years."

*176. It is important to note that the above view is reached as a result of construing the words of the 2001 Agreement as prescribed by Articles 31 and 32 of the VCLT. Nothing more and nothing less. While the parties have debated vigorously the issue of whether an obligation can be "implied" in an international agreement, that debate is rendered pointless by the terms of VCLT Articles 31 and 32, which do not categorize treaty provisions as being either "express" or "implied". Hence the VCLT-prescribed interpretive process is just that [sic]. **No greater or lesser force resides in a term by virtue of the relative magnitude of the clarity with which it has been (or has not been) written.** The Tribunal's construction of Article 17 and Exhibit 3 becomes clearer still when, as the VCLT requires, one considers their wording "in light of the [the 2001 Agreement's] object and purpose" and "in their context".*

22. Paragraph 176 is obviously intended to reassure, but saying that one has done "nothing more and nothing less" than construing the words of the Treaty does not make it so. The proposition that "No greater or lesser force resides in a term by virtue of the relative magnitude of the clarity with which it has been (or has not been) written" seems nothing less than revolutionary. (Indeed it is difficult to stifle the impression that this extraordinary declaration betrays an awareness of likely doubts.) It seems not only that the majority, contrary to what they profess, have fastened upon far-reaching *implications*, but that they have moreover built their conclusions on a series of four *non sequitur* sentences, noted in the margin of the quoted text in Paragraph 21. It seems to me that each of them contains assertions which are not justified by any of the analysis. Expressions like "of course" and "perforce" and "permeate" have no weight unless they have some foundation in reason. The same is true of the reference to a "two-way street" as well as of the ceaseless repetition of the expression "parity principle".

23. My reasoning is hardly recondite. The following simple observations with respect to para. 174 of the Decision (quoted in

Paragraph 21 above) are sufficient, in my view, to show the error of the majority's Decision. Relevant passages from Exhibit 3 are of course correctly reproduced just before the four sentences. But the notion that the Exhibit 3 "of course" is "in line" with "the parity principle" that "permeates" the Treaty seems to be an effort to convince by dint of confident expression rather than by reasoning. The essence of this sentence (beginning with the words "This of course") is a mystery. The Decision repeats the expression "parity principle" time and again, as if this uncontroversial element of the case carries some special significance for the issue at hand. The headings throughout the ostensibly objective "Summary of Facts" repeat references to "the parity principle" – although it is the post facto construction of HEP, not an expression used in the referenced documents.³ The expression first appears in para. 9 of the Decision, where it is said blandly that the 50:50 partnership "became known as the 'parity principle'". (One can only wonder: by whom? in what document? how was it imported into the Treaty?) This is apparently intended to provide an ostensibly factual foundation to the reference, in the first sentence of the section on the Treaty's "Object and Purpose" (para. 177 of the Decision), to the proposition that what the States-party were doing was to proceed "in accordance with the parity principle". I have no objection to the expression itself, but rather to its appearance in this portentous manner – as though it were the luminous pathway to a proper disposition of the controversy at hand. It is not. The mantra of "parity" is simply inconclusive as to the issue whether Slovenia in effect promised HEC to cover any adverse financial consequence on account of non-ratification (and therefore non-delivery) as of 1 July 2002. That proposition simply does not flow from the ideas of wiping the *past* "slate clean" and maintaining *future* "parity". The past is the past. The future is whenever the Treaty comes into force. The issue of non-deliveries after signature but before ratification is *in between*. If the States-party had wanted to stipulate some consequences in this hypothesis of the period between signing and entry into force, they needed to do so explicitly. They did not.

- Hence there is no foundation for the four heady leaps of logic that follow. The fact that Farmer Ellis and Farmer Henry agree to settle the accounts of past repairs to the barn made by Ellis cannot possibly, in and of itself, mean that Ellis promises to indemnify Henry if future milk is not delivered. *There is no*

³ In para. 191, the majority's Decision asserts that its reliance on its view of good faith "*does no violence*" to the terms of the Treaty. That is hardly good enough. The Tribunal's duty is to decide *in conformity with* the terms.

connection. That would be a separate deal and would have to be explicit.

- To say that the cost of all hay to feed the cow will be covered by Farmer Ellis until 30 June cannot be given the meaning – “Hence” – that *Farmer Henry* will share those costs starting on 1 July. We need to know when the two are going to begin sharing the milk. If that date is prior to 1 July, Henry will get something of a free ride. If it is subsequent – *any time* subsequent – he will have to pay his share, then and only then.
- There is no corollary that Henry shares the milk as of 1 July. That remains to be agreed.⁴
- There is no warrant to say that “*of course*” Henry is entitled to the financial benefit of undelivered milk as from 1 July. This seems to be the concrete meaning of the majority’s abstract idea of “a financial settlement” which “*perforce*” took effect upon ratification and was “based on the financial facts that would flow” had supplies begun 1 July 2002.⁵

24. And so it seems the majority are walking on thin air when, as they reach para. 175, they refer to the “critical date” of 30 June 2002. One searches in vain for any reference to the words *critical date* in the Treaty or in Exhibit 3. (In contrast, “delivered” and “undelivered”, the two other expressions that appear in inverted commas in para. 175, do come from Exhibit 3.) The ostensible quotation of “critical date” appears again in para. 178, which is a part of the discussion of the Treaty’s “Object and Purpose” – a rather facile demonstration for the majority once they have achieved the four leaps of para. 174. By now one wonders who actually used these quoted words. The answer comes in paras. 185-186; they were used in the witness statement prepared for this arbitration under the signature of a leader of the Croatian negotiating team, Dr Granic. The expression loses valence as the mere *ipse dixit* of a litigant.

⁴ Might one wonder who pays for the hay between 1 July and whenever Henry begins to receive (and pay for) the milk? Well, that would surely be Ellis, unless he wants the cow to starve. Is this a lacuna in the agreement? We do not have to know, because no one is suing Ellis. Anyway, Ellis took all the milk and part of the price he paid for it therefore covered the hay.

⁵ The concept of “financial facts” is unclear to me, and hardly seems equivalent to an undertaking in the Treaty *to compensate for lost future deliveries in the event of non-ratification* – which could easily have been drafted, but evidently was not agreed.

25. I perceive no logical reason why 30 June 2002 should have been an inherently “critical date” in terms of deliveries. There is no basis upon which to infer from the terms of the Treaty that it would be *inherently disadvantageous* to HEP for deliveries to commence at some time after 30 June 2002. If HEP did not receive the electricity, it would not pay for it – including the built-in surcharges which would up to that date have been paid by the Slovenian side. There is no premise in the Treaty to the effect that the prices ex-Krško were particularly advantageous to HEP, so that alternative purchases would have been costlier. This can only be observed post facto in light of evolving market realities, such as HEP’s own downstream commitments, and the cost and availability of alternative sources. If the 30 June 2002 date had been “critical” to Croatia, it could have withheld its ratification – or suspended it pending Slovenia’s ratification.

26. If the majority feel that their approach was necessary to avoid a *conceivable* disadvantage to HEP, one can only counter that their rewriting of the Treaty in fact causes a *definite* unjustified prejudice to Slovenia. Consider the following:

- (a) Neither Article 17 nor Exhibit 3 create, in terms, a separate financial obligation in case the Treaty (and therefore supply of electricity) have not come into being before 1 July 2002.
- (b) It is difficult to see how such an obligation could be simply read into the Treaty, absent express terms to that effect. The obligation would be draconian; it would amount to a promise to pay HEP:
 - (i) the difference between the price of electricity supplied by the Plant and whatever price of electricity HEP could procure elsewhere,
 - (ii) without receiving HEP’s contribution towards the modernization of the Plant,
 - (iii) for any length of time from 1 July 2002 to one day before the end of the useful life of the Plant (i.e. more than 20 years), and all this

- (iv) whatever the reason for the Treaty's non-entry into force during this time, and whether or not Slovenia had ratified the Treaty before Croatia did.

27. There is nothing left to analyse under Article 17 and Exhibit 3. But it is not the end of the matter. The supposed obligation to pay the monetary value (to HEP) of electricity from a given date (1 July 2002) onwards can be regarded only as a substitute for the obligation to supply actual electricity. This is a matter which, had the parties wished to do so, would have been regulated in Article 5(2). They did not. What they have done, in fact, is to indicate a date as of which the cost of electricity supplied in accordance with Article 5(2) would incorporate a modernization surcharge. That date was 1 July 2002 (Paragraph (1) of Exhibit 3). It is agreed by all that it was assumed that by that date the Treaty would have entered into force. But I cannot share the majority's view that this assumption can retrospectively be transformed into an obligation for *both* States-party to ratify the Treaty by that date – failing which Slovenia, and Slovenia alone, is to be penalised. That is in my view an elementary error, given that the Treaty was subject to ratification for its entry into force, and that there is no rule of general international law requiring States to ratify international treaties. To decide such matters in the Contracting States' place is what the majority now purport to do. I find this plainly impermissible. (Indeed, although they seem not to have considered the point, the majority's logic would compel the conclusion that the true time-limit for ratification was some unknown date sufficiently in advance of 1 July 2002 – perhaps in May, but who knows? – to allow for technical preparations for the flow of electricity into the Croatian grid.)

28. The majority apparently arrive at this result on the basis of an understanding they have formed that the Croatian side was to service loans for NEK's modernisation project starting on 1 July 2002, irrespective of whether any electricity was delivered. They derive that understanding from a provision regarding the price of electricity until 30 June 2002. Given that this understanding is of the essence to the majority's view of the object and purpose of the Treaty and the equities involved in construing its text, it is useful to look at the relevant Treaty provision closely. The key sentence, the last in Paragraph (1) of Exhibit 3, reads:

Until June 30, 2002, the cost of these loans will be borne through the cost of electricity by the Shareholder from the Republic of Slovenia and from

that day forward by both Shareholders. (Emphasis added.)

29. There might have been some merit in the majority's approach if the sharing of the cost of the loans were an unqualified obligation starting on 1 July 2002. But it is not. The cost of the loans is to be serviced "through the cost of electricity" produced by the Plant, pro rata to deliveries actually made to HEP. Plainly the cost-sharing obligation is conditional upon the electricity-supply obligation in Article 5(2). That latter obligation came into effect as of 10 March 2003. To condition the electricity-supply obligation on the indicative date for the cost-sharing obligation strikes me as unorthodox on any view of treaty interpretation, for it puts the cart before the horse.

30. The text of the Treaty itself simply does not mention the date of 30 June 2002. The delivery obligation is stipulated as extant throughout the useful life of the power plant, but with no starting date. Nor does Paragraph (2) of Exhibit 3, which defines the reciprocal waivers between HEP and NEK, mention any date. That leads to the straightforward proposition that entry into force wiped the slate clean of claims between HEP and NEK, as indeed explicitly suggested by the preambular phrase of Paragraph (2) of Exhibit 3: "By virtue of the entry into force ...".

31. I find it impossible to ignore the striking difference between Paragraphs (1) and (2) of Exhibit 3. In Paragraph (1) of Exhibit 3, the 100% attribution to Slovenia of an electricity-price factor to service loans for NEK's modernisation programme was stated to end on 30 June 2002. Thereafter both shareholders would absorb that factor in the price for their share of delivered electricity. This arrangement was not expressly qualified by any reference to entry into force of the Treaty. On the other hand, the series of reciprocal waivers which are the object of Paragraph (2) of Exhibit 3 are so qualified.

32. This difference creates no difficulty, and should not objectively have caused any doubt in the mind of the members of Parliament in either country. What were they to have made of Paragraph (1) of Exhibit 3, where the 30 June 2002 date does appear? The answer is: (i) that its terms become effective, like any other term of the Treaty, upon entry into force and (ii) that in consequence electricity supplied subsequently to the Treaty's entry into force would be priced to both shareholders with a factor representing debt service for modernisation. The sole significance of the date is thus plain to see. I would put it in a nutshell as follows:

If ratification and resumption of deliveries to HEP occurred prior to 30 June 2002, that price-component would be payable by the Slovenian purchaser, ELES, but not by HEP even though HEP was receiving power. *This appears to be the only effect of Paragraph (1); it is a negotiated element of the deal.*⁶ After that date, HEP's price would begin to include that component as well, but obviously only from the moment of resumption of deliveries (i.e. following entry into force). There is neither ambiguity nor any problem of logic in either hypothesis.

33. If ratification and entry into force did not occur prior to 30 June 2002, nothing required that deliveries to the Slovenian purchaser subsequent to that date would bear this charge, the forecast date of 30 June 2002 (Paragraphs (1) and (5) of Exhibit 3) notwithstanding. Nor of course would the Croatian shareholder pay anything for deliveries *not made*.⁷ That meant that Slovenia, as a party to the Treaty, did not have any obligation to procure any particular pricing regime applicable to ELES with respect to the time period between 1 July 2002 and entry into force. This left NEK and ELES to sort out the issue of pricing; Croatia had no way of insisting that the modernisation surcharge would be paid by ELES during this period, but on the other hand all indications are that the Slovenian Government (not to mention NEK) wanted this to be done. In any event, nothing turns on this; if for whatever reason this circumstance made the Treaty unpalatable to either Parliament, it was open to its Members to withhold ratification. Both Parliaments, of course, elected the opposite course.

34. Thus, while the Treaty does not regulate the incidence of the modernisation surcharge between 1 July 2002 and the Treaty's entry into force, this is not fatal to the Treaty's object and purpose. There is no reason to put in question, let alone supplement, the express terms of Paragraph (1) of Exhibit 3, for there is no rule requiring that a treaty deal with all eventualities.

⁶ Paragraph (1) appears to be a specific carve-out of the more general principle of Paragraph (2)(5). If so, it is an example of the infinite sub-bargains that are routinely made in complex commercial transactions.

⁷ HEP has never questioned its obligation in principle to pay the surcharge from the time deliveries commenced pursuant to the Treaty. Not, it seems, did HEP, at the time before entry into force of the Treaty, offer to pay for the surcharge.

35. Nor is there any residual difficulty with respect to Paragraph (2); and the position can be explained in even fewer words. I would put it thus:

The reciprocal waiver of claims would occur by virtue of ratification; absent ratification it would not occur at all. No predefined calendar date is involved. The many waivers of para. 2 could not include claims for undelivered electricity, for the simple reason that there was no defined supply obligation under the Treaty prior to its ratification.

36. The Treaty wiped the slate clean of claims between HEP and NEK that had arisen before the date of entry into force, as indeed explicitly suggested by the preambular phrase of Paragraph (2) of Exhibit 3: “By virtue of the entry into force ...”. The majority point out that Paragraph (2) does not set a specific date as of which claims would be waived.⁸ That makes it all the more difficult to understand how that paragraph could waive claims arising before – but not after – 30 June 2002, a date the paragraph neither mentions nor incorporates by reference. Even without the preambular phrase, the natural assumption would be, as with any provision of any treaty not specifying a particular date, that Paragraph (2) was effective as of the Treaty’s entry into force.

37. That conclusion is significant in two respects. First, the Croatian side (like the Slovenian side) waived all claims arising from the non-delivery of electricity, making it very difficult to see how HEP can now claim compensation calculated on the basis of “financial facts” said to have flown from the non-delivery of electricity between 30 June 2002 and 19 April 2003. Second, the unfairness my colleagues seem to perceive in not compensating HEP for such non-delivery is based on the mistaken assumption that the benefits HEP

⁸ See para. 175: “[T]he ‘critical date’ of 30 June 2002 [also] determine[s] the extent of the waivers contained in Paragraph (2) of Exhibit 3. Paragraph (2) expressly refers to ‘delivered’ and ‘undelivered’ electricity without also giving a date against which electricity is to be classified as ‘delivered’ or ‘undelivered’”. I do not understand why one needs a date in order to “classify” electricity as “delivered” or “undelivered”. The point is that *claims* arising from the fact that electricity was delivered and either not taken or not paid for, on the one hand, or not delivered in spite of an obligation to do so, on the other, would be waived; nothing in Paragraph (2) suggests that claims existing as of entry into force would *not* be waived if they had arisen after 30 June 2002. The waivers of Paragraph (2) included all claims arising from the delivery or non-delivery of electricity up to the date the Treaty entered into force – notably including any claim from the Slovenian side that HEP should have been buying electricity from NEK prior to the Treaty’s entry into force in order to offset HEP’s share of NEK’s modernisation or other costs.

received pursuant to Exhibit 3 (including the waivers in HEP's favour in Paragraph (2)) were cut off as of 30 June 2002, a problem that does not arise on a straightforward textual construction of Paragraph (2).

38. To conclude, the States-party to the Treaty were seeking to establish a new framework for their cooperation in the nuclear industry. The *critical date* for that framework was the date the Treaty entered into force. As of that date, the parties would start from zero, with no claims against each other, and their national utility companies would receive electricity and bear the costs of the project on a 50/50 basis, the only proviso being that HEP would not have to pay its full share of the costs until 30 June 2002 at the earliest. Nothing in the text of the Treaty, including Exhibit 3, creates an obligation to supply HEP with electricity before the Treaty enters into force or a corollary right for HEP to receive compensation for non-delivery during that period.

Fairness, reasonableness, and extrinsic evidence

39. As I believe the foregoing section makes plain, the text of the Treaty, including Article 5(2) and Exhibit 3, cannot plausibly be read to establish the obligation that the majority now impose on Slovenia. There is no ambiguity that would justify recourse to the secondary interpretive sources mentioned in VCLT Article 32. Yet the majority rely to a great extent on various extrinsic expressions of the Contracting States' intentions. This approach may be motivated, as I have suggested above, by a conviction that it would be unfair, or contrary to the essence of the bargain underlying the Treaty, if HEP were not compensated for the delay in receiving electricity caused by Slovenia's "late" ratification of the Treaty. (As I note in several places below, the majority relies explicitly on what they perceive as tardy ratification by Slovenia. The fallacy of this argument becomes apparent if one considers that the outcome of the majority's reading of the Treaty would be the same even if *Croatia* had ratified second, and after 30 June 2002.) Again, the perceived unfairness is illusory; the majority apparently do not appreciate the significance of the fact that HEP is relieved of any liability to contribute to the costs of the Plant, including modernisation or decommissioning costs, until the date the Treaty enters into force. In any case:

- the result commanded by the Treaty text is neither "manifestly absurd [n]or unreasonable" so as to permit recourse to VCLT Article 32;

- the construction urged by HEP and accepted by my colleagues, on the other hand, *could* lead to substantial unfairness or even absurdity;
- over time, that construction would have created an increasingly powerful disincentive for Slovenia to ratify the Treaty; and
- there are no expressions, by authorised persons at a relevant time, of an intention to compensate the Croatian side for the non-delivery of electricity between 30 June 2002 and the Treaty's effective date.

In my view, there is therefore no need to resort to these sorts of policy considerations, nor to a highly contested inquest into non-textual evidence of what the parties “really” had in mind. But in view of the approach taken in the Decision, some brief observations may be in order, first as to its remarkable view of the law of treaties, and secondly as to its conceptual errors even on the premise that arbitral tribunals may proceed on unrestrained teleological inquiries.

40. I have no concern whatever that my colleagues, any more than I, harbour some a priori preference for either party. My confidence in the majority's impartiality is total. Our difference is purely a matter of principle, but that does not make it less acute. It is my view that the majority have engaged in a remarkable rewriting of history, as though the epic battles that led to the VCLT had gone the other way. To disregard the VCLT's vindication of Gerald Fitzmaurice's view of treaty interpretation is the jurisprudential equivalent of pretending that Octavian lost at Actium. Fitzmaurice wrote in 1957 – citing the ICJ's decision in the *Iranian Oil* case – that treaty “texts must be interpreted as they stand and, *prima facie*, without reference to extraneous factors”.⁹ He, along with Humphrey Waldock, his successor as Special Rapporteur on treaty law of the International Law Commission, never gave in to the onslaughts of the advocates of “total context”. In the end, as Douglas Johnston put it in his learned work, *The Historical Foundations of World Order*: “The victory of the ‘textual’ approach in the ILC and at the Vienna

⁹ 33 BYIL 203 at 212. Fitzmaurice derived six canons of interpretation from the jurisprudence of the International Court of Justice, three of which were primary and three secondary (subject to the primary ones). The primary canons were those of “textuality”, “natural and ordinary meaning”, and “integration” of specific terms into the whole of a treaty.

conference was a victory for formalism and for Sir Gerald Fitzmaurice”.¹⁰

41. This historical fact may not be to the liking of those who would favour a more expansive view of the decision-making power of international tribunals, but it cannot be denied. More importantly, it is the bedrock of the international law of treaties, and it is therefore impermissible to ignore it when giving effect to what States understand they do when they sign treaties. It is important to see precisely how the majority, I regret to say, appear to turn the VCLT on its head.

42. The general rule of the VCLT is to the effect (Article 31) that a treaty:

shall be interpreted in good faith in accordance with the meaning to be given to the terms of the treaty in their context and in the light of their object and purpose.

43. The majority appear simply to have erased the words “in accordance with the meaning to be given to the terms of the treaty in their context” and gone on to determine the outcome that commends itself to them. I shall revert to this in a moment.

44. A critical aspect of the words just quoted is the use of the pronoun *their* rather than *its*. The permissible context is *the context of the terms* of the treaty and *not the context of the treaty generally*, in the way desired by the “total context” proponents. This is precisely how the textualist approach carried the day when the VCLT was signed in 1969.¹¹ Professor Johnston confirms this, *ibid*, noting that Article 31 restricts “context” to the text of the treaty (along with its preamble and annexes), and to two other types of text:

¹⁰ At p. 33 (2008).

¹¹ Waldock, the last Special Rapporteur of the ILC for the VCLT, outlined the following considerations as being of primary importance: “the particular arrangement of the words and sentences, their relation to each other and to other parts of the document, the general nature and subject-matter of the document, the circumstances in which it was drawn up”: [1964-II] YBILC at 54. He noted, *ibid*. at 54-55, that he proposed to give effect to Fitzmaurice’s “principle of actuality or textuality”, contrasting it with “doctrinal differences ... which have tended to weaken the significance of the text as the expression of the will of the parties”.

(a) any agreement relating to the text which was made between all parties in connection with the conclusion of the treaty,

and

(b) any agreement which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

As far as I can discern, the majority's Decision proceeds in ignorance of this fundamental and much-discussed constraint on the freedom of international judges and arbitrators to interpret treaties. My observation seems to be confirmed by the very heading of their discussion at paras. 181-182, namely "The Treaty's Context". They seem to ignore that they are allowed to refer only to the context *of the terms* of the Treaty, i.e. the internal consistency of the text as one whole. This fundamental error, it seems, has freed the majority to impose its vision of commercial reasonableness on the entire history of Krško NPP. This is not what States submit themselves to when concluding a Treaty. The majority's vision of commercial logic leads them to all manner of reading between the lines of the Treaty and of various more or less related, more or less contemporaneous, and more or less superseded documents. This is what apparently inspires their constant repetition of the expression "parity principle" (per se unobjectionable) and to their assertion in para. 178 that a "settlement was keyed to the presumed time of entry into force" of the Treaty (as far as I can see a pure invention). There is no sequence of agreed words anywhere that sustains the proposition essential to HEP's claim.

45. In recent years, voices have been heard to the effect that the strongly textual philosophy of the VCLT should be tempered in the context of broad-based "law-making" multilateral treaties intended to create frameworks for cooperation expected to last into the indefinite future. Whatever views one may have in this regard, they are obviously inapposite to the case of a Treaty like this: a highly technical bilateral agreement intended to resolve a specific problem arising from lengthy factual antecedents well known to both States.

46. Two propositions are salient in the majority's section titled "Good Faith". Both are set out in para. 191:

- in treaty interpretation, good faith is “the core principle about which all else revolves”;
- “As both parties agree was their desire, a line is drawn as of 30 June 2002 ...”.

47. The reasoning of the majority is that the two States intended to establish a “principle of parity”, and *it must follow* that it was to be established as of 30 June 2002 (see paras. 174-175) and therefore the 2001 Agreement has to be read in a way that produces this outcome; a different reading would be contrary to good faith. As noted above, a novel legal proposition has been conceived to advance this kind of reading: “No greater or lesser force resides in a term by virtue of the relative magnitude of the clarity which it has been (or has not been) written” (para. 195). The majority says, in effect, that one may postulate an outcome and force-fit it into the actual text. Nuances and omissions in the text are of no moment. In the result, the majority retains from Article 31(1) VCLT only the elements that confirm their subjective gloss (perceptions of good faith and object and purpose), ignoring those which are of an objective nature (textual terms and context). This is precisely the approach described in Paragraph 7 above, with which I simply cannot associate myself. It lies at the heart of my reason for producing this Individual Opinion.

48. On the majority view, instruments are evidently to be read starting from one’s perception of their object and purpose and requirements of good faith, and the express terms are secondary. Yet Paul Reuter explained cogently why interpretation must start from the text and not be bolted onto it:

If [the parties have reduced their agreement to a written] document, the intention has become a text by means of a very specific operation, going backwards from the text to the initial intention. Drafting methods and rules of interpretation are therefore two aspects of the same problem viewed from two opposite angles: both deal with an intention embodied in a text. ...

The primacy of the text, especially in international law, is the cardinal rule for any interpretation. It may be that in other legal systems, where the legislative and judicial processes are fully regulated by the authority of the State and not by

the free consent of the parties, the courts are deemed competent to make a text say what it does not say or even the opposite of what it says. But such interpretations, which are sometimes described as teleological, are indissociable from the fact that recourse to the courts is mandatory, that the court is obliged to hand down a decisions, and that it is moreover controlled by an effective legislature whose action may if necessary check its bolder undertakings. When an international judge or arbitrator departs from a text, it is because he is satisfied that another text or practice, i.e. another source of law, should prevail.

In the interpretation of international law, because of the submission to the expression of the parties' intention, it is essential to identify exactly how that intention was expressed and to give precedence to its most immediate manifestation. ...¹² (Emphasis added.)

49. At the very least, one would have expected the majority to have identified in the object and purpose of the 2001 Agreement the specific reasons for which its reasoning is *compelled* – rather than simply comforted. The closest the majority comes to that is at para. 174, where it is said that the supposed settlement as of 30 June 2002 was “a two-way street”. But the text which follows falls short of making good on that assertion. Indeed, the text of fn 152, so far as I can tell, infirms the majority’s reasoning. Reference is there made to Articles 10-11 of the 2001 Agreement, which are expressly stated to operate from a given date after entry into force. That fact is said to support the conclusion that “HEP in no way escapes its obligation to contribute its 50 percent share of ultimate decommissioning costs”. The opposite appears to be true.

50. Finally, the reverse-engineering of the majority’s reasoning becomes apparent at para. 193, where it is said that Slovenia is now, as it were, to atone for the sin of not having “ratified the 2001 Agreement in time for it to enter into force before 1 July 2002”. So it is clear that (a) Slovenia was not obligated to supply electricity under Article 5 before the Treaty’s entry into force and (b) Slovenia had no obligation under the 2001 Agreement or customary international law to ratify that Agreement on or by a certain date, and yet – to serve an

¹² P. Reuter, *Introduction to the Law of Treaties* (2nd English edn, 1995) paras. 141-143 (emphasis in the original, citations omitted).

obligation imported only by the majority's perception of good faith – it has to take the consequences of not having taken acts which it was not legally required to take.

51. In his voluminous study of *La bonne foi en droit international public* (2000), the Swiss scholar Robert Kolb concludes succinctly at p. 277 that interpretation should not be made to fit a preconceived result, precisely because “good faith forbids it” (“*la bonne foi l'interdit*”). The majority in this case, I fear, have turned this around, following their own intuition that good faith points to a certain result, and that therefore the effort of interpretation should consist of seeking to justify it.

52. Next, some observations of a teleological nature. Even if contrary to my belief ICSID arbitrators had full sway to exercise their imagination in this respect, the circumstances of this case do not lead to the conclusions defended in the Decision. To start with, there is the problematic notion in my colleagues' text that Slovenia accepted an obligation to pay damages for the non-occurrence of an event – entry into force by 30 June 2002 – whose occurrence the majority accepts Slovenia had no duty to procure. This is problematic on both the theoretical and practical planes. One may imagine an understanding that a ratifying party accepts responsibility for *past due performance* of an obligation already in existence, but absent an explicit stipulation to that effect why should a ratifying party assume responsibility for doing something which was never due and which can no longer be done? The result of that would be that if the Treaty had entered into force one day before the end of the useful life of the plant – due to (say) the ratification of a Slovenian Parliament ignorant of the egregious implied term – then NEK would stand to earn a miniscule sum for the electricity it could deliver within that day, and HEP would stand to receive a vast sum, say a billion Euros if one makes it proportional to the present claim, for more than 20 years of non-delivered electricity. An absurd example? Perhaps, but how about ten years? Five? Where is any line of principle? It is sufficient to state this proposition, and its consequence, to see how implausible it is as an interpretation of the Treaty.

53. In addition, it is curious to posit a breach which could be rendered nugatory simply by non-ratification (a course of action that is agreed by all was open to Slovenia, consistent with elementary rules of international law). The ratification of the Treaty was controversial in Slovenia. How much more controversial would it have been had the Slovenian Parliament been told that the act of ratification would instantly create a State liability in the tens of millions of euros? If that consideration had delayed ratification, the notional debt would have

continued to grow, making it ever less likely that Slovenia would ever ratify. The analysis is not advanced by speculating that the Slovenian Parliament felt that accepting this liability was an acceptable price for achieving a settlement, for it is equally plausible that the Croatian Parliament felt that absorbing higher costs of alternative power purchases during the delay pending entry into force (assuming such costs were indeed higher) was the price for achieving the same settlement.

54. The paradoxes do not end there. The subtext of HEP's case, and of the majority's reasoning, is that Slovenia should pay the price for its Parliament's slowness in ratifying the Treaty. But consider the hypothesis that Croatia rather than Slovenia acted "late", and that as a result entry into force occurred only toward the end of the useful life of the plant. This would mean that Slovenia assumed the risk and financial consequences of post-30 June 2002 ratification by Croatia. This seems patently unreasonable; but the majority's view would have led to the same outcome in that hypothesis. And so one would have to add another implied term, to wit that the implied obligation inferred by HEP operates only if Slovenia ratifies second. I cannot accept a reading of an international treaty which varies depending on which Contracting State ratifies first or last. That is ad-hocery, not law.

55. The majority's reading of Exhibit 3 also throws open the doors to claims by both sides under the pre-Treaty Governing Agreements, exactly contrary to the Treaty's object and purpose of settling all such claims once and for all. As noted above, the majority conclude that the reciprocal waivers in Paragraph (2) of Exhibit 3 wiped out only claims arising before 30 June 2002. Under their Decision, NEK's claims against HEP for the interim period have not been waived. If HEP can claim for the financial consequences of the interim non-deliveries, so can NEK. The Decision resuscitates the lengthy debate as to Slovenia's entitlement to take measures affecting NEK's pricing and NEK's right to adjust its prices accordingly. It is difficult to believe that in ratifying the 2001 Agreement on 3 July 2002, the *Croatian* Parliament understood by implication that there had been such an undermining of the two Prime Ministers' achievements on 19 December 2001. The vastly complex issues attendant on the independence of former Yugoslavian States would flow back full force as though there had been no meeting of the minds of the heads of the two governments.

56. For example, Article 17 refers to the extinction of NEK's obligations to contribute to decommissioning costs "as of the date of entry into force". If it had been understood that production was promised to commence 1 July 2002 (regardless of the date of the

Treaty's entry into force), this would mean that the controversial surcharge would apply to deliveries between that date and the date of entry into force. More precisely, the debate as to its applicability would be revived. This seems implausible, since the purpose of the Treaty was to put all such matters to rest.

57. As a mental exercise, one might put oneself in the position of a lawyer advising HEP in early 2003. If HEP's current claim is good, that lawyer would have said: *If you are unlucky, Slovenia will not ratify and you will be back in the fractious pre-June 2001 environment, but if you are lucky Slovenia will ratify, will instantly owe you €60 million and will simultaneously free you from all past claims.* What agreed terms could the imaginary adviser rely upon to give such advice – and what chances would he or she give to its endorsement by an international tribunal? And what would have been the reaction of the Slovenian Parliament if advised that the alternatives were as just posited?

58. Similarly, practical questions arise. NEK, as we know, offered to deliver electricity to HEP during the interim period, but on what logical basis could it have invoiced HEP on the majority's construction of the Treaty? If NEK had insisted on invoicing the modernisation and decommissioning surcharges, HEP would have been provoked by NEK's insistence on terms which HEP had so long and so vigorously resisted, and would not have paid them (just as HEP in fact rejected NEK's offers to supply electricity on this basis). Until the Treaty came into force and HEP's past claims against the Slovenian parties were waived, NEK could hardly have delivered to HEP at the prices HEP wished to pay, effectively giving up the position of the Slovenian side without any reciprocity from the Croatian side.

59. To conclude on these matters, the majority's approach invites renewed controversy over precisely the issues that the Treaty was supposed to lay to rest. Moreover, during the period between 30 June 2002 and ratification, the parties, if they had understood the Treaty as the majority now interpret it, would have had an incentive to rekindle that controversy at the time, threatening the prospect that the Treaty would ever be ratified. The practical implications of the majority's interpretation can hardly be advocated as furthering the Treaty's object and purpose.

Retroactivity

60. The reasons for my dissent have already been stated. (For the attentive reader, Paragraph 23 should be sufficient.) What follows serves only to indicate why my colleagues' attempt to rescue their preferred outcome, using the lifeline of the *Mavrommatis* case, cannot succeed.

61. It is an elementary rule of customary international law that international agreements do not operate retroactively in the absence of a stipulation to that effect. Article 28 of the VCLT was intended to be declaratory of customary law, and has since been recognized as such; citations are hardly necessary. It provides:

Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

This is why, when a treaty as a whole is subject to ratification, it is in principle impossible to accept that *some* of its provisions have retroactive effect, unless there is a clear stipulation or other agreement to the contrary.¹³

62. In the light of the cardinal rule of non-retroactivity, what could Croatia and Slovenia have done to ensure that deliveries of electricity commence no later than 1 July 2002? Two possible solutions would have suggested themselves:

- (1) To provide that Article 5(2) obligations would be applied on a provisional basis from 1 July 2002 at the latest (i.e. if the Treaty as a whole had not entered in force by that time).¹⁴ Provisional application

¹³ See *Ambatielos*, *ICJ Reports 1952*, 28 at 40. As the International Court of Justice observed, *ibid.* at 43, "The ratification of a treaty which provides for ratification ... is an indispensable condition for bringing it into operation. It is not, therefore, a mere formal act, but an act of vital importance."

¹⁴ See the examples given in the UN Handbook (note 2 above) at 42-44; Aust, *Modern Treaty Law and Practice* (2000) 139-141; and Sinclair, *The Vienna Convention on*

provisions are typically to be found in agreements envisaging immediate or timely measures.¹⁵ The present Treaty itself provides for an obligation of immediate action prior to entry into force, in Article 2(3) regarding the conclusion of the Memorandum of Association in Exhibit 1 of the Treaty.¹⁶

or

- (2) To provide that, once the Treaty entered into force, its provisions, or Article 5(2) specifically, would have retroactive effect from 1 July 2002.¹⁷

Given the existence of these well known mechanisms in international treaty practice, it is impossible to read any retroactive effect into Article 5(2) of the Treaty here.

63. A suggestion to imply into the Treaty a term that would operate retrospectively (i.e. from 1 July 2002) once the Treaty had entered into force at a subsequent time faces the same difficulties. It is accepted by the Parties here that terms cannot be implied unless the express terms of the Treaty are ambiguous or absurd *and* the term to be implied would resolve that ambiguity or absurdity in a manner consistent with the two Contracting States' manifest intent in concluding the Treaty. McNair observed¹⁸ that certain treaties will "rightly" fail to produce a result – or at least the result contended for by one party on the basis of an implied-terms doctrine – because the Contracting States did not wish to make provision for that result. McNair's example is that of the *Peace Treaties* case, where the International Court of Justice ("ICJ") refused to read provisions in two treaties as authorizing the Secretary-General of the UN to appoint a member of a three-member commission in the stead of a state that defaulted in its obligation to make that appointment. The ICJ read the

the Law of Treaties (2nd edn, 1984) at 50 (note 60). The Energy Charter Treaty contains elaborate provisions on provisional application in Article 45.

¹⁵ See for example Article 68 of the Agreement on an International Energy Programme (Paris, 18 November 1974), (1974) 14 ILM 1. That Agreement provided for measures to deal with the oil-supply emergency of that time.

¹⁶ For a similar example see Article VIII of the 1894 Gámez-Bonilla treaty, discussed in *Case Concerning the Arbitral Award by the King of Spain*, ICJ Reports 1960, 192 at 208.

¹⁷ See, e.g. the US-Korea Utilities Claims Settlement Agreement (Seoul, 18 December 1958), UNTS No. 4702; or the Belgium-France Double Taxation Convention (Brussels, 10 March 1964), UNTS No. 8127.

¹⁸ *The Law of Treaties* (1961) 383.

treaty provisions on their face, as permitting an appointment by the Secretary-General only when the two representatives already appointed by the states failed to agree on the *third* commission member.¹⁹ As a result, the commission could not be constituted; the States-party had not dealt with all eventualities, and had not set forth a mechanism to permit the constitution of a commission in all circumstances. As the ICJ said in a later case, “Rights cannot be presumed to exist merely because it might seem desirable that they should”.²⁰

64. In other words, a term may be implied only when it is clear beyond peradventure, from the overall text of the relevant instrument, its negotiating history, or its actual implementation by the parties, that *all* Contracting States would have had no hesitation to include that term if they had applied their minds specifically to the situation with which the term is to deal. No such *lacuna* appears here. As discussed throughout this Individual Opinion, the Treaty is perfectly capable of operating, and reasonably so, on the basis of its express terms.

65. The majority discuss the issue of retroactivity under the rubric “The Non-Issue of Retroactivity”. While this certainly makes it clear to the reader where they want to go, I fear that calling something a non-issue does not cause it to vanish.

66. When Slovenia ratified the Treaty, the date of 1 July 2002 was in the past. Any duty to make deliveries or face monetary liability as from that date would plainly be retroactive if it did not become binding (as it could not) until ratification: retroactivity is determined by reference to entry into force, not signing.²¹ Moreover,

¹⁹ See *Interpretation of Peace Treaties (Second Phase)* (Advisory Opinion), *ICJ Reports 1950*, 221.

²⁰ *South West Africa (Second Phase)*, *ICJ Reports 1966*, 6, para. 91.

²¹ As Article 28 of the VCLT makes clear, the critical date by reference to which one has to determine whether an international treaty has any retroactive character is its *actual* date of entry into force. It is legally immaterial whether the obligation in question relates to events that antedated the *signing* of the relevant treaty. One cannot say that a point in time prior to a treaty’s entry in force but subsequent to its signing is prospective for the purposes of Article 28 of the VCLT. And a putative obligation tied to that point in time is no less retroactive if it was envisaged – but neither certain nor legally assured – that the treaty would have entered into force before that time. After the treaty’s entry in force, the obligation can only be characterized as retrospective, not prospective.

The *Ambatielos* case (*ICJ Reports 1952*, 28 at 40) does not say otherwise. Indeed, it says the contrary. Obligations under a treaty come into being only after its entry in force, and in respect of events that occur, or are to occur, after that time – unless there is a “special clause or any special object *necessitating* retroactive interpretation” (emphasis added). The reference to a “special object” clearly points to the *Mavrommatis* case, discussed in the text below (paragraphs 70 *et seq.*).

as the majority concede, *no obligation of delivery* was defined in the Treaty. Somehow they wish to attach liability to Slovenia for not having caused NEK to do what Slovenia had not undertaken that NEK would do. This considerable feat is purportedly achieved by referring to a “financial settlement ... based on the financial facts that would flow had NEK been supplied electricity starting 1 July 2002” (para. 174).

67. This is surpassingly strange, since by the express terms of the Treaty (Article 17) the financial settlement concerned “financial relations up to the *signing*” of the Treaty – i.e. 19 December 2001.

68. It is perfectly obvious that a treaty may resolve a dispute about past events, such as responsibility for an environmental catastrophe having consequences across borders, without raising any issue of retroactivity. An event occurred, two States agreed on the terms of a settlement, and when their agreement is ratified they are bound by their promise. That is not the hypothesis here. On HEP’s pleaded case, the claim is one for damages arising from Slovenia’s failure to make deliveries of electricity for a nine-month period starting on 1 July 2002.²² The proposition is that the Treaty contains a duty for Slovenia to pay for the consequences of NEK’s non-delivery of electricity as from 1 July 2002. This is on any view a claim for liability arising from the breach of the obligation to supply electricity. I have already explained that no such duty to deliver electricity is to be found as of 1 July 2002. But even if it existed, it would run afoul of the non-retroactivity principle, for the following reasons.

69. In other words, to say that the primary obligation (supply of electricity) is to be considered as having been breached nine months before the Treaty’s entry into force is evidently an argument that the Treaty “bind[s] a party in relation to an[] act or fact which took place ... before the date of the entry into force of the treaty with respect to that party” (Article 28 of the VCLT). That claim can therefore succeed only if it were established that under Article 5(2) there was an obligation to supply electricity starting on 1 July 2002 whether or not the Treaty had entered in force by that time.

70. The majority seem to feel that this retroactivity (which they refuse to call by its name) is necessary in order not to deprive the Treaty of its intended effect. (I have already questioned their identification of this putative intent – see Paragraph 23 above – and

²² See Request for Arbitration, paras. 9-11; Statement of Claim, paras. 254, 260, Reply, paras. 232, 253.

will not revert to that subject here.) They refer to the *Mavrommatis Palestine Concessions* case in support. Their reliance is, with respect, misplaced. The claim in that case was that the UK, administering Palestine since 1920 (but having formally obtained a Mandate only in 1922), had in 1921 granted a concession that conflicted in part with 1914-1916 Ottoman concessions to Mr Mavrommatis; and that in so doing the UK had breached its obligations as a Mandatory under Protocol XII to the Treaty of Lausanne (which entered into force in 1924).²³ The argument was that the terms of the Mandate were “subject to any international obligations accepted by the Mandatory” (Article 11), and Protocol XII, which was such an international obligation, required observance of pre-1914 concessions. Depending on whether or not the concession had been “put into operation”, the obligation of the UK would be either to put Mavrommatis’ concession “into conformity with the new conditions” or to “dissolve” it and pay compensation (Articles 4 and 6 of Protocol XII).

71. The majority rely on a passage from the PCIJ *Jurisdiction* decision which is quoted in the International Law Commission’s commentary on the draft text for the 1969 diplomatic conference for the VCLT.²⁴ The PCIJ held that the “the rights recognised” in Protocol XII were “most in need of protection” in the period immediately after the restoration of peace. It was on that basis that the Court concluded that such protection was available even before the Protocol’s entry in force. The import of this passage becomes clear when one reads it in context; its meaning is simply not that ascribed to it by the majority Decision:

- The main provision of Protocol XII, Article 1, stated that “concessionary contracts ... duly entered into before ... 1914 [by] the Ottoman Government ... *are maintained*” (emphasis added). As the Court held (at p. 27), the essential purpose of Protocol XII was to preserve pre-existing concessions. Preservation of pre-existing concessions was the very subject-matter of Protocol XII; and to permit a successor state to terminate such a concession before the entry in force of the Protocol would effectively defeat its entire purpose.

- To achieve this goal, Article 9 of Protocol XII had an explicit provision to the effect that in territories which were detached from Turkey by virtue of the Treaty of

²³ LNTS No. 707.

²⁴ See [1966-II] YBILC 212.

Lausanne (which territories included Palestine), the successor state was to be subrogated to the obligations of the Ottoman Empire “as from the 30th of October, 1918”. Article 9 was expressly relied upon by the Court in its judgment on the merits²⁵ where it found against the UK on this point. So there was an explicit element of retroactivity in the applicable international instrument at issue in *Mavrommatis*, which is absent in the Treaty here.

- Though Protocol XII entered in force in 1924, after the Mandate had formally been given in 1922, the draft text of the Mandate had envisaged a provision requiring preservation of pre-1914 concessions (see pp. 24-25 and 36 of the judgment). The UK was aware of that obligation in accepting the Mandate.²⁶

72. In short, the subject-matter of Protocol XII to the Treaty of Lausanne was preservation of acquired rights. That is the very opposite of the prospective obligation to supply electricity under the Treaty here. There is no plausible analogy between *Mavrommatis* and the present case. Retroactivity is not necessary to the object and purpose of the Treaty. The Treaty is perfectly capable of operating in full without reading the date of 1 July 2002 into Article 5(2).

73. Moreover – and this strikes me as fundamental – (i) if the date of 1 July 2002 were an essential ingredient of the “financial settlement” *between the two Contracting States*, and (ii) that settlement is an essential – indeed, self-standing – term of the Treaty, without which the Treaty as a global bargain makes no sense, and (iii) if the 1 July 2002 date cannot, for objective reasons, be met, then (iv) the consequence would not be a cause of action accruing to HEP but an inter-State claim for revision or termination of the Treaty. No such claim has been made or apparently ever envisaged.

74. At their para. 201 the majority reason that the expression “otherwise established” in Article 28 VCLT allow them to look at the “intention” that flows from “the very nature” of the Treaty. This

²⁵ Series A, No 5 (1925). At p. 39: “The obligation accepted by the Mandatory to maintain concessions governed by the Protocol is therefore to be regarded, by virtue of this clause [Article 9], as having existed at the time the Rutenberg concession [competing with the *Mavrommatis* concession] was granted.”

²⁶ The Mandate would be subject to the Treaty of Sèvres (signed August 1920, never in force), Article 311 of which was to effect similar with that of Protocol XII to the Treaty of Lausanne.

seems to be an almost mystical suggestion that any tribunal may do what it pleases by referring to “the very nature” of a Treaty instead of to its terms. It does not strike me as acceptable legal scholarship. The ILC commentary to the draft text for the 1969 diplomatic conference (from which my colleagues quote at para. 197 and from which they borrow the *Mavrommatis* quotation) said this:²⁷

The general phrase “unless a different intention appears from the treaty or is otherwise established” is used in preference to “unless the treaty otherwise provides” in order to allow for cases where the very nature of the treaty rather than its specific provisions indicates that it is intended to have certain retroactive effects.

The example given by the ILC as one of a treaty “having a ... ‘special object’ necessitating retroactive interpretation” is none other than *Mavrommatis*.²⁸ One could scarcely think of a better way of underscoring *Mavrommatis*’ inappositeness here.

HEP’s standing under the Treaty

75. As indicated in Paragraph 3 above, the curiosity of HEP’s claiming under the Treaty, although a non-party to it, was not a matter of fundamental concern in terms of my determination that I would express dissent, for the simple reason that it was not a key feature of the Parties’ debate. But having seen paras. 166-169 of the majority’s Decision, concluding with the affirmation that they are “in no doubt” as to their jurisdiction to resolve “the dispute here presented” (i.e. as presented by HEP as claimant), I cannot assent. Para. 168 contains the majority’s only reasoning on this point. It simply does not address the issue of HEP’s standing. The words “In doing so” that introduce the fourth sentence of para. 168 is yet another *non sequitur*. The fact that the Treaty contains a number of elements that are frequently to be found in shareholders’ agreements may or may not make it convenient that corporate entities like HEP should, under the Treaty, be given the right of direct action before ICSID. But where does the Treaty say that the States-party so agreed? Where is the evidence that Article 25(1) of the ICSID Convention is satisfied to the effect that “the parties to the dispute”, i.e. HEP and Slovenia, have given “consent in writing to submit to the Centre”?

²⁷ [1966-II] YBILC 212-213.

²⁸ See *ibid* 212.

Conclusions

76. I cannot concur in the conclusions reached by the majority, and therefore naturally disassociate myself from the *dispositif* they have proposed, particularly the portion set out in paragraph 202(A) of their Decision. Specifically:

- Subparagraph 202(A)(i) declares that Article 17(1) and Exhibit 3 of the Treaty constitute a financial settlement “as of 30 June 2002”, a conclusion that is contradicted by the two cited parts of the Treaty, perhaps most starkly by Article 17(1): “Mutual financial relations existing *up to the signing of this Agreement* ... shall be regulated in accordance with the principles set forth in Exhibit 3 of this Agreement” (emphasis added).

- Subparagraph 202(A)(ii) imposes liability on Slovenia (subject to further proceedings) for non-delivery of electricity after 30 June 2002. As I have stated, I cannot see anything in the Treaty imposing on Slovenia either an obligation to procure delivery between 30 June 2002 and the Treaty’s entry into force or to compensate Croatia (let alone HEP) for non-delivery. It is in my view telling that the *dispositif* cites two parts of the Treaty as the basis for Slovenia’s liability (Article 17(1) and Exhibit 3) but does not cite the only Treaty provision that actually mentions, let alone imposes, a delivery obligation, namely Article 5.

- The remaining subparagraphs of the *dispositif* track, nearly verbatim, the subparagraphs of Exhibit 3, Paragraph (2) of the Treaty. These are the subparagraphs that spell out the specific claims that have been waived by virtue of that Paragraph in Exhibit 3. The only significant difference between the texts of the Treaty and the Decision is the majority’s addition, in each subparagraph, of a phrase to the effect that claims have been waived “from the beginning of time through 30 June 2002”. This is a radical rewriting. Why 30 June 2002? Surely if there is no date in the

Treaty text, the most plausible date is that of entry into force. That plausibility becomes certainty when one sees the words at the beginning of Paragraph (2) that do *not* appear in the *dispositif*: the parties waive all claims “by virtue of the entry into force of this Agreement”.

[*signed*]

Jan Paulsson
8 June 2009